

Pragad v Davis

2023 NY Slip Op 31209(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 652334/2022

Judge: Melissa Crane

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Action”) for a more complete recitation of this matter’s factual background (*see* March 22, 2023 Decision and Order, Index No. 652344/2022, Doc. No. 154). However, the court provides factual allegations from the verified complaint in this *Pragad* action as relevant to the Defendants’ motions at issue in this Decision and Order.

Davis is the chief executive officer of IBT as well as one of the directors, officers, and owners of NW Media Holdings Corp. (“NW Media”). IBT owned the magazine and media company Newsweek from 2013 until it sold Newsweek to NW Media in 2018 (Verified Complaint, NYSCEF Doc. No. 2, ¶¶ 41-42). The verified complaint alleges that following the sale of Newsweek to NW Media, “Newsweek continued to maintain digital records for both companies in Newsweek’s Google Workspace” (Verified Complaint, ¶ 107).

Newsweek issued a litigation hold in August 2020 (Verified Complaint, ¶ 109). The verified complaint alleges that Uzac, the former chief executive officer of IBT, then approached Plaintiff Dev Pragad (“Pragad”), the current chief executive officer of Newsweek, and indicated that they “needed to find someone to delete the accounts containing problematic information” (Verified Complaint, ¶ 110). David Jang¹ then allegedly directed Uzac to orchestrate the deletion of documents from the Newsweek Google Workspace (“Workspace”), and Uzac “coordinated with Davis, the current CEO of IBT, to carry out the deletions” (Verified Complaint, ¶ 111).

Davis allegedly logged into the Workspace and searched for documents and records covered by the litigation hold, after which he initiated a data export and downloaded the exported file (Verified Complaint, ¶¶ 112-114). The verified complaint alleges that after Davis downloaded this data from the Workspace, Davis “caused” the deletion of documents from the Workspace,

¹ The verified complaint alleges that Jang is a pastor and founder of a Christian sect called the Community and that he has “close ties and effective control over [] companies owned by Community members, such as IBT” (Verified Complaint, ¶ 27).

specifically through directing Defendant Titus Choi (“Choi”) to “clean up” the files by “deleting any accounts that might contain information damaging to Jang or the Church” (Verified Complaint, ¶¶ 116-119). Thereafter, the account associated with Choi allegedly logged into the Workspace and deleted approximately 1.8 terabytes’ worth of data (Verified Complaint, ¶¶ 119-122).

Plaintiff additionally alleges that Davis “is continuing to use his access to Newsweek confidential information, via his role as a Director of NW Media Holdings, for the benefit of . . . IBT . . . and to the detriment of NW Media Holdings” (Verified Complaint, ¶ 127). Through his role at NW Media, Davis has allegedly stolen “proprietary business strategies and confidential financial information” with the “specific intent of helping IBT to compete directly with Newsweek” (Verified Complaint, ¶¶ 129, 136). Davis allegedly “intends to exploit that information for the benefit of IBT and to the detriment of Newsweek and NW Media Holdings” (Verified Complaint, ¶ 135).

The verified complaint alleges causes of action derivatively or double derivatively on behalf of NW Media or Newsweek LLC against Davis for conversion and aiding and abetting conversion (Count I), conspiracy to convert (Count II), trespass to chattels and aiding and abetting trespass to chattels (Count III), conspiracy to trespass (Count IV), misappropriation of trade secrets (Count V), and breach of fiduciary duty (Count VI). Count VI additionally alleges aiding and abetting breach of fiduciary duty against Jang, Uzac, IBT, and Choi. Lastly, the verified complaint contains a cause of action “Brought by Plaintiff Pragad In His Own Right” for removal of Davis as a director and officer of NW Media pursuant to BCL §§ 706(d) and 716(c) (Count VII).

DISCUSSION

Davis has moved to dismiss the causes of action against him for lack of standing pursuant to CPLR 3211(a)(3) and for failure to state a claim pursuant to CPLR 3211(a)(7). The court grants in part and denies in part Davis's motion (Motion Seq. No. 01).

1. Davis's Motion to Dismiss for Lack of Standing (MS 01)

As an initial matter, the court denies Davis's motion to dismiss the verified complaint for lack of standing pursuant to CPLR 3211(a)(3). Davis argues that Pragad lacks standing to assert the claims against him on behalf of Newsweek or as a shareholder of NW Media because NW Media's purported acquisition of Newsweek was "illusory" (Opening Mem., NYSCEF Doc. No. 32, p. 3). However, the court already rejected the theory that the acquisition was a sham in the decision and order on Pragad and NW Media's motions to dismiss in the related action, *IBT Media Inc. v Pragad and NW Media* (652277/2022). Because the court already has found that the clear terms of the parties' purchase agreement contradict the argument that the acquisition was a sham (December 19, 2022 Decision and Order, Index No. 652277/2022, Doc. No. 66), the court denies the portion of Davis's motion that seeks dismissal for lack of standing.

2. Davis's Motion to Dismiss for Failure to State a Claim (MS 01)

The court grants in part and denies in part Davis's motion to dismiss the verified complaint pursuant to CPLR 3211(a)(7).

a. *Misappropriation of Trade Secrets (Count V)*

The court grants without prejudice Davis's motion to dismiss the cause of action for misappropriation of trade secrets (Count V) based on the reasoning set forth at oral argument, *i.e.*, that Plaintiff has failed to sufficiently allege damages (*see* December 15, 2022 Oral Argument Transcript, pp. 132-134).

b. *Trespass to Chattels Causes of Action (Counts III and IV)*

The court also grants Davis’s motion to dismiss the causes of action for trespass to chattels and aiding and abetting trespass to chattels (Count III) and conspiracy to trespass (Count IV). These causes of action are based on allegations that in August 2020, Davis accessed the Workspace to download files and then aided and abetted Choi’s deletion of a massive amount of data from the Workspace (Verified Complaint, ¶¶ 161-180). The court already determined in its decision on Choi’s motion to dismiss (MS 08) in the *NW Media* Action (Index No. 652344/2022) that this conduct, if anything, constitutes conversion—not trespass to chattels (*see* March 22, 2023 Decision and Order, p. 5). Therefore, the causes of action relating to trespass to chattels are also dismissed here.

c. *Conversion and Aiding and Abetting Conversion (Count I)*

The court denies Davis’s motion to dismiss the cause of action for conversion and aiding and abetting conversion. In order to state a cause of action for conversion, a plaintiff must allege that they had a “superior right of possession” and that the defendant “interfered with [their] right of possession” (*Grocery Delivery E-Servs. USA, Inc. v Flynn*, 201 AD3d 585, 586 [1st Dept 2022]; *Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]). A plaintiff can only state a cause of action for conversion where the defendant allegedly interfered with the plaintiff’s property “to the exclusion of the owner’s rights” (*Lemle*, 92 AD3d at 497; *Lopez v Fenn*, 90 AD3d 569, 572 [1st Dept 2011]). Additionally, a plaintiff can state a cause of action for aiding and abetting conversion by alleging “the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance” (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018]).

Here, the verified complaint alleges both (1) that Davis himself is liable for conversion for downloading files from the Workspace and then causing the deletion of data through directing

Choi to do so and (2) that Davis aided and abetted Choi's deletion of the files (Verified Complaint, ¶¶ 144-146).² The court denies dismissal under either theory at this time. First, Plaintiff sufficiently alleges conversion against Davis directly. As the court has previously found, the ownership of the data is an ultimate issue in these cases that the court cannot determine at this time (*see e.g.*, March 22, 2023 Decision and Order, p. 8). For the purposes of this motion, Plaintiff has sufficiently alleged that Newsweek had a superior right of possession by asserting that Davis coordinated with Uzac to delete accounts that were subject to a "Newsweek" litigation hold and then directed the deletion in "flagrant disregard of the retention notice" (Verified Complaint, ¶¶ 109-111, 116).

The verified complaint also adequately alleges that Davis interfered with that data to the exclusion of Newsweek. Davis is correct that the verified complaint alleges that Choi—not Davis—was the individual who ultimately deleted the data off of the Workspace (*see* Verified Complaint, ¶ 145 ["Defendant Choi intentionally accessed, exercised control over, and destroyed electronic data in the Newsweek Google Workspace without permission"]; Reply Mem., NYSCEF Doc. No. 59, p. 7). However, the verified complaint also alleges Davis personally took part in the conversion of data from the Workspace by exporting and downloading files from the Workspace (Verified Complaint, ¶¶ 112-115). Additionally, Plaintiff alleges that Davis explicitly directed Choi to delete the data (Verified Complaint, ¶ 149 ["Davis then directed Choi to delete certain user accounts from the Newsweek Google Workspace"]). Because a principal generally is liable for an agent's misconduct where the agent was acting "in furtherance of the [principal's] business and within the scope of employment" (*Parlato v Equitable Life Assur. Soc. Of U.S.*, 299 AD2d 108,

² The court notes that the verified complaint formally asserts the underlying cause of action for conversion only against Davis himself (*see* Verified Complaint, p. 41 [stating in the heading for the cause of action, "Conversion of Electronic Documents and Data as against Jonathan Davis and Aiding and Abetting Conversion of Electronic Documents and Data as against Jonathan Davis"]). However, the body of the verified complaint alleges that Davis "aided and abetted Choi in his tortious conduct" (Verified Complaint, ¶ 146).

113-114 [1st Dept 2002] [citations and internal quotation marks omitted]), Davis's alleged direction to Choi, an IBT employee, is sufficient to state a cause of action for conversion (*see Hatton v Quad Realty Corp.*, 100 AD2d 609, 610 [2d Dept 1984] [stating that, typically, a principal is "liable for conversion by his agent" where the agent's conduct may have been "reasonably expected"]; *see also Okyere v Palisades Collection, LLC*, 961 F Supp 2d 508, 517 [SDNY 2013]).

In the alternative, the verified complaint states a cause of action for aiding and abetting conversion. As described above, the verified complaint sufficiently alleges an underlying conversion. Additionally, Plaintiff has alleged facts sufficient to establish actual knowledge. In order to state a cause of action for aiding and abetting conversion, a plaintiff must allege that the defendant had "actual knowledge that the person who directly converted the plaintiff's property did not own that property" (*Starr Indemnity & Liability Co. v Global Warranty Group, LLC*, 165 AD3d 1308, 1309 [2d Dept 2018]; *see also Torrance Const., Inc. v Jaques*, 127 AD3d 1261, 1263 [3d Dept 2015], citing *Weisman, Celler, Spett & Modlin v Chadbourne & Parke*, 271 AD2d 329 [1st Dept 2000]). Plaintiff met this burden by alleging that Davis coordinated to delete "problematic" information subject to a Newsweek litigation hold in August 2020, in "flagrant disregard" of that litigation hold (Verified Complaint, ¶¶ 109-112, 116). Plaintiff further alleged knowledge that these were Newsweek documents through specifically asserting that Davis caused the deletion of accounts associated with Newsweek reporters (Verified Complaint, ¶¶ 118, 120). These allegations are sufficient to allege that Davis had actual knowledge that IBT did not own all of the data that Defendants allegedly converted.

Further, Plaintiff alleges that Davis provided substantial assistance. A plaintiff can adequately plead substantial assistance through alleging "concealing, or failing to act when required to do so, enabling the harm to proceed" (*Sayles v Ferone*, 137 AD3d 486, *1 [1st Dept

2016]). Here, Plaintiff alleges that Davis personally logged into the Workspace prior to Choi's deletions, exported and then downloaded files from the Workspace (Verified Complaint, ¶¶ 112-115). The verified complaint additionally alleges that Uzac and Davis worked together to "identify documents to be deleted" by Choi before Davis directed Choi to carry out the deletions (Verified Complaint, ¶¶ 158-159). These factual allegations are sufficient at this stage.

d. *Conspiracy to Convert (Count II)*

However, the court grants Davis's motion to dismiss the cause of action for conspiracy to convert. A claim for conspiracy is subject to dismissal where it is duplicative of an aiding and abetting cause of action (*see Kew Gardens Hills Apt. Owners, Inc. v Horing Welikson & Rosen, P.C.*, 35 AD3d 383, 386 [2d Dept 2006] [dismissing conspiracy to breach fiduciary duty claim as duplicative of the aiding and abetting claim], citing *American Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92 [1st Dept 2000]; *Tatintian v Vorotyntsev*, 2019 WL 1746004, *11 [SDNY Apr 18, 2019] [dismissing conspiracy claim where it "ar[ose] out of precisely the same conduct as [the] aiding and abetting claims"]). Here, the cause of action for conspiracy alleges substantially the same claim against Davis as the cause of action for aiding and abetting conversion, *i.e.*, that Davis directed Choi to delete user accounts from the Workspace (Verified Complaint, ¶¶ 149, 159). As such, the court dismisses the conspiracy claim.

e. *Breach of Fiduciary Duty (Count VI)*

The court denies Davis's motion to dismiss Plaintiff's cause of action for breach of fiduciary duty. In order to state a cause of action for breach of fiduciary duty, a plaintiff must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages" (*Besen v Farhadian*, 195 AD3d 548, 549 [1st Dept 2021]; *PF2 Securities Evaluations, Inc. v Fillebeen*, 171 AD3d 551, 553 [1st Dept 2019]). A plaintiff must

state a cause of action for breach of fiduciary duty with heightened particularity (*see* CPLR 3016[b]; *Stewart Title Ins. Co. v Liberty Title Agency, LLC*, 83 AD3d 532, 533 [1st Dept 2011]; *Stang LLC v Hudson Square Hotel, LLC*, 158 AD3d 446, 446 [1st Dept 2018]).

Here, the verified complaint has alleged facts with sufficient particularity to state a cause of action for breach of fiduciary duty against Davis. The verified complaint alleges breach of fiduciary duty based on the theory that Davis, a director and officer of NW Media, directed the deletion of data off the Workspace and separately used his position at NW Media to steal financial and other proprietary information in order to help IBT compete with Newsweek (Verified Complaint, ¶¶ 190, 193, 198-199). Davis does not dispute that, as a director and officer of NW Media, he owed—and continues to owe—a fiduciary duty to NW Media (*see* Verified Complaint, ¶ 190).

Additionally, the verified complaint alleges that Davis engaged in misconduct. In particular, Plaintiff alleges that Davis downloaded documents from the Workspace and then directed Choi to delete a massive amount of files (Verified Complaint, ¶¶ 112-115). The verified complaint alleges that Davis did this in coordination with Uzac specifically to delete accounts containing “problematic information,” including information that could be “damaging to Jang or the Church” and “potentially incriminating information concerning IBT” (Verified Complaint, ¶¶ 110-111, 119-120).

Davis’s primary argument hinges on his contention that Plaintiff has failed to allege that he incurred any damages or that Davis has improperly used any misappropriated information (Opening Mem., p. 13; Reply Mem., pp. 10-11). However, the verified complaint sufficiently alleges that NW Media incurred damages including, among other things, the cost of Newsweek’s forensic investigation into the deletion of data from the Workspace, costs related to Newsweek’s

unsuccessful attempts to recover the data, and the value of the data that was destroyed (Verified Complaint, ¶ 205). Further, even though a cause of action for **misappropriation of trade secrets** requires allegations that the defendant used the trade secret (*see Nostrum Pharmaceuticals, LLC v Dixit*, 2014 WL 4370695, *10 [SDNY Sept 2, 2014] [internal quotation marks and citation omitted]), Davis has provided no case law suggesting that allegations of use are required where the cause of action sounds in **breach of fiduciary duty** based on misconduct involving alleged misappropriation of trade secrets.³ Plaintiff was not required to allege use of a trade secret for this cause of action, but merely damages in some form. Plaintiff has done so. Therefore, Davis's motion to dismiss this cause of action is denied.

f. *Removal of Director and Officer (Count VII)*

The court also denies Davis's motion to dismiss Pragad's cause of action for removal of Davis as a director and officer of NW Media pursuant to BCL §§ 706(d) and 716(c). BCL §§ 706(d) and 716(c) allow a shareholder of at least ten percent of the outstanding shares of a corporation to bring an action to remove a director or officer for cause. In order to state a cause of action under these provisions, a plaintiff must allege that the director or officer engaged in some underlying misconduct, such as breach of fiduciary duty (*see Max v ALP, Inc.*, 203 AD3d 580 [1st Dept 2022] [affirming dismissal of cause of action for removal of defendants as directors and officers because "the underlying claims are not viable"]; *Kilger v Drucker*, 2011 WL 10653316, **5, 11 [Sup Ct, Nassau County Oct 5, 2011] [finding that plaintiff stated a cause of action for removal of defendant as officer and director where plaintiff alleged that the defendant "provided

³ Davis's citation to *Bartfield v RMTS Assoc., LLC* (11 AD3d 386, 387 [1st Dept 2004]) is unpersuasive. The court there found that the trial court properly dismissed a breach of fiduciary duty cause of action because of the failure to demonstrate that counterclaim defendants "had made improper use of RMTS's time or facilities, disseminated its confidential information or otherwise usurped its business opportunities for the new, competing company." However, the court by no means found those to be the only types of damages that a plaintiff can allege for breach of fiduciary duty. Additionally, *Bartfield* is inapposite as it was a decision after a trial motion to dismiss pursuant to CPLR 4401. At this early stage, Plaintiff has sufficiently alleged damages.

confidential business information and trade secrets” to a third party as grounds for removal]; *O’Brocta on Behalf of Frank J. O’Brocta Salvage, Inc. v O’Brocta*, 1989 WL 19606 [WDNY Feb 24, 1989] [finding complaint properly pled cause of action for removal as director pursuant to BCL § 706(d) where the other causes of action, including for breach of fiduciary duty, alleged misconduct and “any single act of misconduct may provide a basis for removal”]).

Here, it is not disputed that Pragad controls 50% of the shares of NW Media. Therefore, because the court has found that the verified complaint states causes of action for conversion and aiding and abetting conversion (Count I) and breach of fiduciary duty (Count VI), the court also finds that the verified complaint states a cause of action for removal of Davis as a director and officer pursuant to BCL §§ 706(d) and 716(c).

3. Uzac’s and IBT’s Motions to Dismiss the Aiding and Abetting Fiduciary Duty Cause of Action (Count VI) (MS 02 and 04)

In addition to the allegations that Davis is liable for breach of fiduciary duty, the verified complaint also alleges that Defendants Jang, Uzac, IBT, and Choi are liable for aiding and abetting breach of fiduciary duty. The court has already denied Choi’s motion to dismiss in this action (*see* March 6, 2023 Decision and Order, NYSCEF Doc. No. 80). The court notes that while Jang has moved to dismiss the causes of action against him in the *NW Media* Action (MS 09 in Index No. 652344/2022), Jang has not moved to dismiss the verified complaint in this action.

Based on the reasoning set forth at oral argument, the court denies Uzac’s motion to dismiss the aiding and abetting breach of fiduciary duty cause of action (MS 02), but grants IBT’s motion to dismiss the aiding and abetting breach of fiduciary duty cause of action (MS 04) (*see* December 15, 2022 Oral Argument Transcript, pp. 167, 170).

CONCLUSION

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Davis’s motion to dismiss (MS 01) is denied as to the causes of action for conversion and aiding and abetting conversion (Count I), breach of fiduciary duty (Count VI), and removal of Davis as a director and officer of NW Media (Count VII); and it is further

ORDERED that Davis’s motion to dismiss (MS 01) is otherwise granted, and Counts II, III, IV, and V are dismissed against him; and it is further

ORDERED that Uzac’s motion to dismiss (MS 02) the cause of action for aiding and abetting breach of fiduciary duty (Count VI) against him is denied; and it is further

ORDERED that IBT’s motion to dismiss (MS 04) the cause of action against it for aiding and abetting breach of fiduciary duty (Count VI) is granted; and it is further

ORDERED that Davis and Uzac must file an answer to the verified complaint within 20 days of the date of this decision and order.

04/11/2023
DATE


MELISSA CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	