

Hello Beautiful Salon, Inc. v Dimoplou

2024 NY Slip Op 33138(U)

September 4, 2024

Supreme Court, Kings County

Docket Number: Index No. 516031/2023

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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HELLO BEAUTIFUL SALON, INC.,

Plaintiff,

Decision and order

- against -

Index No. 516031/2023

KRISTINA DIMOPLON, JUSTIN GOSLIN,
and LIVE BY THE SWORD,

Defendants,

September 4, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order of the court dated May 14, 2024 which dismissed all the causes of action against defendant Live By the Sword. The defendant has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision Hello Beautiful is a hair salon that employed the defendants Kristin Dimoplon and Justin Goslin. The complaint alleges the two defendants left the plaintiff's employment and opened their own hair salon and utilized the plaintiff's Clover point of sale account and the plaintiff's customer list and other private information. The plaintiff instituted this action and alleged causes of action for fraud, trespass to chattels, tortious interference with business relations, violations of General Business Law §349 and the breach of the employment contract. The court granted defendant's motion seeking to dismiss the causes of action and now this motion

seeking reargument has been filed. As noted the motion is opposed.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS3d 617 [2d Dept., 2019]).

The plaintiff argues the court overlooked allegations in the complaint that adequately establish a cause of action for fraudulent concealment. Specifically, the plaintiff points to paragraph 14 of the complaint which alleges that the defendants "(i) opened a second point-of-sale system associated with Plaintiff's Clover Account; and (ii) utilized, without authorization, Plaintiff's Clover Account to usurp Hello Beautiful Salon's clients and services" (see, Complaint, ¶14 [NYSCEF Doc. No. 8]).

Essentially, that paragraph alleges the defendants stole the plaintiff's electronic information to then steal customers. While if true that conduct is surely improper it does not constitute fraudulent concealment. First, if such conduct could consist of fraudulent concealment then every theft of any kind would also be fraudulent concealment. There is no support for such a wide-reaching theory of fraudulent concealment. More

importantly, fraudulent concealment is based upon and is an extension of fraudulent misrepresentation (see, P.T. Bank Central Asia v. ABN AMRO Bank N.V., 301 AD3d 373, 754 NYS2d 245 [1st Dept., 2003]). Thus, where fraud is alleged, which consists of a material misrepresentation, there need not be an actual misrepresentation, rather, the concealment of such information may suffice. That does not mean any time an employee or any individual steals money or business or private information of another that fraudulent concealment has occurred. As noted in the prior opinion, the complaint does not allege any misrepresentations made by any of the defendants. The tort of fraudulent concealment only exists within the context of fraud. Since no fraud has been properly alleged there can be no fraudulent concealment either.

Furthermore, 'access device fraud' is a federal crime (see, 18 U.S.C. §1029(a)(5)) not a civil tort and has no application to this case. Therefore, the motion seeking to reargue the reinstatement of any fraud claims is denied.

Next, the plaintiff argues the court erred dismissing the claim asserting trespass to chattels because diverting the plaintiff's electronic information can constitute such trespass. While other jurisdictions may endorse such an understanding (see, AMF Bowling Centers Inc., v. Tanase, 2023 WL 9503452 [Eastern District of Virginia 2023]), New York courts have rejected the

tort in these circumstances as recorded in the prior order. Thus, in order to allege this tort there must be "allegations of actual injury either in the form of 'harm to the condition, quality or material value' of the computer" (Elektra Entertainment Group Inc., v. Santangelo, 2008 WL 4452393 [S.D.N.Y. 2008]). Likewise, "a plaintiff alleging trespass to chattels based on unauthorized access to a computer system must allege damage or disruption to that computer system" (see, Casillas v. Berkshire Hathaway Homestate Insurance Company, 79 Cal.App5th 755, 294 Cal.Rptr3d 841 [Court of Appeal, Second District, Division 4 California 2022]). The plaintiff does not allege any damage to the system as a result of the defendant's use. The plaintiff argues that the trespass "diminished the quality and value of Plaintiff's account as a result of Defendants intentional clandestine intrusion into Plaintiff's account to forward booking requests sent by clients to Plaintiff in order to deprive Plaintiff of the use of its account for booking services" (Memorandum in Support, page 12 [NYSCEF Doc. No. 45]). However, even if that is true there is no allegation there has been any damage to the system itself. Therefore, the motion seeking to reargue the reinstatement of the trespass to chattels cause of action is denied.


The plaintiff's remaining arguments seeking to reinstate the remaining causes of action do not really point to any error committed by the court but rather merely seek to reargue the same

issues again. That is an improper basis upon which to seek reargument. While the allegations surely allege improper conduct by the defendants, the allegations in the complaint must sufficiently assert valid causes of action. The court granted the motion to dismiss without prejudice to enable the plaintiff to assert such valid claims. This reargument motion fails in that endeavor. Therefore, based on the foregoing, the motion seeking reargument is denied in all respects.

So ordered.

ENTER:

DATED: September 4, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC