

**Bamboo Ide8 Ins. Servs., LLC v
Everett Cash Mut. Ins. Co.**

2024 NY Slip Op 33731(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 650491/2023

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BAMBOO IDE8 INSURANCE SERVICES, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,	INDEX NO. <u>650491/2023</u>
Plaintiff,	MOTION DATE <u>--</u>
- v -	MOTION SEQ. NO. <u>003</u>
EVERETT CASH MUTUAL INSURANCE COMPANY, A PENNSYLVANIA CORPORATION,	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33
were read on this motion to/for DISMISS.

In motion sequence 003, defendant Everett Cash Mutual Insurance Company, a Pennsylvania Corporation, moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).¹

Background

Unless indicated otherwise, the following facts are taken from the complaint and, for the purposes of this motion, are accepted as true.

In 2022, plaintiff Bamboo Ide8 Insurance Services, LLC, an Arizona Limited Liability Company, “developed a plan to purchase certain valuable farm insurance policy

¹ Citation to the complaint, which was filed on NYSCEF, is sufficient to satisfy the requirement that relevant pleading be attached to the motion. (See Rules of Commercial Div of Sup Ct [22 NYCRR 202.70 (g)] rule 16 [a].) Plaintiff’s argument that the motion should be denied due to the failure to attach the complaint is rejected. (See generally *Terranova v Baselice*, 222 AD3d 901, 903 [2d Dept 2023] [“Pursuant to CPLR 2214 (c), a party in an e-filed action may rely on e-filed papers and need not include those papers in its motion papers, but may make reference to them, giving the docket numbers on the e-filing system” (internal quotation marks and citation omitted)].)

renewal and replacement rights ... from various subsidiaries of Global Indemnity Group, LLC ('GBLI'), including American Reliable Insurance Company, Diamond State Insurance Company, and United National Insurance Company" (collectively, Global). (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶ 1.) In May 2022, plaintiff approached defendant "as a potential partner in its planned acquisition" of the renewal rights. (*Id.* ¶ 2.) Defendant committed to provide plaintiff with (i) \$10 million in financing, which amount was subsequently reduced to \$7 million and (ii) an additional \$5 million "in exchange for the exclusive right to reinsure policies under the Renewal Rights." (*Id.* ¶ 19.) Plaintiff and Global "worked toward the consummation of the planned transfer" and defendant "was included as a collaborative partner in the parties' discussions." (*Id.* ¶ 3.) The signing of the operative transaction documents was planned for Friday, August 5, 2022. (*Id.* ¶ 4.) Defendant's financing commitment continued until August 5, 2022. (*Id.* ¶ 8.) On August 5, 2022, however, defendant repudiated its financing commitment with no explanation. (*Id.* ¶ 5.) On Monday, August 8, 2022, defendant "publicly announced that it had agreed with [Global] to directly acquire the Renewal Rights." (*Id.* ¶ 6.) Plaintiff alleges that defendant wrongfully and intentionally interfered with its prospective transaction with Global.

Additionally, plaintiff

"conducted extensive due diligence of the Renewal Rights, designed a communication plan and process for the anticipated transfer of Renewal Rights, prepared extensive transactional documentation to effectuate the transfer of the Renewal Rights, and provided significant assistance with respect to transferring and repurposing technology and improving the Renewal Rights business going forward"

and shared its work product with defendant. (*Id.* ¶ 22.) Plaintiff alleges that defendant relied on the work product in deciding whether to negotiate directly with Global to independently purchase the renewal rights. (*Id.* ¶ 23.)

Plaintiff alleges claims for (i) tortious interference with prospective contractual relations, (ii) unfair competition – misappropriation of products of labors and expenditures, (iii) unjust enrichment, and (iv) promissory estoppel. (*id.* ¶¶24-51.)

Discussion

On a CPLR 3211 (a) (1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

On a CPLR 3211 (a) (7) motion to dismiss, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Availability of Claims

Plaintiff does not allege any contract claims. Defendant argues that because the parties' relationship is governed by a contract, a term sheet,² plaintiff cannot proceed with its tort or quasi-contract claims.³

"[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated and where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory." (*IKB Intl., S.A.*, 40 NY3d at 290 [internal quotation marks and citation omitted]; see also *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 550-52 [1992] [discussing availability of tort and contract claims].) "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012] [citations omitted], *rearg denied* 19 NY3d 937 [2012].) A claim for "promissory estoppel ... cannot stand when there is a contract between the

² As insufficient briefing is proffered, the court will not determine whether the term sheet is an enforceable contract. Plaintiff does not allege a binding contract and the mere submission of the term sheet, with nonbinding and binding provisions, does not conclusively establish there was a binding contract between the parties. In any event, even if it was an enforceable contract, the term sheet does not conclusively establish a defense to plaintiff's claims, as discussed *infra*.

³ Defendant invokes the economic loss rule, which is inapplicable. As the Court of Appeals explained, "courts appear to conflate our economic loss rule with the prohibition against duplicative contract and tort claims. However, this Court's economic loss rule ... stands for the proposition that an end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer, and does not have application beyond the products liability context." (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 290 [2023] [internal quotation marks and citation omitted].)

parties.” (*Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012].)⁴

Defendant submits the June 3, 2022 term sheet as documentary evidence, in support of its motion, which

“summarizes certain terms and conditions for a potential transaction concerning ... the sale by [Global] ... of renewal rights in the book of business for Project Ponderosa ... to [plaintiff] and supported by [defendant]. This Term Sheet is provided for evaluation and discussion purposes only Except with respect to paragraphs 8, 9, 10, 11,12 and 13 hereof, and this paragraph 1, this Term Sheet is non-binding and nothing herein shall give rise to any obligation on the part of [Global], [defendant], [and plaintiff] ... with respect to the negotiation, execution or consummation of any definitive transaction (including the transactions described herein), or otherwise.” (NYSCEF 24, Term Sheet ¶ 1.)

However, the terms sheet does not conclusively establish that it covers the entirety of parties’ relationship. One of its binding provisions states that the term sheet “will automatically terminate and be of no further force and effect upon the earlier of (a) execution of the Definitive Agreement by Buyers and Seller, (b) mutual agreement of Buyers and Seller, or (b) July 1, 2022.” (*Id.* ¶ 11.) The parties concede that the term sheet terminated on July 1, 2022. (NYSCEF 22, Moving MOL at 8/28; NYSCEF 31, Opp MOL at 12/25.) Although the precise timing of the complained of conduct is not pleaded, the allegations that defendant repudiated its continuing financing commitment on August 5, 2022, and instead announced a direct deal with Global on August 8, 2022, raise an inference that the wrongful conduct continued or arose after the term sheet’s

⁴ In certain circumstances, however, tort and quasi-contract claims are available alongside contract claims. (See *Sommer*, 79 NY2d at 550-52 [discussing availability of tort and contract claims]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [1st Dept 2008] [affirming dismissal of the promissory estoppel claim as duplicative of breach of contract claim, but stating it was duplicative “[i]n the absence of a duty independent of the agreement” (citation omitted)].)

termination. (NYSCEF 2, Complaint ¶¶ 5-6, 8-9, 19, 23.) Thus, plaintiff's claims are not "entirely based on alleged conduct that is proscribed by" the term sheet. (See *Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 418 [1st Dept 2020] [internal quotation marks and citation omitted] [affirming dismissal of tort claims and unjust enrichment claim as duplicative of contract claim because the dismissed claims were "entirely based on alleged conduct that is proscribed by' contract" (internal quotation marks and citation omitted)].)

To the extent defendant argues that plaintiff has alleged existence of a contract in the complaint, this argument is contradicted by defendant's own admission. Indeed, defendant states that "[i]f this case survives this motion to dismiss ... Defendant will introduce written evidence demonstrating ... that ... there was never a meeting of the minds between and among Plaintiff and Defendant as to the proposed transaction." (NYSCEF 22, Moving MOL at 9/28 n 1.) The court notes there is no mention of the term sheet in the complaint and as previously stated, insufficient briefing is proffered regarding whether the term sheet is an enforceable contract.

Tortious Interference with Prospective Contractual Relations

"The required elements of a cause of action for tortious interference with prospective business relations are as follows: [1] business relations with a third party; [2] the defendant's interference with those business relations; [3] the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and [4] injury to the business relationship." (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY County 2007] [citations omitted], *mod* 44 AD3d 317 [1st Dept 2007].)

[1] Business Relations with Third Party; [4] Injury to Business Relationship

Plaintiff alleges that it worked with Global towards consummation of the contemplated purchase of the renewal of rights, which never took place because

defendant withdrew its financing commitment on the signing date and instead pursued a counter-proposal and agreed with Global to purchase the renewal rights directly.

(NYSCEF 2, Complaint ¶¶ 16-17, 27.) These allegations are sufficient to plead the first and fourth elements, i.e. plaintiff's business relations with Global and injury to such relations.

[2] Interference; [3] Wrongful Means

“[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.” (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004] [citations omitted].)

“[W]here a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not 'lawful' but 'more culpable.’” (*Id.* at 190.) Plaintiff must make “a showing that the interference was accomplished by wrongful means or with malicious intent.” (*Arnon Ltd (IOM) v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015] [internal quotation marks and citations omitted].) “'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” (*Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980].)

Plaintiff alleges no facts giving an inference of defendant's malicious intent.⁵ Further, although as alleged, defendant's withdrawal of its financing commitment on the

⁵ The opposition brief is silent on the issue of whether defendant's malicious intent is alleged.

signing day may indicate that defendant misrepresented to plaintiff its intention to finance the deal, such conduct was addressed at plaintiff. (See *Arnon Ltd (IOM)*, 125 AD3d at 454 [interference not alleged where “the interfering lawsuit was not directed at the defendants’ customers so as to induce or cause them to terminate business relations with defendants”].)

As far as the third party Global is concerned, no interference accomplished by wrongful means is alleged. Plaintiff alleges that defendant “intentionally refused to sign the operative transactional documents on August 5, 2022 in order to pull funding from [plaintiff], thus pressuring [Global] over the ensuing weekend to sell the Renewal Rights directly to [defendant] at a better price.” (NYSCEF 2, Complaint ¶ 7.) No facts are pleaded, however, to raise an inference of “extreme and unfair ‘economic pressure’ [towards Global] that might be ‘wrongful’.” (*Carvel Corp.*, 3 NY3d at 192; see *Advanced Global Tech. LLC v Sirius Satellite Radio Inc.*, 2008 NY Slip Op 32355[U], *15-16 [Sup Ct, NY County 2008] [discussing cases on extreme and unfair economic pressure].) Accordingly, the second and third elements are insufficiently alleged.

Plaintiff relies on *Brown v AXA Re*, 2004 WL 941959, 2004 US Dist LEXIS 7624 (SD NY, May 3, 2004, No. 02 Civ. 10138 [LTS][AJP]) and *Randolph Equities, LLC v Carbon Capital, Inc.*, 2007 WL 914234, 2007 US Dist LEXIS 21670 (SD NY, Mar. 26, 2007, No. 05 Civ. 10889 [PAC]). *Brown*, however, did not analyze specifically at whom the interfering conduct was directed and *Randolph Equities, LLC* relied on *Brown*. (See *Brown*, 2004 WL 941959, *7, 2004 US Dist LEXIS 7624, *21; *Randolph Equities, LLC*, 2007 WL 914234, *5, 2007 US Dist LEXIS 21670, *13.) Here, as discussed, plaintiff alleges no actionable interference directed at Global. New York courts consistently hold

that a claim for tortious interference with prospective business relations requires allegations of actionable interference directed at a third party. (See *Carvel Corp.*, 3 NY3d at 192 [“economic pressure that must be shown is not, as the franchisees assume, pressure on the franchisees, but on the franchisees’ customers”]; *Arnon Ltd (IOM)*, 125 AD3d at 454 [interference not alleged where “the interfering lawsuit was not directed at the defendants’ customers so as to induce or cause them to terminate business relations with defendants”]; *Rockwell Global Capital, LLC v Soreide Law Group, PLLC*, 100 AD3d 448, 449 [1st Dept 2012] [“defendants have not alleged that plaintiff’s conduct was directed at the clients with whom defendants have or sought to have a relationship” (citation omitted)]; *GS Plasticos Limitada v Bur. Veritas*, 88 AD3d 510, 510 [1st Dept 2011] [“This claim fails because it is not alleged that [defendant] made the misrepresentations to any of the unnamed third parties”], *lv denied* 17 NY3d 714 [2011], *rearg denied* 18 NY3d 877 [2012].)

Defendant’s alleged misappropriation of plaintiff’s work product, which forms the basis of the unfair competition claim, is conduct directed at plaintiff and thus cannot constitute interference. This claim is dismissed without prejudice.

Unfair Competition – Misappropriation of Products of Labors and Expenditures

“To properly assert this claim, which is a subset of New York’s unfair competition law, a plaintiff must allege that a defendant misappropriated plaintiff’s labor, skills, expenditures or good will, and displayed some element of bad faith in doing so In this context, bad faith can be established by a showing of fraud, deception, or an abuse of a fiduciary or confidential relationship.” (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015] [citations omitted].)

Defendant first argues that the complaint is insufficiently specific in describing what was misappropriated. This argument fails. Plaintiff alleges that it

“conducted extensive due diligence of the Renewal Rights, designed a communication plan and process for the anticipated transfer of Renewal Rights, prepared extensive transactional documentation to effectuate the transfer of the Renewal Rights, and provided significant assistance with respect to transferring and repurposing technology and improving the Renewal Rights business going forward. Such extensive work was shared with” defendant. (NYSCEF 2, Complaint ¶ 22.)

These allegations are sufficient to put defendant on notice of what was allegedly misappropriated. (See CPLR 3013.)

Defendant next argues that there are no allegations to suggest that the misappropriated work product was novel. This argument fails too because plaintiff does not allege misappropriation of ideas. (See *Schroeder v Pinterest Inc.*, 133 AD3d at 30 [misappropriation of ideas claim requires allegations of “an idea that is novel and concrete” (citations omitted)].) Instead, plaintiff alleges misappropriation of work product. (See *id.* [stating elements of misappropriation of skills and expenditures claim]; *Sokol Holdings, Inc. v BMB Munai, Inc.*, 726 F Supp 2d 291, 303 [SD NY 2010] [“New York law permits recovery on a claim of unfair competition where a defendant has misappropriated the product of a plaintiff’s investment of labor, skill, and expenditures with respect to a business plan, system, or venture, even absent a showing of ‘novelty’” (citation omitted)], *affd* 438 Fed Appx 45 [2d Cir 2011]; *Linkco, Inc. v Fujitsu Ltd.*, 230 F Supp 2d 492, 501-502 [SD NY 2002] [stating that “doctrine of unfair competition has been applied in various situations, like this, where a plaintiff alleges misappropriation of information that does not rise to the level of misappropriation of trade secrets or ideas” and collecting cases].) Defendant’s reliance on *Schroeder v Cohen*, 169 AD3d 412, 412-13 (1st Dept 2019) is misplaced because that case involved misappropriation of trade secrets and ideas.

Further, plaintiff alleges that the work product was highly sensitive (NYSCEF 2, Complaint ¶¶ 21-22), thus raising an inference that it was not public. (See *Schroeder v Pinterest Inc.*, 133 AD3d at 31, n 11 [“Like the other misappropriation causes of action, this claim cannot be premised upon misappropriation of publicly-available information” (citation omitted)].) That the parties may have never executed a confidentiality agreement with respect to the work product is not dispositive.

Finally, at this stage plaintiff sufficiently pleads bad faith. Plaintiff alleges that plaintiff generated work product and shared it with defendant, who committed to finance the transaction, and who relied on the work product in deciding whether to negotiate directly with Global to independently purchase the renewal rights. (NYSCEF 2, Complaint ¶ 23.) Allegations of defendant’s withdrawal of its financing commitment on the signing date with no explanation (*id.* ¶ 5) raise an inference that defendant misrepresented to plaintiff its intention to finance the deal. Plaintiff additionally alleges that defendant acted in bad faith by waiting until the signing date to pull its financing commitment to receive competitive advantage in entering into a direct transaction with Global. (*id.* ¶ 35.) These allegations are sufficient to plead bad faith in misappropriation of the work product. *Town & Country Linen Corp. v Ingenious Designs LLC*, 556 F Supp 3d 222, 291 (SD NY 2021), *recons denied* 2021 WL 4892857, 2021 US Dist LEXIS 201747 (SD NY, Oct. 19, 2021, No. 18-cv-5075 (LJL), is distinguishable because plaintiff in that case failed to argue or identify facts “that would support a finding that Defendants obtained their information by fraud or by any ‘illicit means’ or ‘fraudulently inducing’ Plaintiffs to part with it.”

Unjust Enrichment

“[U]njust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” (*Corsello*, 18 NY3d at 790 [citations omitted].)

Here, the unjust enrichment claim is premised on defendant’s alleged use of the work product for its benefit (NYSCEF 2, Complaint ¶¶ 38-41) and thus merely duplicates the unfair competition claim. Additionally, plaintiff alleges identical damages in the two claims. (*Id.* ¶¶ 36, 42; *id.* at 9 ¶ 2.) The unjust enrichment claim is dismissed. (See *Fifth & Fifty-Fifth Residence Club Assn., Inc. v Vistana Signature Experiences, Inc.*, 217 AD3d 564, 566 [1st Dept 2023] [dismissing unjust enrichment claim as duplicative].)

Promissory Estoppel

“The elements of promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.” (*Odonata Ltd. v Baja 137 LLC*, 206 AD3d 567, 569 [1st Dept 2022] [citation omitted].)

Plaintiff alleges a sufficiently clear and unambiguous promise in that defendant “committed to loan” plaintiff \$10 million, which amount was subsequently reduced to \$7 million, and further “committed to contribute an additional” \$5 million towards plaintiff’s contemplated purchase of the renewal rights. (NYSCEF 2, Complaint ¶ 19.) Defendant proffers no argument regarding the remaining elements.

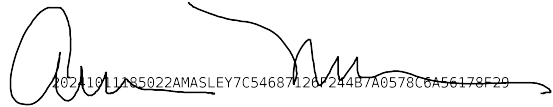
The court has considered the balance of the parties’ arguments and finds that they do not change the outcome.

Accordingly, it is

ORDERED that motion is granted, in part, to the extent that the causes of action for tortious interference with prospective contractual relations and the cause of action for unjust enrichment are dismissed, and otherwise denied; and it is further

ORDERED that defendant shall serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit a joint proposed Part 48 Preliminary Conference Order within 30 days after service of a copy of this order with notice of entry. If the parties cannot agree, they shall submit competing proposed PC Orders.



10/11/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE