

<b>IBT Media Inc. v Pragad</b>
2022 NY Slip Op 34341(U)
December 19, 2022
Supreme Court, New York County
Docket Number: Index No. 652277/2022
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X INDEX NO. 652277/2022

IBT MEDIA INC.,

12/15/2022,
12/15/2022,
11/01/2022

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 002 003 004

DEV PRAGAD, NW MEDIA HOLDINGS CORP.,

Amended
DECISION + ORDER ON
MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 47, 50, 53, 57, 61

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 51, 60, 64

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 54, 55, 56, 59, 62, 63

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents, it is

As the court indicated on the record on 12/15/2022, the court grants the motion of NW Media Holdings Corp.'s and Dev Pragad's motions to dismiss. In a nutshell, plaintiff IBT Media Inc. ("IBT") sold Newsweek to NW Media Holdings Inc. via a "Membership Interest Purchase Agreement" (Purchase Agreement, NYSEF Doc 42) dated September 13, 2018. IBT expressly warranted in the Purchase Agreement that it has no "options or rights to acquire any such ownership interests in the Company" [i.e. Newsweek LLC], [Purchase Agreement ¶ 5(a)] and that the Purchase Agreement constituted the "entire" agreement between the parties regarding ownership of Newsweek:

“This Agreement and the exhibits, schedules and any other attachments hereto, all of which are incorporated herein by reference and made a part hereof, constitute the entire contract between the Parties pertaining to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings between the Parties with respect to the matters set forth herein.” [Purchase Agreement ¶ 12(d)]

Despite this language, IBT claims that the transaction was a sham to spin off Newsweek from IBT, allegedly to “try to protect the Newsweek brand” from “negative media attention” that an investigation by the Manhattan District Attorney’s office had supposedly garnered. IBT alleges that defendants were supposed to convey Newsweek back to IBT once the heat was off (Complaint NYSEF Doc. 1 at ¶ 69). Plaintiff also admits that Pragad, Uzac and Davis constructed the tale “for the media – that Newsweek was now a fully separate entity under [Pragad’s] control” (Complaint ¶87), but that this was not true. Plaintiff alleges that defendants reneged on the supposed oral agreement and have no intention of conveying Newsweek back to IBT.

The problem with IBT’s position is that IBT expressly disclaimed in the Purchase Agreement that it had any right to acquire any ownership interest in Newsweek [Purchase Agreement ¶ 5(a)]. If that were not enough, the Purchase Agreement contains the merger clause discussed above that supersedes all prior and contemporaneous agreements and understandings between the Parties with respect to the matters set forth herein” Therefore, the terms of the contract utterly refute the existence of a side oral understanding between the parties that IBT has a right to reacquire Newsweek (see *Peacock Holdings, Inc. v. Keefe & Keefe, Inc.*, 232 A.D.2d 331 [1<sup>st</sup> Dep’t 1996]) [parol evidence offered to show that promissory notes and security agreements were fraudulent shams to defraud the Internal Revenue Service, entered into to make what was actually gift or at most conditional loan look like unconditional promise to pay, was

properly rejected] see also *Mackenzie v. Emigrant Mortg. Co., Inc.*, 164 A.D.3d 1159, 1159 [1st Dep't 2018]; *UMG Recordings, Inc. v. FUBU Recs., LLC*, 34 A.D.3d 293, 294 [1st Dep't 2006]

In the face of the plain language of the Purchase Agreement, plaintiff argues that parole evidence can come in to demonstrate that an agreement is a sham, primarily citing *Ehrlich v American Moninger Greenhouse Manufacturing Corp.*, 26 NY2d 255 (1970). The problem with this case and the other ones like it, is that they are actions under CPLR 3213, summary judgment in lieu of complaint, a truncated procedure to enforce an instrument for the payment of money only. These cases stand for the proposition that a plaintiff cannot avail itself of this truncated procedure where there is an open question about the underlying debt. Here, there is no dispute that the parties meant to transfer Newsweek to NW Medi. The supposed oral agreement to convey Newsweek back to plaintiff contradicts the very terms of the written contract, wherein plaintiff warranted it had no "options or rights to acquire any such ownership interests."

Plaintiff also argues that the Purchase Agreement is void because NW Media did not pay adequate consideration for Newsweek. The purchase price was \$5,000.00. This begs the question, if the purchase price was inadequate, why on earth did IBT sign a contract in which it represented that the purchase price was fair and adequate:

"Seller is familiar with and at all relevant times have had access to the books and records of the Company for the purposes of determining the adequacy of the Purchase Price. Seller further acknowledges and agrees that the Purchase Price was fully negotiated between Seller and Buyer and, based on the current balance sheet of the Company, the Company's past, current and projected profit and loss statements, and the independent valuation of the intellectual property of the Company prepared by UHY-Advisors, NY Inc., the Purchase price is fair and adequate consideration for the membership interest."

Purchase Agreement ¶ 5(g). To the extent defendants have failed to pay the \$5,000, plaintiff can sue for breach of contract.

Had the parties actually intended for the transfer of Newsweek to be temporary, they could have said so in their contract. Instead, IBT signed a contract that specifically disclaimed that it had any reversionary or other rights to retrieve Newsweek. Therefore, it cannot sue on any supposed right now (see *Ashwood Capital Inc v ORG Mgmt, Inc.*, 99 AD3d 1, 9 [1st Dep’t 2012]).

That the parties allegedly continued to share office space, had access to each other’s computer systems and had overlapping personnel does not make room for an argument that the parties had a side oral agreement to convey Newsweek back to IBT. Again, this is because that alleged side agreement directly contradicts the plain language of the Purchase Agreement, where IBT expressly disclaimed “options or rights to acquire any such ownership interests in the Company.”

Accordingly, because the plain language of the Purchase Agreement contradicts IBT’s claims, the court dismisses the following causes of action with prejudice: Declaratory Judgment (1<sup>st</sup> cause of action), Anticipatory Breach (2<sup>nd</sup> cause of action), Promissory Estoppel (3<sup>rd</sup> cause of action) Unjust Enrichment (4<sup>th</sup> cause of action) and Fraudulent Inducement (5<sup>th</sup> cause of action).

The court also dismisses Promissory Estoppel and unjust enrichment for the additional reason that they are duplicative of other, defective causes of action, such as Anticipatory Breach. With respect to promissory estoppel, plaintiff has also failed to allege unconscionable injury (see *Streit v. Bombart*, 187 A.D.3d 529 [1st Dep’t 2020])

Breach of fiduciary duty (8<sup>th</sup> cause of action), constructive trust (9<sup>th</sup> cause of action) and equitable accounting (10<sup>th</sup> cause of action) are also dismissed, because plaintiff has not alleged the parties had a fiduciary relationship in anything more than a conclusory fashion. Meanwhile, the rest of the actual facts pled indicate the parties could not have a fiduciary relationship.

However, the claims for unfair competition (6<sup>th</sup> cause of action) and misappropriation of trade secrets (7<sup>th</sup> cause of action) are dismissed with leave to replead. Right now, they rely on the sale to NW Media being a sham, an argument the court has rejected based on the plain language of the Purchase Agreement. To the extent IBT alleges that NW Media stole information from IBT that was not transferred in the Newsweek sale, there may be a cause of action. The complaint, as currently constituted, is unclear whether the misappropriation emanates from more than just part of the sale to Newsweek.

Accordingly, it is

NW Media Holdings Corp.'s *Mae*

ORDERED THAT the court grants ~~IBT's~~ motion to dismiss (mot seq no 2), and it is further

ORDERED THAT the court grants Dev Pragad's motion to dismiss (mot seq. 3); and it is further

ORDERED THAT motion seq. 4, to consolidate is denied as moot.

The clerk is directed to mark this case disposed.

*Mel Crane*  
20221219135856MACRANEBAFFA56668104ADA83C7F239F5CF406

12/19/2022

DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: