Evaate LLC v Portfolio BI, Inc.

2023 NY Slip Op 33707(U)

October 19, 2023

Supreme Court, New York County

Docket Number: Index No. 650125/2022

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. BARRY R. OSTRAGER	PART	IAS MOTION 61EFM
	Justice		

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EVAATE LLC,

Plaintiff,

- v -

PORTFOLIO BI, INC.,

Defendant.

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INDEX NO.	650125/2022
MOTION DATE	
MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Currently pending before the Court is the application by defendant Portfolio Bi, Inc ("Portfolio") for a preliminary injunction enjoining plaintiff Evaate LLC ("Evaate") from (a) maintaining, operating, hosting, publishing, or otherwise displaying the website, https://www.portfoliobi-litigation.com (the "Website"); (b) from maintaining, operating, hosting, publishing, or otherwise displaying the press release issued on August 22, 2023, https://www.prnewswire.com/news-releases/founders-and-investors-of-fintech-startup-hentsu-file-litigation-against-portfolio-bi-for-breach-of-acquisition-agreement-30190700l.html (the "Press Release"); and (c) making or publishing any disparaging statement in any medium whatsoever against Defendant.

The parties have been litigating in New York since Evaate's initiation of this action in January of 2022 claiming breach of a Consulting Agreement. In April of 2023, defendant Portfolio initiated a related action in Delaware asserting claims against Evaate's principal captioned *Portfolio Bi, Inc. v. Marko Djukic et al.*, case number 2023-0341-SKR (the "Delaware Action") based on the same set of facts but based on a different contract. The parties had been pursuing discovery and were scheduled to participate in a settlement conference before this Court when, on August 22, 2023, Evaate published the Website and the Press Release. NYSCEF

Doc. Nos. 44, 55. It is undisputed that Evaate is responsible for the publication of the Website and the Press Release. Both the Website and Press Release refer to the New York and Delaware Actions and make claims regarding Portfolio's alleged wrongdoing. On August 30, 2023, defendant filed the instant application via Order to Show Cause seeking the preliminary injunction, including a request for a temporary restraining order. Defendant claims that the publication of the Website and the Press Release violates the non-disparagement clause contained in the Consulting Agreement.

On September 5, 2023, the Court held a conference with counsel for all parties to address defendant's application and the request for a TRO. The TRO was granted on the condition that defendant post a bond of $10,000.00, which condition was satisfied on September 11, 2023. NYSCEF Doc. Nos. 49, 52, 53. The website and press release have since been taken down pursuant to the September 5, 2023 Order to Show Cause. NYSCEF Doc. No. 49. Oral argument on the defendant's application for a preliminary injunction was originally scheduled for October 18, 2023 and subsequently adjourned with consent of the parties to November 2, 2023. NYSCEF Doc. No. 59.

At issue is whether defendant has made the requisite showing warranting the issuance of a preliminary injunction. In order for a preliminary injunction to be issued, defendant must demonstrate (1) a likelihood of success on the merits on the underlying claims, (2) that, absent the injunction, defendant will suffer immediate, irreparable harm, and (3) that the balance of the equities tips in defendant's favor.

<u>I. Likelihood of success on the merits</u>

Defendant argues it has established a likelihood of success on the merits of its underlying claim that the website and press release published by Evaate violated the non-disparagement

clause contained in section 9 of the parties' Consulting Agreement. Section 9 of the Consulting Agreement provides as follows (NYSCEF Doc. No. 43):

> (a) Consultant shall not, and shall cause its employees, affiliates and representatives not to, directly or indirectly, (i) make any negative public statement or communication regarding the Company or its affiliates or any person known by Consultant to be a shareholder, partner, member, director, officer, employee or agent of the Company (together, "Company Group") with the intent of adversely affecting or disparaging the reputation, or to the extent applicable, business or goodwill of the Company, its affiliates or any such person, or (ii) publicly make any disparaging or derogatory statement or communication regarding the Company or its affiliates or any person known by Consultant to be in the Company Group. The foregoing shall not affect, prevent or interfere with Consultant's ability to respond truthfully to any governmental investigation or inquiry related thereto, whether by the U.S. Securities and Exchange Commission or any other governmental entity or as required by any other law, subpoena, court order or other compulsory legal process or any disclosure requirement of applicable law or pursuant to any other legal process, or otherwise engage in any legally protected activity.

According to the Consulting Agreement, a disparaging or derogatory statement is one that adversely affects the reputation, business, or goodwill of Portfolio.

Plaintiff's opposition to the preliminary injunction does not appear to dispute that the contents of the Website and Press Release are disparaging. NYSCEF Doc. No. 57. Rather, plaintiff claims that the statements published in the Website and Press Release are absolutely privileged as statements made in connection with a proceeding before a court. Plaintiff further cites to Section 74 of the New York Civil Rights Act, which provides that "a civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding…." The statute extends to contract claims for violations of a non-disparagement clause. *See Wexler v. Allegion (UK) Ltd.*, 374 F.Supp.3d 302, 314 (S.D.N.Y. 2019).

For a report to be considered "fair and true" pursuant to Section 74 of the New York Civil Rights Act, it is "enough that the substance of the article be substantially accurate." *Holy Spirit Ass'n for Unification of World Christianity v. New York Times*, 49 N.Y.2d 63, 67 (1979). A one-sided report of the official proceedings may be fair and true, and use of the exact language contained in the official proceedings is not required for Section 74 protection to apply. *See, e.g.*, *Wexler*, 374 F. Supp. 3d at 311. However, the Section 74 privilege does not attach as a matter of law if the substance of the article suggests more serious conduct than that actually suggested in the official proceeding. *See Daniel Goldreyer, Ltd. v. Van de Wetering*, 217 A.D.3d 434, 435 (1st Dept. 1995).

To proceed with the analysis of Portfolio's likelihood of success on the merits, it is necessary to review the facts alleged in the official proceedings and evaluate the likelihood that the protections of the New York Civil Rights Act apply to Evaate's Website and Press Release (i.e. whether the substance of the Website and Press Release suggests more serious conduct than alleged in the official proceedings). The Website and Press Release contain references to both the New York action and the Delaware Action. Both the New York and Delaware actions are based on the same set of facts, which are as follows.

In February of 2021, defendant Portfolio Bi, Inc. ("Portfolio") acquired a non-party entity named Hentsu. Both Portfolio and non-party Hentsu are owned in part by non-party NEXT Investors II, L.P., who is an affiliate of Credit Suisse (hereinafter referred to as "CS Next"). CS Next, which owned a minority interest in Hentsu, allegedly pushed for a merger between Hentsu and Portfolio. This allegedly led to the departure of Hentsu's founder, non-party Marko Djukic (a defendant in the Delaware Action but a non-party in this case). CS Next allegedly required that non-party Marko Djukic agree to act as an independent consultant after the consummation of the

transaction in order to help with the transitioning of the business and offered to compensate Djukic with a success fee worth $675,000.00. The terms of this agreement were set forth in a Consulting Agreement executed by Portfolio and Marko Djukic's other entity Evaate, the plaintiff in this case and the defendant/counterclaim plaintiff in the Delaware action. Evaate alleges that it performed all its obligations under the Consulting Agreement, but that Portfolio failed to pay the success fee. Evaate makes various allegations that Portfolio has been operating in bad faith.

In this New York action, Evaate asserts a single cause of action against Portfolio for breach of the Consulting Agreement. In the Delaware action, which is based on the same set of facts but a separate contract, Portfolio asserts claims against Evaate's principal Marko Djukic for breach of a Stock Purchase Agreement as well as claims for fraud. Evaate asserts counterclaims for declaratory relief and indemnification against Portfolio. The Court notes that CS Next is not a party in either the New York or Delaware Actions.

Plaintiff has demonstrated a likelihood of success on the merits of its claim for breach of contract. It is undisputed that the statements contained in the Website and the Press Release may be disparaging. The Website and Press Release also both contain statements which suggest conduct more serious than what is actually alleged in both this action and the related Delaware Action. Both the Website and the Press Release suggest that Portfolio breached its fiduciary duties to Evaate and Djukic and that documents support these claims, but nowhere in either the New York action or the Delaware Action does Evaate or its principal make any reference to any breach of fiduciary duties, nor that Portfolio owed any fiduciary duty to Evaate and/or Djukic.

Claims of breach of fiduciary duty are more serious than simple breach of contract claims because fiduciary duties only arise where a special relationship between the parties exist.[1]

Evaate also argues that judicial filings are absolutely privileged under a "litigation privilege." While it is true that statements uttered in the course of a judicial proceeding are absolutely privileged (*see Herzfeld & Stern v. Beck*, 175 A.D.3d 689, 691 [1st Dept. 1991]), this privilege extends only to "all pertinent communications among the parties, counsel, witnesses, and the court." *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 174 (1st Dept. 2007), *abrogated on other grounds*. To the extent the publicly published Website and Press Release contain statements apart from those contained in judicial filings, those statements are not necessarily protected by the litigation privilege.

Because the Website and the Press Release contain statements that do not appear to be subject to the protections of the litigation privilege or of Section 74 of the New York Civil Rights Act, and because the Website and the Press Release contain statements that may be derogatory or disparaging, Portfolio has demonstrated a likelihood of success on the merits of its claims.

II. Irreparable harm

Defendant has also established the existence of irreparable harm. "The loss of the goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief." *Advent Software, Inc. v. SEI Glob. Services, Inc.*, 195 A.D.3d 498, 499 (1st Dept. 2021). Defendant has submitted an affidavit made on personal knowledge by

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[1] The CPLR recognizes the difference between breach of contract claims and breach of fiduciary duty claims, as breach of fiduciary duty claims must be pleaded with particularity under the higher standard set forth in CPLR 3016(b) rather than the simple standard set forth in CPLR 3013, which applies to breach of contract cases.

Jeremy Siegel, the CEO of defendant Portfolio, indicating that the company was contacted by multiple clients after the publication of the Website and Press Release to voice their "serious concerns" over the published material and allegedly indicating they were reconsidering their business relationship with Portfolio. NYSCEF Doc. No. 42. Plaintiff's opposition to the motion was silent as to this issue. Defendants have sufficiently established the existence of immediate, irreparable injury in the event no preliminary injunction is granted.

III. Balance of the equities

The balance of the equities also tips in defendant's favor. Plaintiff will not be prejudiced by the issuance of a preliminary injunction enjoining them from the publication of the Website and Press Release. On the other hand, should the injunction not be granted, defendant will be prejudiced because the publication of the Website and Press Release threatens to impact defendant's goodwill and customer relationships. Once again, plaintiff failed to address this prong in its opposition papers.

The Court therefore grants defendant's motion for a preliminary injunction. Defendant is directed to maintain the $10,000.00 bond posted on September 11, 2023. The November 1, 2023 oral argument is cancelled. A follow-up status conference is scheduled for December 7, 2023, using the same dial-in number previously provided. The parties are encouraged to consensually resolve this case.

Accordingly, it is hereby

ORDERED that plaintiff Evaate LLC is preliminarily enjoined from: (a) maintaining, operating, hosting, publishing, or otherwise displaying the Website, https://www.portfoliobi-litigation.com; (b) from maintaining, operating, hosting, publishing, or otherwise displaying the Press Release issued on August 22, 2023, https://www.prnewswire.com/news-releases/founders-

and-investors-of-fintech-startup-hentsu-file-litigation-against-portfolio-bi-for-breach-of-acquisition-agreement-301907001.html; and (c) making or publishing any disparaging statement in any medium whatsoever against Defendant; and it is further

ORDERED that defendant Portfolio Bi, Inc. maintain the $10,000.00 bond posted on September 11, 2023.

Dated: October 19, 2023

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	CASE DISPOSED		X NON-FINAL DISPOSITION	
	X GRANTED	DENIED	GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE