Shah v Ortiz
2012 NY Slip Op 33361(U)
July 26, 2012
Supreme Court, New York County
Docket Number: 651500/11
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

Index Number : 651500/2011
SHAH, SAMAR
vs.
ORTIZ, JUAN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 651500/11
MOTION DATE 6/1/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion ~~to/~~for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1
Answering Affidavits — Exhibits ____ | No(s). 2
Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7-26-12

Eileen Branston, J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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SAMAR SHAH and INDIGO GLOBAL, INC.,

Plaintiffs,

-against-

JUAN ORTIZ, A-DATA TECHNOLOGY LATIN AMERICAN, LLC and FAR EAST INVESTMENTS, LLC,

Defendants.

Index No.: 651500/11
Motion Date: 6/1/12
Motion Seq. Nos.: 001, 002

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EILEEN BRANSTEN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants Juan Ortiz ("Ortiz"), A-Data Technology Latin America, LLC ("ALA") and Far East Investments, LLC ("FEI") move, pursuant to CPLR 3212, 3211(a)(4) and CPLR 327, for summary judgment dismissing the complaint on the grounds of forum non conveniens and because there is another action pending.

In motion sequence number 002, plaintiffs Samar Shah ("Shah") and Indigo Global, Inc. ("IG") move, pursuant to CPLR 3211(a)(7), to dismiss the first, third and fourth counterclaims for failure to state a cause of action.

BACKGROUND

In 2005, FEI, a company owned equally by Ortiz, a Florida resident, and Shah, a New Jersey resident, entered into a joint venture with non-party A-Data Taiwan to form ALA. ALA distributed computer components and peripherals in Florida and Latin America.[1]

[1] The FEI and ALA operating agreements are governed by Nevada Law.

Thereafter, Shah transferred his ownership in FEI to IG, a company that he owns and controls.

In July 2006, A-Data Taiwan terminated its joint venture agreement with FEI and shut down ALA. Thereafter, ALA filed a Florida arbitration proceeding against A-Data Taiwan. ALA sought damages for breach of the joint venture agreement. In December 2008, in furtherance of the arbitration, Shah, Ortiz and ALA entered into a letter agreement (the "2008 Letter Agreement"), that states in its entirety:

> Samar Shah will travel to Miami, without counsel, on reasonable notice to testify in the case on the following conditions.
>
> 1. A-Data Technology Latin America, LLC ("ALA") and Juan Ortiz will hold Mr. Shah, individually and Indigo Global, Inc. harmless from any and all claims related to his membership in or activity as it relates to his being an officer or member of A-Data Technology Latin America, LLC.
>
> 2. We understand that legal fees and expenses related to the . . . arbitration are to be paid by the losing party . . . . As such, in the event ALA is deemed to be the "prevailing party" . . . Mr. Shah will recover 50% of any recovery paid to [ALA] after Juan Ortiz is reimbursed fees and expenses incurred in connection with this matter.
>
> 3. Should there be any dispute between Mr. Ortiz and Mr. Shah or between Mr. Shah and ALA, it will be resolved in New York City and service of any process involved will be deemed adequate if served by Federal Express on you for Mr. Ortiz or on this office for Mr. Shah.

Shah claims, in his affidavit, that Ortiz told him that ALA settled the arbitration with A-Date Taiwan and that it received $2 million dollars. Shah also claims that Ortiz has refused to account for that money. Shah Aff., ¶ 3.

Defendants contend that they discovered during the arbitration that Shah and IG colluded with A-Data Taiwan to undermine ALA's business by, *inter alia*, diverting ALA's biggest customer to a company run by Shah.

Shah alleges that, in a March 29, 2010 letter, Ortiz stated that (1) any monies allegedly due Shah were subject to deductions of consulting fees in the amount of $344,000.00, legal and related expenses in the amount of $237,820.64 plus a legal fee of $1 million paid to the firm that conducted the arbitration on ALA's behalf; and (2) that after expenses and other set-offs related to Shah and IG's allegedly unlawful actions, no money was due to Shah. Complaint, ¶ 15.

In March 2011, Ortiz and FEI filed a lawsuit against plaintiffs in Miami, Florida. Ortiz and FEI alleged that Shah and IG breached their fiduciary duty to ALA by colluding with A-Data Taiwan to undermine ALA's business.

In July 2011, Shah and Indigo filed this action. Shah and Indigo allege breach of the 2008 Letter Agreement, breach of the implied obligation of good faith and fair dealing, unjust enrichment and breach of fiduciary duty.

Defendants have asserted counterclaims for breach of fiduciary duty, breach of the duty of good faith and fair dealing, tortious interference with contract and prospective economic advantage and unjust enrichment.

Motion Sequence 001

Defendants first argue that the court should dismiss or stay this action on the ground that there is another action pending in Florida which was filed prior to this action and is between substantially the same parties and for the same cause of action. Defendants also claim that Florida is the more appropriate forum. Defendants assert that virtually all of the alleged events occurred in and around Miami-Dade County and that New York has no connection to the controversy.

In opposition to dismissal and/or a stay of this action, the plaintiffs argue that Ortiz, Shah and ALA agreed in the 2008 Letter Agreement that any disputes regarding the proceeds from the arbitration would be resolved in New York City.

In reply, defendants, for the first time, take the position that the letter agreement is unenforceable because Shah breached the agreement by failing to testify at the arbitration and that the December 2008 letter agreement was procured by fraud.[2] However, allegations of fraud and breach of contract raised for the first time in reply papers may and will not be considered by the court. Plaintiffs have not had an opportunity to respond to these allegations. *See, Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100, 102 (1st Dep't 1998); *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 625 (1st Dep't 1995).

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[2] Defendants seventeenth affirmative defense claims that the December agreement was procured by fraud. However, in their memorandum of law in support of the motion to dismiss or stay the action, the defendants did not rely on that defense or argue that the letter agreement was invalid because of fraud.

DISCUSSION

"The parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of a contract." *Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). "[T] he 'very point' of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction . . . ." *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 222 (1st Dep't 2006). "It is the well-settled 'policy of the courts of this State to enforce contractual provisions for . . . selection of a forum for litigation.'" *Id.*, citing *Koob v. IDS Fin. Servs.*, 213 A.D.2d 26, 33 (1st Dep't 1995). Such a forum selection clause provides certainty and predictability and it "is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." *Adler v. 20/20 Cos.*, 82 A.D.3d 918, 919 (2d Dep't 2011) (internal quotation marks and citation omitted). "Absent a strong showing that it should be set aside, a forum selection agreement will control." *Bernstein v. Wysoki,* 77 A.D.3d 241, 249 (2d Dep't 2010) (internal quotation marks and citations omitted).

Non-signatories to an agreement can be bound by an agreement's forum selection clause under circumstances where the nonsignatory has a sufficiently close relationship with

the party to the forum selection clause and to the dispute that it is foreseeable that the nonsignatory will be bound. *Freeford Ltd. v. Pendleton,* 53 A.D.3d 32, 39 (1st Dep't 2008); *Weingard v. Telepathy, Inc.,* 2005 WL 2990645, *5 (S.D.N.Y. 2005) (holding that a forum selection clause is applicable to all defendants, even though they were not all signatories to the contract containing the clause, because they are closely related to each other). "A non-party is closely related to a dispute if its interests are completely derivative of and directly related to, if not predicated upon the signatory party's interests or conduct." *Id.* (internal quotation marks omitted).

The jurisdiction clause in the 2008 Letter Agreement clearly states that Shah, Ortiz and ALA consent to have disputes resolved in New York City. In addition, FEI, which was owned equally by Shah/IG and Ortiz and which was the managing partner of ALA[3] is also subject to the forum selection clause because that entity is so closely related to the parties and the controversy that enforcement of the forum selection clause against it is foreseeable. *See Triple Z Postal Servs, Inc. v. United Parcel Serv., Inc.,* 13 Misc. 3d 1241(A), 2006 NY Slip Op 52202(U), * 10-11 (Sup. Ct. NY County 2006). Plaintiff IG, which is not a party to the letter agreement, has consented to the jurisdiction of this court by bringing suit here.

Here, the defendants have failed to make a prima facie showing that they are entitled to judgment dismissing or staying this action. The defendants have presented no evidence that

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[3] Shah was originally the managing partner of FEI but, at the time of the alleged occurrences, he had been replaced by Ortiz.

the forum selection clause in the 2008 Letter Agreement, which requires disputes to be settled in New York City, should be set aside as unreasonable or unjust, or that a trial in New York City would be so gravely difficult that, for all practical purposes, they would be deprived of their day in court. Indeed, to the contrary, defendants have proceeded in this litigation. Defendants have retained New York counsel, answered the complaint and then filed an amended answer containing four counterclaims against the plaintiffs.

Defendants' reliance on the "first filed" rule and/or the fact that there is another action pending in Florida is unavailing. Chronology, while important, is not dispositive in determining whether to stay or dismiss an action based on a similar action in another jurisdiction, particularly where both actions are at the earliest stages of litigation, *see AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 496 (1st Dep't 2011) or where the action is filed as a preemptive strike or to try to gain a tactical advantage in filing in a more favorable forum. *See L-3 Communications Corp v. Safenet, Inc.*, 45 A.D.3d 1, 8 (1st Dep't 2007).

Here, the defendants filed the Florida action, but never effected service of process on Shah and IG. Shah and IG have moved to dismiss the Florida action based on defendants failure to effect service of process and on the forum selection clause in the 2008 Letter Agreement. At this time, it appears that all proceedings in the Florida action have been stayed. Weinberger Reply Aff., Ex. B.

Moreover, where the party to a contract agrees to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on forum non conveniens grounds. *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 223 (1st Dep't 2006); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley,* 257 A.D.2d 228, 232 (1st Dep't 1999); *Concord Assets Fin. Corp. v. Radebaugh,* 172 A.D.2d 446, 448 (1st Dep't 1991) (defendant's contention that New York was an inconvenient forum was misplaced, where he had consented to New York jurisdiction in forum selection clause).

Accordingly, defendants motion to dismiss this action on the grounds that there is another action pending and based on forum non conveniens is denied.

Motion Sequence 002

Plaintiffs/counterclaim defendants (hereinafter, "plaintiffs") argue that Defendants/counterclaim plaintiffs' (hereinafter, "defendants") first counterclaim for breach of fiduciary duty must be dismissed as duplicative of the contract counterclaim. Plaintiffs contend that defendants' third counterclaim alleging tortious interference with contract must be dismissed because it fails to allege any of the claim's essential elements. Plaintiffs assert that defendants' fourth counterclaim alleging unjust enrichment must be dismissed because upon grounds that an express written contract between the parties precludes the claim.

Defendants argue that their first counterclaim is not duplicative of the contract claim because it is based on Shah and IG's breach of their separate duty of loyalty. They contend that their third counterclaim is based on plaintiffs' attempt to subvert FEI's joint venture

agreement with A-Data Taiwan by diverting customers from the joint venture to IG, and that the fourth counterclaim alleging unjust enrichment is based on plaintiffs' diversion of business from ALA to IG not on the contract between the parties.

DISCUSSION

It is well settled that on a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotations marks and citations omitted).

However, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible allegations are not entitled to preferential consideration. *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

A. Breach of Fiduciary Duty

"Under Nevada law, a fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another." *McDonald v. Palacios*, 2011 WL 4501255 *6 (D. Nev. 2011). "A breach of fiduciary duty claim seeks damages for injuries that

result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Rappaport v. Soffer*, 2012 WL 2522069 *5 (D. Nev. 2012) (internal quotation marks and citation omitted). In order for a director to be held liable for a breach of his/her fiduciary duty, the breach must involve intentional conduct, fraud, or a knowing violation of the law. *Id.* citing NRS § 78.138(7)(b).

The first counterclaim alleges that Shah and IG had a duty of loyalty and good faith to FEI and Ortiz, and that the plaintiffs breached those duties by conspiring with A-Data Taiwan to shut down the joint venture. The counterclaim alleges that Shah actively planned the destruction of ALA's business with A-Data Taiwan's vice president by, *inter alia*, changing invoices and payment practices and usurping the joint venture's business for his personal benefit. Defendants contend that Shah's action's were improper and unlawful. Amended Answer, ¶¶ 71-73. At the pleading stage, these allegations are sufficient to state a claim of breach of fiduciary duty against the plaintiffs. *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152.

B. Tortious Interference with Contract and Prospective Economic Advantage[4]

Tortious Interference with Contract

The elements of a tortious interference with contract claim include: (1) the existence of a valid contract; (2) knowledge of that contract; (3) the intentional procurement of the

[4] All the parties have cited New York law which is consistent with Nevada law, and accordingly, the court will utilize a New York framework to analyze the viability of these causes of action.

breach of that contract; and (4) damages. *See Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006). In addition, to sustain this cause of action, the plaintiff must specifically allege that, but for the defendants' conduct, the contract would not have been breached. *Washington Ave. Assoc., Inc. v. Euclid Equip.*, 229 A.D.2d 486, 487 (2d Dep't 1996). Moreover, it is well settled that in order to maintain this claim, a plaintiff must allege that there was an actual breach of the contract. *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 620 (1996).

In this case, the defendants/counterclaim plaintiffs have failed to allege that there was an actual breach of a particular contract, and that, but for the plaintiff/counterclaim defendants' interference, the contract would not have been breached. Rather, the counterclaim merely alleges that plaintiffs have tortiously interfered with FEI and Ortiz's contract rights by diverting ALA's clients and customers or its prospective clients and customers to a competing entity. These allegations are insufficient to state a claim for tortious interference with contract.

In its brief in opposition to dismissal, defendants appear to argue that this cause of action is based not on the interference with ALA's contracts with its vendors, but rather on Shah and IG's tortious interference with the joint venture agreement between FEI and A-Data Taiwan. However, the counterclaim, as stated in the amended answer, does not contain these allegation and, for this reason, it is unclear exactly what counterclaim plaintiffs are actually alleging as the basis for the tortious interference with contract claim.

Accordingly, the cause of action for tortious interference with contract is dismissed with leave to replead, because it does not adequately apprise the counterclaim defendants of the basis for the cause of action. *See* CPLR 3013 ("statements in a pleading shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences . . . intended to be proved and the material elements of each cause of action or defense").

Tortious Interference with Prospective Economic Advantage

To state a claim for tortious interference with prospective economic advantage, the claimant must plead that: "(1) [it] had a reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of that expectation; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (4) damage." *Aon Risk Servs. v. Cusak,* 34 Misc. 3d 1205(A), 2011 NY Slip Op 52433(U), 2011 WL 6955890 at *20 (Sup. Ct., NY County 2011), citing *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358, 366 (S.D.N.Y. 2009), aff'd 379 Fed. Appx 4 (2d Cir. 2010).

Here, counterclaim plaintiffs have failed to plead any of the elements necessary to sustain a cause of action for tortious interference with prospective economic advantage. It has failed to identify a prospective business opportunity and this omission is fatal to the claim. Defendants/counterclaim plaintiffs counterclaim for tortious interference with prospective economic advantage is dismissed, with leave to replead.

C. Unjust Enrichment

Unjust enrichment is a quasi contract claim. Generally, "the existence of a valid contract governing the subject matter . . . precludes recovery in quasi contract for events arising out of the same subject matter." *Adelaide Prods., Inc. v. BKN Intl. AG*, 38 A.D.3d 221, 225 (1st Dep't 2007) (internal quotation marks and citation omitted). In this case, counterclaim plaintiff has alleged that plaintiff/counterclaim defendant breached the contractual duty of good faith and fair dealing by, inter alia, diverting and misappropriating ALA's customers. *See A.C. Shaw Contr. v. Washoe County*, 105 Nev. 913, 914 (Nev. 1989) (under Nevada law, every contract imposes a duty of good faith and fair dealing upon each party). These are the same allegations that form the basis of their unjust enrichment claim. However, Ortiz, FEI and ALA argue that the unjust enrichment claim is not based on any contractual right and they also argue that they are permitted to plead unjust enrichment, in the alternative, in the event that their claim for breach of the contractual covenant of good faith and fair dealing does not address this harm.

Recently, in *Sabre Intern. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-439 (1st Dep't 2012), the First Department restated the well settled rule that, "where there is a bona fide dispute as to . . .the application of a contract to the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." *Citing Goldman v. Simon Prop. Group, Inc.* 58 A.D.3d 208, 220

(2d Dep't 2008); *Schwartz v Pierce*, 57 A.D.3d 1348, 1353 (3d Dep't 2008); *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225, 228 (1st Dep't 1993).

Accordingly, because there is a question about whether FEI Agreement applies the claims of misappropriation and diversion of clients, at this preliminary stage in the litigation, the court will not require Ortiz, ALA and FEI to elect their remedies and they may plead their breach of contract and unjust enrichment claims in the alternative.

(Order on following page.)

ORDER

Accordingly, it is hereby

ORDERED as to motion sequence 001, that defendant Ortiz, ALA and FEI's motion to dismiss the complaint on the basis of forum non conveniens and/or because there is another action pending, is denied; and it is further

ORDERED, as to motion sequence 002, plaintiff/counterclaim defendants Shah and IG's motion to dismiss the 1st, 3rd and 4th counterclaims is granted to the extent that the third counterclaim is dismissed with leave to replead and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 26, 2012

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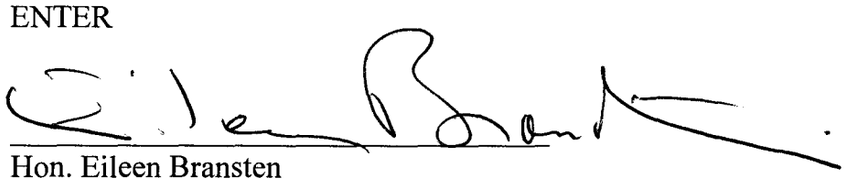

Hon. Eileen Bransten