Daou v Huffington
2011 NY Slip Op 34001(U)
October 7, 2011
Sup Ct, New York County
Docket Number: 651997/10
Judge: Charles E. Ramos

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

PRESENT: Ramos **PART** 53
Justice

Index Number : 651997/2010
DAOU, PETER
vs
HUFFINGTON, ARIANNA
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/7/2011

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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PETER DAOU and JAMES BOYCE,

Index No. 651997/10

Plaintiff,

-against-

ARIANNA HUFFINGTON, KENNETH LERER, and THEHUFFINGTONPOST.COM, INC.,

Defendants.

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Charles Edward Ramos, J.S.C.:

Defendants Arianna Huffington, Kenneth Lerer, and TheHuffingtonPost.com, Inc. (Huffington Post) move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7).

Background[1]

This action arises out of the alleged creation of a joint venture to develop a liberal political blogging website which ultimately became known as the Huffington Post, a news, politics, and entertainment site on the Internet.

Plaintiffs Peter Daou and James Boyce met while working on Senator John Kerry's 2004 presidential campaign. According to a Washington Post article, Daou was the "man behind the Kerry-Edwards campaign's blogging operation." During this time, Daou also met defendant Lerer, and the two spoke regularly about Kerry's campaign strategy.

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[1] The facts set forth herein are taking from the parties' pleadings, and are assumed to be true for the purposes of disposition of this motion.

Shortly after the 2004 presidential campaign ended, Daou launched the liberal news and blog aggregator, "The Daou Report," which was soon integrated into Salon.com, a leading liberal website. Around this time, plaintiffs initiated discussions about forming a joint business venture and prepared a blueprint detailing their plans to develop a "new kind of Democratic news-reporting website and blogging 'ring' or collective."

This proposed website would be designed to promote and enhance Democratic causes and counter the influence of, among other media, the conservative website, "The Drudge Report." Moreover, plaintiffs envisioned combining "a collective of blogs by notable personalities, non-partisan news aggregation, issue-specific web pages, scoops and exclusives derived from the founders' personal relationships with Democratic Party and media insiders, and online community-building.

In mid-November 2004, Boyce presented the memorandum entitled "1460" to reflect the number of days between presidential elections (the 1460 Memo), to defendant Huffington, who purportedly agreed to be substantially involved in the project as a strategic partner and investor.

Boyce also met with Lerer and told him about plaintiffs' idea. On December 3, 2004, the parties met at Huffington's home. Daou made a presentation based upon the 1460 Memo and propounded a specific combination of elements including a "collective of

blogs by notable personalities, non-partisan news aggregation, issue specific web pages, scoops and exclusives derived from the founders' personal relationship with the Democratic Party and media insiders, and online community-building."[2]

The four again met at Huffington's home for breakfast the following day, where they purportedly "discussed and confirmed in detail [Daou and Boyce's] concrete ideas and plans" for the proposed website, further expanding on the 1460 Memo. At the conclusion of the meeting, everyone shook hands and Huffington added, "It will be great to work together." At the December 4, 2004 meeting and in subsequent emails and phone conversations, the parties agreed to a number of the essential terms for the launch and operation of the proposed website.

On or about December 17, 2004, defendants asked plaintiffs for a refined blueprint and strategic plan for the proposed website in order to begin its construction. Several days later, Daou outlined strategies and steps necessary to operationalize the website. As a result of these meetings and discussions, plaintiffs allege that they believed themselves to be partners

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[2] Defendants publicly and repeatedly identified the December 3, 2004 meeting as the genesis of the alleged conception, planning and creation of the Huffington Post. However, plaintiffs allege that a contemporaneous transcript from this meeting shows that, of all the attendees at this meeting, Daou vigorously advocated for the use of a network of blogs as a way of aggregating and driving news stories to enhance and focus Democratic messaging, drawing from the 1460 Memo.

with defendants in a joint venture to develop the proposed website.

Nonetheless, over subsequent weeks and months, defendants used plaintiffs' ideas, plans and materials to raise at least $2 million for the proposed website without informing or crediting plaintiffs, or giving them the opportunity to invest their own resources or raise their own financing.

In January 2005, defendants formally replaced plaintiffs with conservative activist Andrew Breitbart, and caused the development of the website to go forward, based entirely upon plaintiffs' ideas, business plan and strategic insight, only without their participation. The Huffington Post was launched on May 9, 2005, and purportedly implemented all of defendants' ideas and features agreed to at the December 4, 2004 meeting.

According to plaintiffs, they could not believe that defendants would so brazenly exclude them and take their ideas and plans. Additionally, they were very concerned that a public dispute with defendants would damage their clients and livelihood. As a result, plaintiffs continued to work to fulfill their responsibilities to the joint venture, and over the next several years contributed a large volume of content while promoting it to various venues. Privately, plaintiffs attempted to initiate a dialogue with defendants to resolve their concerns amicably, but were rebuffed.

In November 2010, plaintiffs commenced this action asserting causes of action for breach of contract, breach of fiduciary duty, idea misappropriation, fraud, and negligent misrepresentation. In the alternative, plaintiffs assert causes of action for breach of implied contract, unjust enrichment, and quantum meruit.

Discussion

Defendants move to dismiss the complaint on the grounds that all of plaintiffs' causes of action are deficiently alleged or are refuted by publicly available documents and sources which show that plaintiffs' idea is not novel, and that the 1460 Memo, alleged by plaintiffs to be the blueprint for their idea, is not the Huffington Post.

On a motion to dismiss aimed at the sufficiency of the pleadings, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448 [1st Dept 2011]). A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Id.*).

I. Breach of Contract

For an agreement to be a joint venture, a plaintiff must allege the following indicia: manifestation of intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 [1st Dept 2003]). The "ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their own benefit" (*Steinbeck v Gerosa*, 4 NY2d 302, 317, *appeal dismissed* 358 US 39 [1958]).

The alleged oral joint venture agreement presented here, confirmed by little more than a handshake, simply does not rise to the level of an agreement to join property, skills and risk, and is otherwise too indefinite to be enforceable.

For instance, plaintiffs fail to allege that there was an agreement to share in profits or losses. Plaintiffs are generally correct insofar as they argue that the absence of this

element is not necessarily fatal where the other elements of a joint venture are present (*see P.F.G. Indus., Inc. v Tel-Glass, Inc.*, 49 AD2d 112, 114 [1st Dept 1975]; *but see Steinbeck*, 4 NY2d 302).

However, other crucial elements of a joint venture are not alleged. Plaintiffs conclusorily allege that Leher agreed to provide funding and that Huffington agreed to use her name to the proposed website, but little more. Other than conversations and vague assurances that "each party had a stake in the outcome," there is no suggestion as to any discussion of pertinent and necessary details such as control over the enterprise, and distribution of equity.

Moreover, defendants are correct in asserting that the parties' actions since 2004 have been inconsistent with their alleged co-venturer relationship. They admittedly have not been involved in the management or financing of the Huffington Post and, prior to this lawsuit, have made not attempts to assert their purported ownership rights but rather, have contributed as unpaid bloggers.

Therefore, the cause of action for breach of an oral joint venture agreement is dismissed.

II. Breach of Fiduciary Duty and Negligent Misrepresentation

Plaintiffs allege that defendants owe them a fiduciary duty

premised entirely on their relationship as co-venturers. Plaintiffs' cause of action for negligent misrepresentation is similarly based upon the alleged creation of a joint venture, and defendants' false representations that they intended to work with plaintiffs to develop the website.

In order to maintain a cause of action for breach of fiduciary duty, plaintiffs must plead a fiduciary relationship. Similarly, a cause of action for negligent misrepresentation requires the existence of a fiduciary or other special relationship which imposes a duty on the defendant to impart correct information to the plaintiff, that the information imparted was incorrect, and reasonable reliance thereon (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

Plaintiffs conclusorily allege that the parties' status as joint venturers also rendered them fiduciaries. However, plaintiffs fail to sufficiently allege the creation of a joint venture. Plaintiffs also fail to allege that defendants were in a fiduciary or other special position of trust and confidence such that reliance on their representations was justified, or that would give rise to a duty to impart correct information (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]).

As a result, the causes of action for breach of fiduciary duty and negligent misrepresentation must be dismissed.

III. Idea Misappropriation

Plaintiffs' cause of action for idea misappropriation is premised upon allegations that their idea, set forth in the 1460 Memo, to create a website that sought to combine "a collective of blogs by notable personalities, non-partisan news aggregation, issue-specific web pages, scoops and exclusives derived from the founders' personal relationships with Democratic Party and media insiders, and online community-building," is novel and original. Additionally, they allege that defendants misappropriated their idea by using it and continuing to use it without their permission.

New York law recognizes the tort of misappropriation of ideas when a plaintiff's factual assertions establish that the misappropriated ideas were both novel and concrete (*Lois Pitts Gershon PON/GGK v Tri-Honda Adv. Assoc.*, 166 AD2d 357 [1st Dept 1990]; *Alexander v Murdoch*, 2011 WL 2802923, *8 [SD NY 2011]).

On the issue of novelty, the Second Circuit has observed that determining whether an idea is original or novel depends on the idea's specificity or generality, its uniqueness and commercial availability (*Nadel v Play-By-Play Toys & Novelties, Inc.*, 208 F3d 368, 378 [2d Cir 2000]). Novelty "requires a showing of true innovation, not merely that a particular idea has not been used before (*Brown v Johnson & Johnson Consumer Products, Inc.*, 1994 WL 361444, *3 [SD NY 1994], *affirmed* 60 F 3d

811 [2d Cir 1995]).

Determining novelty is generally a question of fact (*Apfel v Prudential-Bache Sec.*, 183 AD2d 439, 439 [1st Dept 1992], *affirmed as modified on other grounds* 81 NY2d 470 [1993]; *accord Kaplan v Michtom*, 17 FRD 228, 229 [SD NY 1955]). Thus, where a plaintiff sufficiently alleges that its ideas were novel and concrete, dismissal at the pleading stage is generally inappropriate (*Id.*; *see Stewart v World Wrestling Fed. Entertainment, Inc.*, 2005 WL 66890, *5 [SD NY 2005]; *but see Lapine v Seinfeld*, 31 Misc 3d 736 [Sup Ct, NY County 2011] [documentary evidence conclusively established lack of novelty as a matter of law]).

Plaintiffs allege presenting to defendants an innovative idea, misappropriation of that idea, and that at the time of the misappropriation, no website had yet combined the elements of a "collective of blogs by notable personalities, non-partisan news aggregation, issue-specific web pages, scoops and exclusives derived from the founders' personal relationships with the Democratic Party and media insiders, and online community building" (Complaint, ¶¶ 25-26, 70).

The Court concludes that plaintiffs have adequately pled the misappropriation of an idea which is sufficiently novel and concrete to survive a motion to dismiss the pleadings. Determining whether the idea is actually novel is a fact-specific

inquiry that cannot be resolved at the pleading stage.

Plaintiffs also allege that Huffington herself publicly acknowledged that their idea was entirely novel. In a March 2010 article in *Wired* magazine, Huffington stated, in reference to the specific combination of elements that went into the Huffington Post, "Now it's, like, so obvious. But at the time, it had never been done" (*Id.*). In November 2006, Huffington told *Playboy* magazine, "Part of [Huffington Post's success], as I look back, was timing. There's a tremendous advantage in being the first with something ... We were the first hybrid of news and group blog" (*Id.*).

The allegation that a defendant acknowledges the novelty and originality of the ideas presented and misappropriated has been held to be sufficient for the purpose of assessing the adequacy of pleading a cause of action for idea misappropriation (*see e.g. Stewart*, 2005 WL 66890 at *4 n 6).

Defendants argue in opposition that the idea described in the complaint merely combines existing elements and thus, is not truly novel. However, even an idea that combines existing elements may be considered novel where the idea itself is not in the public domain (*Victor G. Reiling Assocs. v Fisher Price*, 450 F Supp 2d 175, 180 [D Conn 2006] [applying New York law]).

Moreover, the majority of the authority upon which defendants rely are decisions rendered on motions for summary

judgment, where the courts were searching the record for the existence of a genuine issue as to the novelty and originality of the misappropriated ideas (*see e.g. American Business Training Inc. v American Mgt. Assoc.*, 50 AD3d 219 [1st Dept], *lv denied* 10 NY3d 713 [2008] [summary judgment properly granted where plaintiff failed to raise a triable issue establishing novelty and originality]).

Numerous other decisions assessing causes of action for idea misappropriation were similarly decided at the summary judgment stage (*e.g. Delaney v Weston*, 66 AD3d 519 [1st Dept 2009], *lv dismissed* 14 NY3d 763 [2010]; *Lois Pitts Gershon PON/GGK v Tri-Honda Adv. Assoc.*, 166 AD2d 357 [1st Dept 1990] [denying summary judgment on the ground that novelty is a question to be decided by the trier of fact]; *Brown*, 1994 WL 361444 at *3-4).

One of the few cases defendants cite to where the court dismissed a cause of action for idea misappropriation at the pleading stage (*Lapine*, 31 Misc 3d 736), while not binding on this Court, is nonetheless distinguishable. In *Lapine*, the court considered the novelty of the idea to get children to eat healthier foods by camouflaging them in such a manner that the children will eat them without realizing or objecting (*Id.*). The court noted "significant documentary evidence," including books published as early as 1971, extolling the virtues of "sneaky cookery," in addition to more recent publications that suggested

adding pureed or mashed vegetables to children's favorite dishes in order to get them to eat nutritious ingredients. In total, this documentary evidence, which amounted to "numerous publications" conclusively demonstrated that plaintiff's idea was not novel as a matter of law (*Id.*).

Here, in contrast, the documentary evidence defendants submit, including recent printouts of the homepages of several news and opinion websites, do not conclusively establish the lack of novelty of plaintiffs' specific idea but rather, raise questions that must be resolved by the fact-finder.

Similarly, the contention that the idea described as originating with plaintiffs is "not the Huffington Post," as shown by current print-outs from the Huffington Post website, simply raises more questions. These submissions do not conclusively negate plaintiffs' cause of action for idea misappropriation.

Accordingly, defendants' motion to dismiss the cause of action for idea misappropriation is denied.

IV. Breach of Implied Contract

A cause of action for breach of an implied contract arises from a mutual agreement and an intent to promise, when the agreement and promise simply have not been expressed in words (*Maas v Cornell Univ.*, 94 NY2d 87 [1999]). This type of contract still requires elements of consideration and mutual assent. The

conduct of a party may manifest assent if the party intends to engage in such conduct and knows that such conduct gives rise to an inference of assent. Thus, "a promise may be implied when a court may justifiably infer that the promise would have been explicitly made, had attention been drawn to it." Additionally, in the context of an implied contract for the sale of an idea, the idea must be novel (*Apfel*, 81 NY2d at 476-77).

Plaintiffs have sufficiently alleged the presentation of a novel idea to defendants. Nonetheless, plaintiffs fail to allege conduct on the part of defendants which reflects an intent to be bound by an agreement for the exchange of plaintiffs' idea. Accordingly, the motion to dismiss is granted with respect to this cause of action.

V. Unjust Enrichment and Quantum Meruit

Unjust enrichment is a quasi-contract theory of recovery, and is an "obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co. v Ralph Rieder*, 86 AD3d 406, 408-11 [1st Dept 2011]). A plaintiff must show that the other party was enriched, at plaintiff's expense, and that the services were performed at the defendant's behest (*Id.*).

Plaintiffs allege that defendants were unjustly enriched by their utilization of plaintiffs' novel ideas, expert services, relationships to high-profile blog contributors, and cross-

promotion of the Huffington Post website, for which they have failed to compensate plaintiffs. Nonetheless, plaintiffs fail to allege that these services and benefits were conferred at defendants' behest. It is not sufficient to allege that defendants have profited from plaintiffs' work (*Georgia Malone & Co.*, 86 AD3d at 408-11).

Additionally lacking is the allegation that the parties shared a relationship which would have given rise to reliance or inducement (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182-83 [2011]). For instance, plaintiffs do not allege that defendants assured them that they would be compensated for their ideas and services (*compare Georgia Malone & Co.*, 86 AD3d at 408). Rather, plaintiffs allege that they continued to perform services for defendants in order to make Huffington Post a success despite being so brazenly excluded from receiving credit for its creation in the hopes that defendants would "make things right" (Complaint, ¶ 49).

The cause of action for quantum meruit, based upon identical allegations, is similarly flawed. The elements of a cause of action for quantum meruit are the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation, and the reasonable value of the services" (*Georgia Malone & Co.*, 86 AD3d at 408-11).

Plaintiffs do not allege that defendants requested plaintiffs to perform services for them, or that plaintiffs had a reasonable expectation to be compensated. Accordingly, the cause of action for unjust enrichment must be dismissed.

VI. Fraud

Plaintiffs allege that defendants committed fraud by falsely representing that they intended to work with them to develop the website, and that Lerer would provide funding for the development of the Website.

The elements of a cause of action for fraud are "a misrepresentation of a material fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Where a promissory statement is alleged, such as the case here, the plaintiff "must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]). Moreover, a plaintiff claiming fraud must plead the circumstances constituting the wrong in detail (CPLR 3016 [b]).

Plaintiffs' vague and conclusory allegations that defendants intended to deceive them at the time the parties engaged in

discussions regarding development of the website and that they never actually intended to work with them are insufficient to satisfy the heightened pleading standards of CPLR 3016 (b). Accordingly, the cause of action for fraud fails.

This Court has treated each cause of action in the complaint separately and has not considered allegations that were discreetly alleged in one cause of action as if it had alleged in the others. Accordingly, to the extent this motion is granted, it is granted without prejudice to the right to re-plead to address the deficiencies identified, if the plaintiffs are so advised. In the event the plaintiffs intend to re-plead, counsel shall promptly notify defendants of such intent. Notice of such intent shall toll the defendants' time to answer or move.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied as to the third cause of action for idea misappropriation, and is otherwise granted; and it is further

ORDERED that defendants shall serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

Dated: October 7, 2011

ENTER:

J.S.C.

CHARLES E. RAMOS