Earthlink, LLC v Charter Communications Operating, LLC
2022 NY Slip Op 31177(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 654332/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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EARTHLINK, LLC, Plaintiff, - v - CHARTER COMMUNICATIONS OPERATING, LLC, Defendant.	INDEX NO. 654332/2020
	MOTION DATE
	MOTION SEQ. NO. 002
	DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 63
were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant Charter Communications Operating, LLC (CCO) moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint filed by plaintiff EarthLink LLC (EarthLink) on March 18, 2021.

This action arises from the "proposed combination of AOL and Time Warner [which] raised significant antitrust concerns among U.S. regulators." (NYSCEF Doc. No. [NYSCEF] 15, Amended Compl. ¶ 26.) The regulators were concerned about the "deleterious effect on consumer choice" which "would ultimately deprive consumers of the ability to choose between a variety of Internet providers." (*Id.*) The regulators allowed the combination to proceed on condition that Time Warner "open up its cable system to competitor Internet service providers (ISPs), including EarthLink." (*Id.* ¶ 29.)

On June 30, 2006, Time Warner Cable and EarthLink entered into a High-Speed Services Agreement (HSSA). (*Id.* ¶ 30.) The obligations of the agreement were

assigned to CCO after it merged with Time Warner Cable in May 2016. (*Id.* ¶ 38.) CCO elected to terminate the agreement on October 31, 2017 when Windstream purchased EarthLink, which triggered a three-year transition period which would expire on October 31, 2020. (*Id.* ¶¶ 43, 80.) The parties' dispute arises from COO's alleged conduct during the transition period.

Under the HSSA, subscribers could receive "EarthLink-branded internet in conjunction with voice and video services from COO's Spectrum brand." (NYSCEF 15, Amended Compl. ¶ 11.) COO was "the initial and primary point of contact for customer service and support." (*Id.*) During the transition period, all the terms and conditions of the agreement continued. (NYSCEF 53, HSSA § 8.6.) Specifically, the HSSA requires COO to continue servicing existing subscribers from "immediately prior to, or within six (6) months, after the Change in Control" of Earthlink, which occurred on October 31, 2017. (*Id.* § 13.8; *see also* NYSCEF 15, Amended Compl. ¶ 43.)

EarthLink alleges that at some point prior to the termination of the transition period, COO "secretly used its call centers to target" EarthLink's subscribers and "affirmatively mislead them about EarthLink and its service." (NYSCEF 15, Amended Compl. ¶ 52.) EarthLink also alleges that COO changed its reporting system in an attempt to cover up the deceptive and unfair campaign. (*Id.* ¶ 55.) Around the same time as this reporting change, several subscribers allegedly alerted EarthLink that, during customer service calls, COO representatives had tried to convince them to switch from EarthLink to Spectrum. (*Id.* ¶ 56.) Specifically, EarthLink alleges the following statements:

> "• Spectrum cut you guys off without my approval, * * Real happy with EarthLink, was sad when Spectrum said it would no longer support you.

• Spectrum did not support EarthLink.

• Spectrum made an unauthorized change to my EarthLink internet account which could not be reversed by EarthLink. Consequently, I had to switch to Spectrum * * Wish that EarthLink had internet service in my area independent of Spectrum.

• Spectrum told me that they took over you.

• I was switched by spectrum . . . they told me earthlink wasn't in business anymore * * I would really like to find a fast internet. . haven't so far.

• I was told by Spectrum that I could not keep Earthlink internet because I dropped my TV subscription with Spectrum. I still don't understand why and wish I was still with Earthlink. * * Maybe you can find out why they made me leave Earthlink and forced me to pay more for Spectrum internet?

• Our CATV system stopped carrying Earthlink internet unless we paid double for it.

• TWC was acting as rep for EarthLink and one days changed our service. We were and I do use AOL even now. Then TWC sold to Spectrum who upgraded my Internet and in passing told me they had nothing to do with EarthLink. * * Your old service was fine in our eyes – indeed, we saw nothing of EarthLink as opened AOL. Spectrum gives our HOA a special rate including equipment, HBO, and Showtime. I pay extra for a phone line."

(*Id.* ¶ 59.)

At the outset, EarthLink supplied Time-Warner Cable with 1,000,000 IP addresses, which were necessary to enable the EarthLink subscribers to connect to the Internet. (*Id.* ¶¶ 31, 33.) COO used the same IP addresses, pursuant to the agreement, for that purpose. (*Id.* ¶ 39.) On October 20, 2020, EarthLink sent COO a notice to cease use of the EarthLink IP addresses after the expiration of the Transition Period on November 1, 2020, at which time EarthLink would repurpose the EarthLink IP addresses for its own use, or otherwise engage in negotiations to agree to payment terms for their continued use. (*Id.* ¶ 81.) On November 5, 2020, COO responded that

COO owned the IP addresses. (*See id.* ¶ 82.) COO allegedly persisted in its use of the EarthLink IP addresses, and continued to claim ownership of them, until February 2021. (*Id.* ¶¶ 85, 87.) COO has not reimbursed EarthLink for COO's allegedly improper use of the EarthLink IP addresses because COO asserts that it is the owner of the IP addresses. (*Id.* ¶ 88.)

In the Amended Complaint, EarthLink alleges: (1) breach of the HSSA by targeting EarthLink's subscribers; (2) breach of the HSSA by failing to "save" Earthlink's subscribers; (3) breach of the HSSA by failing to return the IP addresses and using them without compensating EarthLink; (4) breach of the implied covenant of good faith and fair dealing by "misleading Earthlink's Service Subscribers in order to get them to switch their internet service to Spectrum" and falsely attributing price increases to EarthLink; (5) defamation by COO's employees' statements to EarthLink's subscribers; (6) injurious falsehood by COO's employees' allegedly false statements about Earthlink's ability to continue serving its subscribers; (7) tortious interference with business relations between Earthlink and its subscribers; (8) violation of New York General Business Law § 349 – Deceptive Acts and Practices by allegedly misleading Earthlink's subscribers about Earthlink's ability to continue to service them; and (9) conversion of Earthlink's IP addresses.

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St.*

LLC, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be "'essentially undeniable.'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute. (*Amsterdam Hosp. Group., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Breach of Contract: Targeting EarthLink's Subscribers

In its first and second causes of action,[1] EarthLink asserts breach of contract because COO allegedly engaged in a "campaign to dupe EarthLink high-speed Internet customers into switching providers" and that EarthLink suffered damages as a result. (NYSCEF 15, Amended Compl. ¶ 2.) The elements of a breach of contract claim are: (1) existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of contractual obligations, and (4) resulting damages. (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].) The

[1] EarthLink splits the first and second causes of action temporally: the first cause of action concerns marketing prior to the filing of this action on September 9, 2020, while the second cause of action addresses COO's post-filing activities.

HSSA section at issue here is § 5.3, entitled "Coordination of Marketing Efforts," provides in pertinent part:

> "Each Party shall coordinate with the other Party regarding the marketing of the EarthLink High-Speed Service, as set forth in the coordinated marketing efforts proposal described in Exhibit D, in order to minimize possibilities of conflict between the marketing efforts of the other Party. Each party agrees not to directly target the high-speed customers of the other Party, provided however that [CCO] shall have the right to target market voice and video services to Service Subscribers, and provided further that [CCO] shall provide to a third-party service provider agreed by the Parties a list of [CCO's] high-speed customers and provide timely updates as requested. Either party may engage in non-targeted general consumer marketing which is not directly targeted to the other Parties' high-speed customers."

(NYSCEF 53, HSSA § 5.3.)

CCO asks the court to read this provision as covering only "formal" marketing campaigns, such as mail or email campaigns. CCO argues that the conduct alleged by EarthLink—a "campaign" that used routine service calls to target and "dupe" EarthLink's subscribers into switching to CCO, (NYSCEF 15, Amended Compl. ¶ 2)— would not violate the HSSA's prohibition on "target[ing] the high-speed customers of the other Party." (NYSCEF 53, HSSA § 5.3.) CCO also argues that the "stray" comments made by CCO's call center employees do not constitute a breach and, in any case, the resulting damages cannot be recovered because the HSSA bars recovery of indirect damages.

The court rejects CCO's invitation to limit the term "formal" marketing campaigns to mail or email. Indeed, CCO's reading is contrary to § 5.3's broad prohibition on "directly target[ing] the highspeed customers of the other Party." Rather, the "formal" marketing of mail and email seems to be covered by the narrow exception found later in the paragraph, which provides: "[e]ither Party may engage in non-targeted general

consumer marketing which is not directly targeted to the other Parties' high-speed customers." (NYSCEF 53, HSSA § 5.3.) Section 5.3's exception is expressly limited to "general consumer marketing." But CCO asks the Court to read §5.3's broad prohibition as also being limited to "general consumer marketing."

Likewise, CCO's reliance on § 12.1 of the HSSA is misplaced. CCO contends that HSSA § 12.1 (Solicitation) implies that CCO had the right to solicit EarthLink subscribers. It provides: "Solicitation. During the term of the Agreement, [CCO] will not solicit Service Subscribers on behalf of another Online Provider; *provided* that the foregoing will not restrict [CCO] from engaging in any solicitation or marketing activities that are not specifically targeted to Service Subscribers." (NYSCEF 53, HSSA § 12.1 [emphasis in original].) Section 12.1 prohibits CCO from targeting Subscribers on behalf of other providers, while § 5.3 prohibits CCO from targeting Subscribers on behalf of itself; neither provision allows CCO to target EarthLink's subscribers. Moreover, EarthLink gets the benefit of inferences on a motion to dismiss, not CCO, if any. (*Leon,* 84 NY2d at 87.)

As discussed on the record, whether employee comments are "stray," as CCO submits, or an organized marketing campaign, as Earthlink asserts, is not an appropriate determination made on a motion to dismiss where the court accepts plaintiff's allegations in the complaint as true for the purposes of the motion. (NYSCEF 65, tr at 5:12-6:11.)

By alleging that it lost subscribers as a result of CCO's deception, EarthLink has alleged the final element of a breach of contract claim: damages. However, CCO argues that EarthLink's damages are precluded by the HSSA's bar on indirect

damages. Section 11.2 of the HSSA provides that "UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE FOR INDIRECT . . . DAMAGES . . . ARISING FROM OR RELATING TO THIS AGREEMENT, INCLUDING LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS." (NYSCEF 53, HSSA § 11.2.)

The HSSA's bar against indirect damages does not bar EarthLink's claims at this juncture. "The common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision [is] disfavored by the law and closely scrutinized by the courts." (*Banc of Am. Secs., LLC v Solow Bldg. Co. II, LLC,* 47 AD3d 239, 244 [1st Dept 2007] [internal quotation and citation omitted], *appeal withdrawn* 16 NY3d 796 [2011].) Such provisions are not "accorded judicial recognition" if enforcement would "offend public policy." (*See id.*) Thus, an indirect damages bar cannot cover conduct that (1) "smacks of intentional wrongdoing"; (2) is "willful"; (3) is "fraudulent, malicious or prompted by the sinister intention of one acting in bad faith"; or (4) "as in gross negligence, betokens reckless indifference to the rights of others." (*Id.* [internal quotations and citations omitted].)

EarthLink alleges that CCO intentionally breached the HSSA by engaging in a secret "campaign" of deception and defamation intended to "dupe" EarthLink's subscribers into switching providers to CCO. (NYSCEF 15, Amended Compl. ¶ 2.) In support of this allegation, EarthLink relies on subscribers' reports. (*Id.* ¶ 59.) CCO's conduct, as alleged, could qualify as "willful," or "bad faith"; a fact issue that cannot be determined on a motion to dismiss. (*Banc of Am. Secs.*, 47 AD3d at 243 [denying summary judgment as "[t]he amended complaint avers that [Defendant's] demands for payment of a fee of $6 million coincided with its failure to approve some 14 different

alterations to the leased premises . . . . That the complaint does not use the words 'malice' and 'willful' is not material . . . . The allegations of the complaint suffice to raise the issue of defendant's resort to coercion to derive a benefit not bestowed by the parties' agreement."].)

CCO argues that its breach is not "willful" misconduct under *Banc of America* because CCO was acting in its "own economic interest. As Earthlink observes, the defendant in *Banc of America* was acting in his own economic self-interest by, coercively, demanding a payment of $6 million; yet the First Department held that the defendant could not enforce the limitation on damages provision. (*Id.* at 250.)

In the second cause of action, EarthLink also alleges that CCO sent marketing emails after October 7, 2020, directly to EarthLink subscribers, in breach of the HSSA. (NYSCEF 15, Amended Compl. ¶¶ 23-24.) CCO argues that any breach of contract claim based on conduct after October 7, 2020, must be dismissed because on that date EarthLink sent a marketing email blast that mentioned CCO by name, in violation of the HSSA, and because under the HSSA the parties' obligations were expressly contingent on mutual compliance. EarthLink maintains that the October 7 email did not constitute a breach of the HSSA, and in any event CCO was not entirely released of its obligations under the HSSA even if the October 7 email did constitute a breach.

Whether EarthLink's October 7, 2020, email constitutes a breach of the HSSA, and whether that breach released COO of all its obligations under the HSSA, are factual questions that, at this stage, cannot be resolved as a matter of law based on the documentary evidence presented.

Therefore, EarthLink has successfully pled a breach of contract claim as to the alleged targeting of EarthLink's subscribers.

Breach of Contract: CCO's Obligation to "Save"

In its first cause of action, EarthLink alleges that CCO breached an obligation in the HSSA to "save" subscribers. (NYSCEF 15, Amended Compl. ¶¶ 91-92.) CCO contends that EarthLink has failed to plead that the circumstances giving rise to this obligation were in place.

In the Amended Complaint, EarthLink alleges that CCO "was required to make good faith efforts to 'save' Subscribers to EarthLink's High-Speed Service who indicate that they wish to terminate their service," and that CCO "violated the terms of the HSSA by failing to make good faith efforts to 'save' Service Subscribers" who contacted CCO on "routine service calls" regarding their EarthLink service. (NYSCEF 15, Amended Compl. ¶¶ 12, 91-92.)

The source of this "save" obligation is § 2.2(f) of the HSSA, but it only imposes a "save" obligation to the extent that incentives were agreed upon between EarthLink and CCO. The clause reads:

> "For avoidance of doubt, nothing contained herein shall require [COO] to attempt to 'save' any Service Subscriber or transfer calls from terminating Service Subscribers to EarthLink; provided that, [CCO] shall in good faith attempt through its normal customer service operations to 'save' Service Subscribers to the EarthLink High-Speed Service who indicate they wish to terminate through appropriate incentives agreed upon between EarthLink and [CCO]."

(NYSCEF 53, HSSA § 2.2 [f].)

Critically, Earthlink fails to allege the existence of any "agreed upon" "appropriate incentives" in effect at the time of the alleged comments that would trigger COO's

obligation to "attempt . . . to 'save'" certain EarthLink subscribers. (NYSCEF 15, Amended Compl. ¶ 54.) Therefore, EarthLink's breach of contract claim regarding CCO's "save" obligation is dismissed.

Breach of the Implied Covenant of Good Faith and Fair Dealing

EarthLink argues that CCO breached the implied covenant of good faith and fair dealing by making misrepresentations to EarthLink's subscribers and by wrongfully increasing the price of EarthLink service to its subscribers. (NYSCEF 15, Amended Compl. ¶¶ 108-113.) CCO argues that the implied covenant claim should be dismissed because it is premised on the same conduct and damages that underlie the breach of contract claim.

"The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Moran v Erk*, 11 NY3d 452, 456 [2008] [internal quotation and citation omitted.) A breach of the implied covenant claim is duplicative of a breach of contract claim if "both claims arise from the same facts and seek the identical damages for each alleged breach." (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010] [citations omitted], *lv denied*, 15 NY3d 704 [2010].) "However, causes of action for breach of contract and breach of the covenant of good faith and fair dealing may stand together where the defendant engages in conduct that injures or frustrates the other party's right to receive the fruits of the contractual bargain." (*MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC*, 32 Misc 3d 758, 778 [Sup Ct, NY County 2011] [citation omitted].)

In asserting a basis for its breach of implied covenant claim, EarthLink first points to the misrepresentations allegedly made by CCO to EarthLink's subscribers. But these same misrepresentations constitute the basis of EarthLink's breach of contract claim (NYSCEF 15, Amended Compl. Compare ¶¶89-96 to ¶112 and see ¶110), and thus they cannot constitute the basis of a breach of implied covenant claim.

EarthLink also alleges that that CCO wrongfully and secretly increased the price of EarthLink subscribers' service and falsely attributed those price increases to EarthLink. (NYSCEF 15, Amended Compl. ¶ 61.) These price increases would constitute an independent breach, as EarthLink alleges them as CCO's attempt to frustrate EarthLink's right to the fruit of the HSSA, and they do not constitute the basis of EarthLink's breach of contract claim. Thus, the breach of implied covenant of good faith and fair dealing cause of action based on alleged price increases by CCO may proceed.

Defamation

In the fifth cause of action, EarthLink alleges that CCO's customer service representatives made disparaging and false statements about EarthLink's business, including that EarthLink was going out of business. (NYSCEF 15, Amended Compl. ¶¶ 114-118.) CCO argues that this claim should be dismissed because a charge of insolvency does not constitute defamation unless special damages are pled and EarthLink has failed to do so.[2] EarthLink's claim is for defamation per se, for which special damages need not be alleged.

[2] In its reply, CCO raises for the first time the argument that EarthLink fails to identify the particular person to whom the allegedly defamatory statements were made. Therefore, this tardy argument will not be addressed here.

Defamation is a false statement which can expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion from contemporaries, and inhibit positive societal interaction. (*See Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [citation omitted].) The elements of a defamation claim are: (1) "a false statement," (2) "published to a third party," (3) "without privilege or authorization," and (4) "that causes harm, unless the statement is one of the types of publications actionable regardless of harm." (*Id.* [citation omitted].) Statements that cause such harm include "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992].) "[S]ince only assertions of fact are capable of being proven false," a defamation claim therefore must be "premised on published assertions of fact, rather than on assertions of opinion." (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011] [internal quotation marks and citation omitted].) A statement's truth or substantial truth is an absolute defense. (*Stepanov*, 120 AD3d at 34.) On a motion to dismiss, the court considers whether the statement is reasonably interpreted to be defamatory in the context of the entire publication. (*Id.*) An employer is liable for defamation by an employee in the course of employment. (*Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 373 [1986].)

Here, EarthLink alleges reports that CCO's customer service representatives impugned the basic integrity of EarthLink by telling EarthLink subscribers that EarthLink "wasn't in business anymore" or had been taken over by CCO. (NYSCEF 15, Amended

Comp. ¶ 59.) "Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed." (*Ruder & Finn Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981].) "Statements are thus judged according to whether they affect the ability of a business to 'exist and prosper.'" (*Kforce, Inc. v Alden Personnel, Inc.,* 288 F Supp 2d 513, 518 [SD NY 2003].) In New York "a charge of insolvency, bankruptcy or want of credit is actionable per se." (*Academy Orthotic & Prosthetic Assocs. IPA, Inc. v Fitango Health, Inc.*, No. 19-cv-10203, 2020 WL 6135762, at *6 [SD NY, Oct. 16, 2020] [internal quotation marks and citation omitted].) In *Academy*, defendant allegedly stated that plaintiff was "about to go under" and "defunct." (*Id.* at *7.) There, the court found that the plaintiff had adequately alleged a defamatory statement because a "jury [might] find [those] statements tantamount to a charge of insolvency or an absolute negation of [plaintiff's] business existence." (*Id.*) CCO's alleged statements to subscribers that CCO "took over" EarthLink and that EarthLink "wasn't in business" could be found by a jury to impugn Earthlink's creditworthiness and negate its business existence. (NYSCEF 15, Amended Compl. ¶ 59.) Therefore, EarthLink's defamation claim is sufficiently pled.

Injurious Falsehoods

EarthLink also claims that the statements constituted injurious falsehoods. (NYSCEF 15, Amended Compl. ¶¶ 119-127.) CCO argues that the injurious falsehood claim should be dismissed because EarthLink fails to allege special damages.

A cause of action for injurious falsehood is "insufficient in the absence of an allegation of special damages." (*Gersh v Kaspar & Esh, Inc.*, 11 AD2d 1005, 1005 [1st Dept 1960].) EarthLink concedes that it is unable to allege special damages at this time

as to its injurious falsehood claim, as the total number of Subscribers who cancelled their EarthLink High-Speed Service, and their identities, is unknown. (*See* NYSCEF 60, Opp Brief at 19,[3] n 6.) Thus, EarthLink's injurious falsehood claim has not been sufficiently pled.

Tortious Interference with Prospective Business Relations

EarthLink asserts a claim for tortious interference with prospective business relations. (NYSCEF 15, Amended Compl. ¶¶ 124-127.) CCO argues that EarthLink has failed to show that CCO acted with "wrongful means."

"A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009].) To plead the element of "unlawful means," the "defendant's conduct must amount to a crime or an independent tort." (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004].)

CCO argues that EarthLink's tortious interference claim must be dismissed because EarthLink has not alleged an independent tort or that the conduct was intended solely to inflict harm on EarthLink. But EarthLink has adequately pled its claim for defamation which would constitute an independent tort. In New York, the "general rule" is that to be actionable for tortious interference with prospective business relations, the "defendant's conduct must amount to a crime or an independent tort." (*Carvel*, 3 NY3d

[3] Pages cited refer to NYSCEF generated pagination.

at 190.) Moreover, "where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." (*Id.* [internal quotation marks and citation omitted].).

General Business Law §349

EarthLink also asserts that CCO violated § 349 of New York's General Business Law, which renders "unlawful" any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." (Gen. Bus. L. § 349 [a]; NYSCEF 15, Amended Compl. ¶¶ 128-136.) CCO argues that EarthLink has failed to plead conduct "in this state." "[T]o qualify as a prohibited act under the statute, the deception of a consumer must occur in New York." (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 324-325 [2002].)

EarthLink alleges that CCO engaged in a campaign to deceive EarthLink's subscribers, wherever they were, into switching to Spectrum. (NYSCEF 15, Amended Compl. ¶ 2.) EarthLink also alleges that a large portion of the subscribers received their services within New York (*id.* ¶ 64), and that one subscriber located in New York reached out to EarthLink to report deceptive conduct by CCO. (*Id.* ¶ 62.) These allegations are sufficient to establish a nexus between the alleged deception and New York. Thus, the § 349 claim is sufficient.

Breach of Contract: IP Addresses

In the third cause of action, EarthLink also alleges that CCO breached the HSSA by making unauthorized use of IP Addresses that EarthLink allegedly owns. (*Id.* ¶¶ 102-107.) CCO contends that the IP Addresses constituted "System Facilities" and

"networking infrastructure," which were fully owned by CCO under the contract. CCO also argues that the HSSA did not obligate CCO to "cease use of" or "return" any of the IP addresses.

EarthLink fails to identify any provision in the HSSA governing the conduct at issue. Rather, EarthLink points to Section 1.5 of the HSSA, which provides:

> "IP Addresses. Consistent with DOCSIS 1.0, [CCO] will supply the public IP address or addresses as reasonably necessary for the management of the cable modem device in the Service Subscriber's home . . . . As reasonably required by [CCO], EarthLink will supply routable IP address ranges for connecting to the EarthLink High-Speed Service."

(NYSCEF 53, HSSA § 1.5.) This provision is silent regarding the ownership rights of the IP Addresses and, crucially, mentions no obligation to return or cease use of them upon the HSSA's termination. EarthLink has thus failed to plead a breach of contract on this basis. (*See Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016] [affirming dismissal of breach of contract claim where contract "simply does not say what plaintiff claims it says."].)

Conversion

Alternatively, in the ninth cause of action, EarthLink asserts the same conduct, the alleged unlawful use of IP Addresses, constitutes conversion. CCO argues this claim should be dismissed as duplicative of the breach of contract claim. As the breach of contract claim has not been adequately pled, the conversion claim is not duplicative.

"Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights." (*Lemle v Lemle*, 92 AD3d 494 [1st Dept 2012] [citation omitted].) The common-law tort of

conversion can apply to "intangible property," such as electronic data or IP addresses. (*See Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292-293 [2007].)

To the extent that EarthLink alleges CCO wrongfully asserted ownership of the IP addresses and made unauthorized use of them, EarthLink has sufficiently pled a claim for conversion.

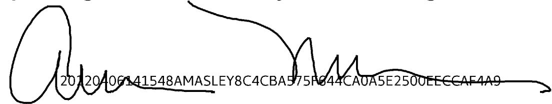
Accordingly, it is

ORDERED defendant's motion to dismiss is denied except that the first cause of action for breach of contract is dismissed to the extent that it is based on the "save" clause and the fourth cause of action may proceed for breach of the implied covenant of good faith and fair dealing as to price increases only; and it is further

ORDERED that defendant shall answer within 20 days of the date of this order; and it is further

ORDERED that the parties are directed to ADR. The Part Clerk will contact counsel with the referral form; and it is further

ORDERED that within 30 days of this order, the parties shall submit by email and filing in NYSCEF a joint proposed PC order or competing orders if they cannot agree.



4/6/2022				ANDREA MASLEY, J.S.C.		
DATE						
CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED		☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
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