

OTR Media Group, Inc. v Vizable Media Group, LLC

2024 NY Slip Op 34117(U)

November 19, 2024

Supreme Court, Kings County

Docket Number: Index No. 519809/2024

Judge: Leon Ruchelsman

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

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OTR MEDIA GROUP, INC. AND AFFILIATES,

Plaintiff,

Decision and order

- against -

Index No. 519809/2024

VIZIBLE MEDIA GROUP, LLC a/k/a VIZIBLE MEDIA,
LLC d/b/a VIZIBLE OUTDOOR, DAN BARNES a/k/a
DANIEL BARNES, and ZAC ZABNER, jointly and
severally,

Defendants,

November 19, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The plaintiff has moved seeking an injunction. The defendants have cross-moved pursuant to CPLR §3211 seeking to dismiss the complaint for the failure to allege any causes of action. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the verified complaint the plaintiff is a marketing company that specializes in physical billboard impressions through the country. The verified complaint alleges that the defendant Dan Barnes established a competing company, defendant Vizable Media Group on September 11, 2014 in violation of an employment agreement the plaintiff maintained with Barnes. Barnes resigned on June 12, 2017 and the plaintiff subsequently discovered that Barnes had opened a competing agency in violation of the employment agreement which prohibited Barnes from

competing while employed and for two years after the termination. This lawsuit was commenced on July 22, 2024. The verified complaint asserts causes of action for breach of contract, unfair competition, tortious interference, attorney's fees, the faithless servant doctrine, misappropriation of trade secrets, aiding and abetting such misappropriation, fraud, an accounting, unjust enrichment and an injunction. The parties have moved as noted.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

Pursuant to CPLR §231(2) the statute of limitations for a breach of contract claim is six years. Moreover, the statute of limitations begins to run when a cause of action accrues (CPLR §203(a)) which means "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (see, Aetna Life & Casualty Company v. Nelson, 67 NY2d 169, 501 NYS2d 313 [1986]).

There can really be no dispute the breach occurred on September 11, 2014 when Barnes opened a competing business while still employed. Although the lawsuit was filed more than six years from that date, the plaintiff asserts the action is timely because "where there is a series of independent, distinct wrongs—like here—the statute of limitations runs from the last breach and, in the case of breach of contract claims, reaches back six years from the date of the filing of the complaint" (see, Memorandum of Law in Opposition, ¶29 [NYSCEF Doc. No. 50]). That argument is based on the fact the defendant allegedly committed numerous wrongs that began in 2014 and continued through September 2022 which extended the statute of limitations. This continuing wrong doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (Henry v. Bank of America, 147 AD3d 599, 48

NYS3d 67 [2d Dept., 2017]). However, a distinction must be drawn between a single wrong that has continuing effects which does not extend the statute of limitations and a series of independent, distinct wrongs, which does extend the statute of limitations (see, Salomon v. Town of Wallkill, 174 AD3d 720, 107 NYS3d 420 [2d Dept., 2019]). The key determinant is whether a single breach occurred with accruing damages as the breach continues or whether each breach gives rise to a new cause of action (see, Kahn v. Kohlberg, Kravis, Roberts & Co., 970 F.2d 1030 [2d Cir. 1992]). Thus, in Doukas v. Ballard, 135 AD3d 896, 24 NYS3d 174 [2d Dept., 2016] the court rejected the continuing wrong theory. In that case, in 1994 or 1995 Doukas agreed to invest in technology development with Ballard and he provided capital in exchange for a fifty percent interest in the company. In 2009 he sued Ballard alleging Ballard breached the contract and diverted the ownership interests to Ballard's wholly owned companies (see, Doukas v. Ballard, 39 Misc3d 1227(A), 972 NYS2d 143 [Supreme Court Suffolk County 2013]). The plaintiff argued the continuing wrong doctrine applied because even at this date he was still being denied profits that were due. The court, citing earlier authority, held the lawsuit time barred. The court explained that "this case is not an example of continuing contractual breaches in which new and timely claims continue to arise. The

acts of which the plaintiffs complain are alleged to have occurred during a discrete period of time in the late 1990's and early 2000. It is irrelevant for purposes of the statute of limitations that the plaintiffs may continue to be damaged as a result of those acts" (id). The Appellate Division affirmed holding that "the breach of contract causes of action accrued, at the latest, in 2000, when a certain patent application submitted by Ballard was approved. Therefore, the breach of contract causes of action, asserted against the defendants in 2011, were time-barred" (supra). In Comm Trade USA, Inc., v. INTL FCStone, Inc., 2014 WL 787912 [S.D.N.Y. 2014] the court explained that the continuing wrong doctrine only applies where action can give rise to future damages which cannot be predicted at the time of the initial act. However, "by contrast, assuming that a breach of the contract occurred, damages were apparent and calculable once defendants refused to pay plaintiff for introductions that plaintiff claimed to have made. To the extent that plaintiff asserts simply an ongoing breach of the contract-with damages increasing as the breach continued-the continuing wrong theory does not apply" (id).

However, the theory does apply where the contract requires continuing performance over a period of time (Bulova Watch Company Inc., v. Celotex Corp., 46 NY2d 606, 415 NYS2d 817

[1979]). The continuing performance can take the form of payments due at certain intervals (CSEA Employee Benefit Fund v. Warwick Valley Central School District, 36 AD3d 582, 828 NYS2d 179 [2007]) or any other continuing duty (see, Beller v. William Penn Life Insurance Policy of New York, 8 AD3d 310, 778 NYS2d 82 [2d Dept., 2004]). For example, in Beller, (supra) the court applied the doctrine where a plaintiff sued alleging the defendant life insurance company breached the agreement by failing to conduct rate reviews every five years. The court explained that "the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates, and to review the cost of insurance rates at least once every five years to determine if a change should be made. Accordingly, the plaintiff's claim for damages accrued each time the defendant allegedly breached these obligations, and only claims for damages accruing more than six years before the commencement of this action are time-barred" (id). Clearly, in Beller, (supra) every five years a new breach occurred unrelated to any previous breach. Thus, the court properly applied the doctrine to extend the statute of limitations.

In this case, while the initial breach occurred when the defendant created a competing entity in 2014 the complaint

alleges the defendant committed further breaches, in addition to the first wrong and extending the statute of limitations thereby. Thus, an examination of those breaches must be examined.

The only conduct allegedly committed within six years of the filing of the lawsuit consists of corporate renewals concerning the corporate entity that was formed in 2014. The nature of such corporate renewals is not really explained, however, the complaint does not include any specific breach of the non-compete that occurred within six years of the filing of the complaint. While it is true that distinct conduct regarding a non-compete clause can fall under the continuing wrong doctrine (see, Vittoria v. Castelotti, 2019 WL 2211046 [Supreme Court Nassau County 2019]) some continuing wrong must be alleged. Merely extending the corporate status of the entity is not a new wrong, it is simply a continuation of an existing wrong and relates back to the formation in 2014. It is true the complaint alleges Barnes sent emails which may have violated the non-compete and which may be independent of the formation of the entity in 2014. However, all those emails were sent more than six years before the filing of the lawsuit. As noted, the only activity within the requisite period is the extension of the corporate status. That is insufficient to constitute a continuing wrong.

Therefore, the continuing wrong doctrine is inapplicable and

consequently the motion seeking to dismiss the breach of contract claim is granted.

Turning to the next causes of action, the claim of unfair competition consists where it is alleged the defendant engaged in bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (see, Beverage Marketing USA, Inc., v. South Beach Beverage Co., Inc., 20 AD3d 439, 799 NYS2d 242 [2d Dept., 2005]). Generally, customer information can be considered trade secrets if the plaintiff took measures requiring the defendant to guard the secrecy of the information (Starlight Limousine Service Inc., v. Cucinella, 275 AD2d 704, 713 NYS2d 195 [2d Dept., 2000]).

Even if the complaint adequately pleads such unfair competition the latest time such incidents occurred as mentioned in the complaint were January 2017. Thus, even if a six year statute applied (see, Katz v. Bach Realty Inc., 192 AD2d 307, 595 NYS2d 455 [1st Dept., 1993]), the claim is time barred. Therefore, the motion seeking to dismiss the second cause of action is granted.

The next cause of action alleges tortious interference with contracts. The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the

defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]).

This claim alleges that defendants Zabner and Vizible Media LLC induced Barnes to breach his employment contract with the plaintiff. However, the complaint never alleges that those defendants improperly interfered with Barnes' employment contract. Indeed, the complaint alleges that Zabner formed the entity and that Barnes was assigned the job of being its managing member (see, Verified Complaint, ¶78 [NYSCEF Doc. No. 1]). Indeed, in Paragraphs 110, 167 and 176 of the complaint Barnes is referred to as the co-founder of the entity. Thus, the complaint fails to allege any facts supporting the tortious interference of any contractual relationship between Barnes and the plaintiff. Therefore, the motion seeking to dismiss the third cause of action is granted.

The causes of action for tortious interference with prospective economic relations, breach of duty pursuant to the faithless servant doctrine, misappropriation of trade secrets and aiding such misappropriation, an accounting and unjust enrichment all carry a three year statute of limitations (Linkable Networks Inc., v. Mastercard Inc., 184 AD3d 418, 125 NYS3d 92 [1st Dept., 2020], Espire Ads LLC v. TAPP Influences Corp., 655 F.Supp2d 223 [S.D.N.Y. 2023], Continental Industries Group Inc., v. Ustuntas, 211 AD3d 601, 181 NYS3d 527 [1st Dept., 2022], Maya NY LLC v. Hagler, 106 AD3d 583, 965 NYS2d 475 [1st Dept., 2013], Ingrami v. Rovner, 45 AD3d 806, 847 NYS2d 132 [2d Dept., 2007]). The statutes begin when the plaintiff first sustains any damage. While no real damages are alleged in the complaint, in any event the causes of action are time barred. Therefore, the motion seeking to dismiss these causes of action is granted.

The cause of action for fraud is similarly time barred. Indeed, the complaint only mentions acts that occurred in 2017. First, those actions are not fraud since they are not misrepresentations of present facts that induced the plaintiff to take any action (MBIA Insurance Corporation v. Countrywide Home Loans Inc., 87 AD3d 287, 928 NYS2d 229 [1st Dept., 2011]). Furthermore, they are time barred (Beizer v. Hirsch, 116 AD3d 725, 983 NYS2d 615 [2d Dept., 2014]).

Lastly, considering the causes of action are all dismissed the causes of action seeking an injunction and attorney's fees are likewise dismissed.

Thus, the motion seeking to dismiss the complaint is granted. The motion seeking an injunction is now rendered moot.

So ordered.

ENTER:

DATED: November 19, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC