

Paramount Mgt. Group, LLC v Tareb

2024 NY Slip Op 32517(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 653218/2021

Judge: Emily Morales-Minerva

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

-----X

PARAMOUNT MANAGEMENT GROUP, LLC,

Plaintiff,

- v -

FARWAZ TAREB, WAFAZ CORP.,

Defendant.

-----X

INDEX NO. 653218/2021

MOTION DATE 12/05/2023

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308

were read on this motion to/for

JUDGMENT - SUMMARY

APPEARANCES:

McCormick & O'Brien LLP, New York, New York (Harry J. Delagrammatikas, Esq., of counsel) for plaintiff.

Sipsas, PC, Astoria, New York (Ioannis P. Sipsas, Esq., of counsel) for defendants.

HON. EMILY MORALES-MINERVA:

I. INTRODUCTION

The plaintiff, PARAMOUNT MANAGEMENT CORP, LLC ("Plaintiff"), commenced this action against the defendants, FAWAZ TAREB ("Tareb") and WAFAZ CORP. ("Wafaz", together with Tareb, "Defendants"), to recover monies for, *inter alia*, an alleged breach of contract arising out of an Asset Purchase Agreement entered into between the parties on March 14, 2018 (the "APA"). Plaintiff's complaint, filed on May 17, 2021 (the "Complaint"), includes six (6) causes of action for breach of contract, breach of implied covenant of good faith and

fair dealing, unjust enrichment, tortious interference with a business relationship, common law fraud, and fraud in the inducement seeking compensatory and punitive damages, and attorney's fees. In Defendants' answer filed on July 22, 2021 (the "Answer"), Defendants interposed sixteen (16) affirmative defenses to the allegations in the complaint.

Discovery commenced in July of 2021, and continued through October of 2023. The parties filed numerous interim discovery motions, all of which were previously decided by the Honorable Nancy M. Bannon (J.S.C.) on September 28, 2023, respectively. The filing deadline for the Note of Issue was extended multiple times by the Court (N. Bannon, J.S.C.), with it ultimately being filed by the parties on October 6, 2023.

Thereafter, on December 5, 2023, Defendants filed the instant motion (seq. no. 009) seeking summary judgment pursuant to Civil Practice Law and Rules ("CPLR") § 3212; or, in the alternative, dismissal of Plaintiff's complaint in its entirety pursuant to CPLR § 3211 (a) (7); and for sanctions. Plaintiff filed an opposition to the motion on January 17, 2024 (the "Opposition"). Upon review and for the reasons set forth below, this Court grants Defendants' motion to dismiss, in part; denies the motion seeking summary judgment; and denies the request for sanctions.

II. BACKGROUND

Plaintiff is a Pennsylvania limited liability company, with offices in Lancaster, Pennsylvania, and Defendant WAFAZ is a New York corporation, of which Defendant TAREB is the President and Principal Owner. Plaintiff and Defendants are providers of automated teller machine ("ATM") products and services.

On March 13, 2018, Plaintiff and Defendants entered into the Asset Purchase Agreement ("APA") in which Defendants sold their exclusive interest in the ATM placement and servicing contracts associated with approximately forty-one (41) merchants and merchant locations throughout New York City, which are annexed to the APA in Schedule 1.01(a) (see NY St Elec Filing [NYSCEF] Doc. No. 268, APA). Pursuant to the APA, the Defendants agreed to sell their right to process ATM transactions at the merchant locations, which consisted mostly of small delis and grocery stores. This included Defendants right to process ATM transactions from "the ATM machines listed on Schedule 1.01(a)" and "all location agreements, branding agreements, management contracts, revenue sharing and other agreements associated with the Acquired ATMs, and certain contract rights regarding locations for additional ATMs as listed on Schedule 1.01(b)" (NYSCEF Doc. No. 268, APA at ¶ 1.01).

In addition, the APA contained restrictive covenants, which prohibited Defendants, for a period of five (5) years, from having any direct or indirect interest - financial or otherwise - in any

other person connected with the operation of a competing ATM business. Further, the restrictive covenants prohibited Defendants solicitation of Plaintiff's customers for the direct or indirect benefit of a competing ATM business (see NYSCEF Doc. No. 268, APA at ¶ 5.06).

Plaintiff's complaint alleges that Defendants violated the restrictive covenants of the APA by "directly or indirectly soliciting, enticing, encouraging, or influencing . . . Plaintiff's customers for the direct or indirect benefit of a competing [ATM] business" (NYSCEF Doc. No. 002, Complaint at ¶ 20). According to Plaintiff, Defendants solicited Plaintiff's customers on behalf of a competing ATM business, and received a substantial economic benefit from doing so.

On December 5, 2023, Defendants filed the subject motion (seq. no. 009) seeking summary judgment, or, in the alternative, dismissal of Plaintiff's complaint. Therein, among other things, Defendants contend entitlement to summary judgment, arguing there are no triable issues of material fact that Defendants breached the APA. Defendants contend that Plaintiff has not set forth any evidence throughout their discovery that would evince Defendants' breach of the restrictive covenants of the APA, i.e., that Defendants solicited the third-party stores to switch out Plaintiff's ATMs with an ATM of a competing business. Instead, Defendants argue that Plaintiff's grievances lie with the third-party grocery stores and delis.

Given that all of Plaintiff's causes of action are grounded in assertions of the same conduct of Defendants, Defendants argue that the court should grant its motion for summary judgment. In the alternative, Defendants argue that Plaintiff's complaint must be dismissed in its entirety, as Plaintiff failed to state a viable cause of action for breach of contract, and that the remaining causes of action are duplicative of their breach of contract claim.

Defendants also request sanctions in the form of attorney's fees. Defendants argue, among other things, that Plaintiff's counsel engaged in frivolous, sanctionable conduct by serving meritless subpoenas on non-parties, which predictably led to unnecessary motion practice.

In opposition, Plaintiff points to the non-party discovery - namely the subpoenaed ATM Access and Switch Commerce records - to demonstrate that Defendants breached the APA by violating the restrictive covenants found therein. Notably, Plaintiff argues that the records show that Defendants continued to receive revenue related to the APA merchants and merchant locations listed on Schedules 1.01(a) and (b) after entering into the APA; that Defendant TAREB solicited Plaintiff's customers on behalf of a third-party ATM company owned by Defendant TAREB's brother; and that the third-party ATM company's revenue was re-directed to Defendant TAREB via payments made to his wife's company, "El Tareb Enterprise" [see NYSCEF Doc. No. 289, Plaintiff's Opposition at p. 7-8, 10].

Plaintiff argues that these material issues of fact preclude summary judgment, and Defendants' motion must be denied. With respect to the Defendants' alternative argument requesting dismissal of the Complaint in its entirety, Plaintiff contends that it has sufficiently pled each cause of action in the Complaint so as to survive a motion to dismiss.

With respect to the request for sanctions, Plaintiff counters that their issuance of the non-party subpoenas pertained to information they deemed to be relevant to their causes of action, and were not lacking in legal merit.

This Court heard oral arguments on March 21, 2024 in Part 42, 111 Centre Street, Room 572, New York, New York 10013, at which counsel for both parties argued extensively in support of their respective positions. Upon review of the motion, opposition, exhibits, and oral arguments, this court grants dismissal as to the third and sixth causes of action of the Complaint; denies the motion seeking summary judgment; and denies the request for sanctions.

III. DISCUSSION

A. DISMISSAL

"On a CPLR § 3211 (a) (7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (Alden Glob. Value Recovery Master Fund, L.P. v KeyBank Nat'l Ass'n, 159 AD3d 618, 621 [1st Dept 2018]; 219 Broadway

Corp. v Alexander's, Inc., 46 NY2d 506 [1979]). Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (see Leon v Martinez, 84 NY2d 83, 87 [1994]). "Whatever an ultimate trial may disclose as to the truth of the allegations, on such a motion, a court is to take them as true and resolve all inferences which reasonably flow therefrom in favor of the pleader" (Sander v Winship, 57 NY2d 391, 394 [1982]).

I. BREACH OF CONTRACT AND BREACH OF THE
IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Recovery under breach of contract requires a plaintiff to demonstrate (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages (see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445, 446 [1st Dept 2016]; Harris v Seward Park Housing Corp., 79 AD3d 425 [1st Dept 2010]; Flomenbaum v New York Univ., 71 AD3d 80 [1st Dept 2009]). "Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under the agreement" (Jaffe v Paramount Comm. Inc., 222 AD2d 17, 22-3 [1st Dept 1996], citing Rowe v Great Atlantic & Pacific Tea Co., 46 NY2d 62 [1978]).

Plaintiff's Complaint sufficiently alleges causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. Here, the Complaint states that the parties entered into an APA; that Defendants breached the APA by enticing Plaintiff's customers to switch to a competing business; and Plaintiff has been damaged as a result the breach. These allegations give Defendants sufficient notice of the transactions intended to be proven at trial, as well as the claims asserted (see Second Source Funding, LLC, 144 AD3d at 446). Therefore, the motion to dismiss the breach of contract claim is denied.

The Complaint also alleges that Defendants solicited Plaintiff's customers on behalf of a competing ATM business; that by doing so, Defendants acted in a manner which frustrated the purpose of the APA; and, as result of such, Defendants received fees which rightfully belonged to Plaintiff. These allegations state a cause of action for breach of the implied covenant of good faith and fair dealing (see Pleiades Publishing, Inc v Springer Science Business Media LLC, 117 AD3d 636, 637 [1st Dept 2014] [motion to dismiss cause of action for breach of the implied covenant of good faith and fair dealing denied, as defendants did not have the right to frustrate plaintiff's rights under the agreement, or benefit itself at plaintiff's expense]). As such, the motion to dismiss is denied as to this cause of action as well.

ii. UNJUST ENRICHMENT

"A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter" (Goldstein v CIBC World Markets Corp., 6 AD3d 295, 296 [1st Dept 2004]). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012]). Here, Plaintiff's unjust enrichment claim is indistinguishable from the breach of contract claim and must be dismissed (see Andrews v Cerberus Partners, 271 AD2d 348 [1st Dept 2000]). Accordingly, the motion to dismiss the unjust enrichment cause of action is granted.

iii. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

"The elements of a tortious interference with a contract claim are well established - the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages" (Hoag v Chancellor, Inc., 246 AD2d 224, 228 [1st Dept 1998]). "[W]here 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" (Carvel Corp v Noonan, 3 NY3d 182, 190 [2004]).

In the Complaint, Plaintiff alleges that it had contracts with the APA merchants; that Defendant TAREB was aware of such, given

Defendant TAREB sold the aforementioned contracts to Plaintiff; Defendant TAREB intentionally interfered with the business relations of Plaintiff by inducing a breach of Plaintiff's contract and acting as an agent of a competing ATM business for pecuniary gain; and that Plaintiff suffered damages as a result. Construing this cause of action liberally and giving Plaintiff the benefit of every favorable inference, the court finds that the allegations are sufficiently pled to assert the elements of tortious interference with a contract, and the motion to dismiss this cause of action is denied.

iv. COMMON LAW FRAUD AND FRAUD IN THE INDUCEMENT

"The essential elements [of common law fraud] are representation of a material existing fact, falsity, scienter, deception and injury" (Browning Ave. Realty Corp v Rubin, 207 AD2d 263, 266 [1st Dept 1994]). "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (First Bank of Ams. v Motor Car Funding, 257 AD2d 287, 291 [1st Dept 1999], citing Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 [1988]).

While Defendants contend that the common law fraud cause of action is duplicative of the breach of contract claim, the court finds this argument unavailing. In its complaint, Plaintiff alleges that several APA merchants asserted that their signatures on the underlying merchant contracts were forgeries. Plaintiff relied on

Defendants' representations regarding the validity of the signatures when entering into the APA with Defendants. Because Plaintiff alleges that it entered into the contracts based upon its reliance on the validity of the signatures, and Defendants misrepresented the validity of such, Plaintiff has pled a separate claim for common law fraud. Though the circumstances are similar, the allegations are not duplicative, and the motion to dismiss the common law fraud cause of action is denied.

Though common law fraud and fraud in the inducement are substantially similar, "[t]o sufficiently allege fraud in the inducement, the cause of action must allege 'a representation of present fact, not of future intent' . . . collateral to, which was the inducement for the contract" (Sandra Greer Real Estate v Johansen Org, 182 AD2d 468, 469 [1st Dept 1992], citing Deerfield Comm. Corp. v Cheseborough-Ponds, Inc., 68 NY2d 954 [1986]). Here, Plaintiff simply recites the elements of fraud in the inducement in its Complaint - these conclusory recitations of the rules of law do not contain any factual details demonstrating any specific conduct of the Defendants. Therefore, the motion to dismiss the fraud in the inducement cause of action is granted, as this cause of action is insufficiently pled.

B. SUMMARY JUDGMENT

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of

law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact (see CPLR 3212 § (b); see also *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the movant produces such evidence, the non-moving party then has the burden "to establish the existence of [factual issues] which require a trial of the action" (*Nomura Asset Capital Corp.*, 26 NY3d at 49, citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez*, 68 NY2d at 324). The court must view the facts in the light most favorable to the non-movant, giving it the benefit of all reasonable inferences (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Importantly, "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." (*Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990], quoting *Nesbitt v Nimmich*, 34 AD2d 958, 959 [2nd Dept 1970]).

Following this Court's laborious review of the evidence submitted by Plaintiff - namely, the ATM Access and Switch Commerce records, which span over 1,500 pages - it is evident that there is a triable issue of material fact as to whether Defendants breached

the terms of the APA's restrictive covenants.¹ The evidence raises triable issues of fact as to (a) Defendant TAREB's role, if any, in the APA merchants' cessation of business with Plaintiff, and their subsequent commencement of business with ATM Access, an ATM business owned by Defendant TAREB's brother; and (b) whether the payments ATM Access made to "El Tareb Enterprise" from the revenue earned at any of the APA merchant locations benefitted Defendant TAREB financially.

Specifically, the evidence demonstrates that pursuant to the APA, Plaintiff acquired the exclusive rights to service ATMs at various merchant locations throughout New York City. Despite the APA and its restrictive covenants being in full force and effect, certain merchant locations that were listed on Schedule 1.01 (a) and (b) of the APA subsequently appeared on the vendor reports of ATM Access, a company owned by Defendant TAREB's brother (see NYSCEF Doc. No. 297, ATM Access records).² The ATM Access records further reveal that, during this time frame, ATM Access made payments to "El Tareb Enterprise" from revenue earned for servicing the ATMs at the same merchant locations which Plaintiff was entitled to service pursuant to the APA. The "Certificate of

¹ This Court would be remiss in failing to note that during oral argument, Plaintiff advised the Court that the documentary evidence submitted by Plaintiff, which is in PDF format, was not searchable and therefore, Plaintiff was unable to point to more than one specific example of Defendants' conduct. This Court, however, reviewed the documentary evidence, and discovered that it was, indeed, searchable, and conducted a search therein.

² Defendant TAREB is not disputing that ATM Access is owned by his brother.

Incorporation of El Tareb Enterprise, Inc." dated July 30, 2021 indicates that the mailing address of "El Tareb Enterprise" - 2187 Holland Avenue, Apartment 1D - is the residential address of Defendant TAREB and the incorporator, Amal El Tareb, is Defendant TAREB's wife³ (see NYSCEF Doc. No. 298, Cert. of Incorporation; see also NYSCEF Doc. No. 275, EBT of TAREB at pg. 19, ¶ 14-25).

Though Defendant TAREB has denied any involvement, this Court is unable to conclude, at this juncture, that Defendant TAREB did not play a role in any of the APA merchants' decisions to cease operations with Plaintiff in order to conduct business with his brother's ATM company, particularly in light of the payments made from his brother's ATM company to his wife's corporation. Thus, this Court can not grant Defendants' motion for summary judgment as to the remaining causes of action in the Complaint, as Plaintiff's submissions raise an issue of material fact that can only be resolved at trial.

C. SANCTIONS

Defendants seek sanctions in the form of attorney's fees stemming from motion sequences 006 and 008. "The Rules of the Chief Administrator of the Courts grant the court discretion to impose financial sanctions and/or costs on a party or the party's

³ Defendant TAREB is not disputing that Amal El Tareb is his wife. Defendant is, however, alleging that at some point, Ms. El Tareb transferred her stock ownership in El Tareb Enterprise and was no longer the owner of the company.

attorney for engaging in frivolous conduct" (Grozea v. Lagoutova, 67 AD3d 611, 611 [1st Dept. 2009], citing 22 NYCRR § 130-1.1[a],[c])). "Frivolous conduct" is described as conduct that is "completely without merit in law and cannot be supported by a reasonable argument . . . is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130-1.1[c][1-3]). "It is well established that a party's abuse of the judicial process is frivolous conduct supporting an award of costs or the imposition of sanctions" (Divito v Fiandach, 160 AD3d 1404, 1405 [4th Dept 2018])).

The request for the imposition of sanctions in the form of attorney's fees is denied. With respect to both motions, there is no evidence that the issuance of Plaintiff's non-party subpoenas constituted an abuse of the judicial process or otherwise frivolous conduct (see YRN LLC v Migos LLC, 193 AD3d 607 [1st Dept 2021] [Defendants' conduct during discovery did not rise to level of frivolous conduct warranting sanctions]). Further, Defendants are not entitled to recover attorney fees and costs simply for their successful motion to quash (see Carson v Hutch Metro Center, LLC, 110 AD3d 468 [1st Dept 2013]). Therefore, the request for sanctions is denied.

Accordingly, it is hereby:

ORDERED that Defendants' motion (seq. no. 009) for summary judgment is denied in its entirety; and

ORDERED that Defendants' motion (seq. no. 009), is granted, in part, to the extent that Defendants' motion to dismiss is granted as to the third and sixth causes of action for unjust enrichment and fraud in the inducement, and the motion is otherwise denied in its entirety.

This constitutes the decision and order of the court. Notify parties.

7/12/2024
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, 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: