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 : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

Motion is decided in accordance with
accompanying Memorandum Decision

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

Dated: 2/14/13

_____, **J.S.C.**

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: COMMERCIAL DIVISION
----------X

PETER DAOU and JAMES BOYCE,

Plaintiffs,

Index No. 651997/10

-against-

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

Defendants.

----------X

Charles E. Ramos, J.S.C.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendants Arianna Huffington (Huffington), Kenneth Lerer (Lerer) and TheHuffingtonPost.com, Inc. (the Huffington Post) move, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the amended complaint.

All but one of the causes of action in the original complaint in this action were dismissed by order of this Court, without prejudice to plaintiffs' repleading to address the deficiencies identified in the court's decision, dated October 7, 2011. The surviving cause of action was for idea misappropriation.

Plaintiffs served an amended complaint, dated May 21, 2012, repleading causes of action for fraud against defendants Huffington and Lerer (second cause of action); breach of implied

contract against Huffington and Lerer (third cause of action); and unjust enrichment against all defendants (fourth cause of action).

In motion sequence number 004, nonparty Timothy M. Armstrong (Armstrong) moves, by order to show cause, for an order quashing plaintiffs' subpoena dated August 23, 2012, for Armstrong's deposition, or, alternatively, for a protective order with respect to that subpoena.

Background

Fora full recitation of the factual background in this action, see this Court's decision dated October 7, 2011.

Plaintiffs Peter Daou (Daou) and James Boyce (Boyce) contend that they developed the idea for what eventually became the Huffington Post, and presented the idea to Huffington and Lerer. When Huffington and Lerer expressed interest in developing the idea, plaintiffs provided more specifics and, believing that Huffington and Lerer had agreed to embark on the venture with them, disclosed the details of how to launch the project. Plaintiffs maintain that Huffington deliberately caused them to believe that she would join with them in the project so as to obtain detailed information about their concept, and then gave that information to nonparty Roy Sekoff (Sekoff), who then emailed Huffington a rehash of the website idea previously conveyed by plaintiffs to Huffington. This was, according to

plaintiffs, an effort to make it appear that Sekoff had developed the idea by himself, so that Huffington could use the idea without including plaintiffs in the project. Huffington then launched the Huffington Post on May 9, 2005 with the assistance of Lerer and Sekoff, using plaintiffs' concept and substantive plan.

In the amended complaint, plaintiffs contend that there was an implied contract between them and Huffington and Lerer; that Huffington and Lerer fraudulently induced them to reveal the business plan which Huffington and Lerer then used to launch the Huffington Post without giving either credit or an interest in the Huffington Post to plaintiffs; and that defendants were unjustly enriched by using plaintiffs' idea without compensating them.

In January 2011, not long after this action was commenced, non-party AOL acquired the Huffington Post. In the course of discovery in this action, plaintiffs discovered that AOL's CEO, Armstrong, had discussed AOL's acquisition of the Huffington Post with Huffington, and served a subpoena on him. Armstrong maintains that he did not work on the valuation of the website, but that another AOL employee, Michael Smith, is the person who would have the most information about AOL's decision to buy the Huffington Post. Nonetheless, plaintiffs believe that Armstrong has information regarding the value of plaintiffs' idea in

valuing the Huffington Post.

Discussion

I. Motion to Dismiss

Defendants seek to dismiss the amended complaint in its entirety.

A. Idea Misappropriation

Defendants move to dismiss the cause of action for idea misappropriation, arguing that the claim is barred by the applicable statute of limitations, and because, absent a viable joint venture, fiduciary relationship or contract claim, plaintiffs have failed to adequately allege a legal relationship between the parties to support the claim.

To the extent that defendants seek dismissal of the cause of action for idea misappropriation, plaintiffs object. They rely upon this Court's previous ruling sustaining that cause of action. According to plaintiffs, this portion of the motion is barred by the single motion rule (CPLR 3211 [e]), which permits only one motion pursuant to CPLR 3211. Additionally, plaintiffs maintain that this portion of the motion is barred by the law of the case doctrine.

Defendants reply that, because plaintiffs amended the claim by incorporating all of their new allegations, the single motion rule does not apply.

The single motion rule prohibits a party from filing a

second motion to dismiss an action. As pointed out by defendants, when an amended complaint is filed, the single motion rule is relaxed, although not entirely abolished. While the case law addressing this issue is not clear as to the precise point at which the court may address a second motion to dismiss, it is clear that with respect to causes of action that were not previously addressed, such a motion is permitted.

Defendants rely on *L & L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.* (23 Misc 3d 1139[A], 2009 NY Slip Op 51200[U] [Sup Ct, Kings County 2009]) in support of their position that once an amended complaint has been filed that is not merely restated, they possess an unfettered right to seek dismissal. The case cited is a trial court decision from Kings County. While it is informative, is not binding on this Court and otherwise is unpersuasive.

The First Department squarely addressed this issue in *Schwartzman v Weintraub* (56 AD2d 517 [1st Dept 1977]). There, the court found that because the original "complaint contained a cause of action founded upon fraud that is basically the same as the second cause in this proposed fourth amended complaint," it did not permit another challenge (*Id.* at 517).

Similarly, plaintiffs' idea misappropriation claim in the amended complaint is virtually identical to the claim stated in the original complaint. Although the amended complaint contains

additional allegations, it does not alter the essential nature of the claim which survived the prior motion to dismiss.

Consequently, under the single motion rule and law of the case doctrine, defendants cannot now seek to dismiss this claim.

The Court will not address defendants' argument that the statute of limitations bars the idea misappropriation claim. This defense was not raised in the prior motion. The failure to raise in a prior pre-answer motion to dismiss a possible basis for dismissal constitutes a waiver of the opportunity to raise that argument in a second motion (*Gross Moving & Packing Co. v Damens*, 233 AD2d 128 [1st Dept 1996]), including the defense of statute of limitations (*Horst v Brown*, 72 AD3d 434 [1st Dept 2010]).

B. Fraud

The Court previously dismissed the fraud cause of action, as asserted in the original complaint on the ground that plaintiffs made "vague and conclusory allegations that defendants intended to deceive [plaintiffs] at the time the parties engaged in discussions regarding development of the website and that [defendants] never actually intended to work with [plaintiffs]" (Opinion, at 16-17). Defendants contend that the amended complaint merely contains additional conclusory allegations, which do not satisfy the heightened pleading standard of CPLR 3016 (b).

Despite the heightened pleading standard set forth in CPLR 3016 (b),

> [S]ection 3016 (b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.' ... Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-92 (2008) (internal quotation marks and citation omitted).

Plaintiffs allege that Huffington stated that she wanted to join with plaintiffs in this venture, and also told them that Lerer would be willing to finance it for the first six months. At no point did defendants express any reservations to plaintiffs about the plan, or that they did not wish to pursue it with plaintiffs. While defendants dismiss this as a nonactionable promise of future performance, plaintiffs also allege that Huffington forwarded plaintiffs' business plan to Sekoff, who then emailed her a business proposition based nearly entirely on the plaintiffs' plan. Plaintiffs also allege that Huffington and Lerer prepared a story to describe how the Huffington Post came into being, hiding plaintiffs' role in it, rather than publicizing its true origins.

This Court concludes that the amended complaint alleges concrete facts that establish the basic elements of a fraud claim, namely, that defendants deliberately led plaintiffs to believe that they would be partners in the venture in order to

delay, and ultimately prevent, plaintiffs from launching their own project based on the business plan. Such actions then allowed defendants to launch their project first, based on plaintiffs' plan.

This Court rejects defendants' argument that their alleged silence, unaccompanied by some act or conduct which deceived plaintiffs, cannot constitute an actionable fraud in the absence of any confidential or fiduciary relationship.

Defendants correctly recite the law that, generally, silence is not actionable as fraud. "A party's silence will be deemed an acquiescence where he or she is under such duty to speak that his or her 'conduct, accompanied by silence, would be deceptive and beguiling' ... and failure to speak therefore misleads the other party" (*see Russell v Raynes Assoc., L.P.*, 166 AD2d 6, 15 [1st Dept 1991]).

Nonetheless, plaintiffs allege more then mere silence on defendants' part. Rather, they allege concrete facts from which a fraudulent intent can be inferred based upon defendants' representations to plaintiffs that they agreed to be partners in carrying out plaintiffs' website plan, featuring Huffington and funded by Lerer. Simultaneously, defendants secretly sent plaintiffs' ideas to a group assembled by defendants to create the website without the plaintiffs' participation or even knowledge.

Moreover, based upon these allegations, defendants' silence could be deemed acquiescence, and support a finding that Huffington fraudulently induced plaintiffs to rely on her participation in the project. In doing so, Huffington prevented plaintiffs from using their own business plan to create a website in accordance with that business plan and enabled her to launch the Huffington Post based on their plan, but without their participation.

Defendants contend that plaintiffs have failed to allege with particularity legally sufficient facts to support the element of reliance. Defendants maintain that, because plaintiffs were uncertain as to what their exact role would be in the enterprise, plaintiffs cannot successfully allege that they justifiably relied on any representations of defendants.

Defendants' position is unconvincing. While Boyce was uncertain as to the exact position that Daou would fill, there was no question in his communications with Huffington that the enterprise would include both Boyce and Daou. Further, the allegations in the amended complaint support plaintiffs' assertions that Huffington deliberately led plaintiffs to believe that they would work together in order to enable defendants to make use of plaintiffs' business concept and plan before plaintiffs would have the opportunity to launch the project on their own, due to the delay created by their reliance on joining

forces with defendants. Accepting all inferences in favor of plaintiffs, as this Court must do at this stage, plaintiffs have adequately pleaded justifiable reliance.

This Court also rejects defendants' argument that the prior failed breach of contract claim is being recast here as a fraud claim. Plaintiffs have adequately alleged that defendants took the information that plaintiffs provided, secretly shared it with another person, camouflaged the origin to make it appear as if it came from that other person, and, in effect, stole the idea and developed it with that other person. Thus, the issue is not just assurances and promises that defendants would enter into a business venture with plaintiffs. Consequently, defendants have not demonstrated, as a matter of law, that the allegations in the complaint fail to state a cause of action for fraud.

C. Breach of Contract

Defendants contend that the repleaded cause of action for breach of implied contract is insufficient because it contains no new factual assertions demonstrating that the parties agreed on the principal terms of a contract, or that defendants engaged in conduct reflecting such an agreement.

An implied contract, in order to be enforceable, must contain the same elements as an express contract. There must be a mutual agreement and an intent to promise; only the agreement and promise are not expressed in words (*Maas v Cornell Univ.*, 94

NY2d 87, 93 [1999]). In its prior decision, the Court noted that the basic elements of a contract or joint venture were missing. Moreover, the complaint lacked allegations as to an agreement to share in profits or losses, control over the enterprise, nor did the parties reach an agreement regarding the distribution of equity. Additionally, this Court found that there was no conduct by defendants reflecting an intent to be bound. Defendants contend that these same failings are present in the amended complaint.

Plaintiffs contend that the conduct of the parties can support an inference that an implied contract existed. Specifically, plaintiffs rely on the November 14, 2004 draft 1460 Memorandum sent to Huffington which expressly identified her as a partner and investor. The next day, Boyce updated the memorandum to reflect that Huffington had agreed to participate in the project. Huffington was provided with these documents, but never disavowed her agreement to participate. In fact, she responded by saying that Lerer would provide the funds needed for the website. Further, at the December 4, 2004 breakfast, the four parties discussed and confirmed the concrete ideas for the website and agreed to build the website together as partners.

Nonetheless, the amended complaint still fails to set forth adequately the terms of the agreement. There is nothing in the amended complaint concerning the manner in which the parties

would distribute profits and losses, how the equity in the venture would be allotted, and who would control the enterprise. These factors are essential terms of an agreement, and without them, any agreement would be too indefinite to be enforceable (*see Delaney v Weston*, 66 AD3d 519, 519-520 [1st Dept 2009]). Consequently, the cause of action for breach of an implied contract must be dismissed.

D. Unjust Enrichment

In its prior decision, this Court dismissed the unjust enrichment cause of action, finding that "plaintiffs fail to allege that these services and benefits were conferred at defendants' behest" (Opinion, at 15). Defendants contend that plaintiffs fail to remedy that defect in the amended complaint, and merely seek to recover for their time and effort expended in pitching their idea to defendants. Defendants aver that, after discussion, defendants decided to cause an entirely different website to be built without any contribution from plaintiffs.

There is no question that time and effort spent in negotiating a deal that fails to come to fruition is an insufficient basis to recover for unjust enrichment (*Metal Cladding, Inc. v Brassey*, 159 AD2d 958, 959 [4th Dept 1990]).

Moreover, where a plaintiff asserts a claim for unjust enrichment, the plaintiff must allege a relationship with the defendant which, while not necessarily one of privity, is not so

attenuated as to make the plaintiff's reliance on the defendant's representations unreasonable (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]). In discussing where the boundary lies, the Court of Appeals recently stated that in *Sperry* and in *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173, 182 [2011]), the relationship was too attenuated "because they simply had no dealings with each other" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517-518 [2012]).

The same cannot be said in the instant case. Plaintiffs discussed the project with defendants, and provided defendants with their ideas and business plans. According to plaintiffs, after agreeing to become partners with plaintiffs, thereby inducing plaintiffs to provide details of the manner in which the website could be launched, defendants then took those plans to launch the Huffington Post. If true, such allegations do not reflect a relationship so attenuated as to preclude the possibility of recovery under the theory of unjust enrichment. Moreover, plaintiffs sufficiently allege that equity and good conscience do not permit defendants to retain the benefits of plaintiffs' idea, and that defendants were unjustly enriched, sufficient to survive the pleading stage.

II. Motion to Quash

Plaintiffs served a subpoena on nonparty Timothy Armstrong, CEO of AOL, seeking to depose him with respect to AOL's purchase

of the Huffington Post. The subpoena was served on Armstrong personally, not on AOL. However, it is clear that the information that plaintiffs seek from him relates to his position as CEO of AOL, not his private life. Plaintiffs contend that Armstrong has unique knowledge concerning the claims underlying this action, and that, therefore, only his deposition is adequate, and that a deposition of someone else at AOL would not suffice.

Armstrong represents that he has no unique knowledge regarding the valuation of the Huffington Post, and that the primary author of the February 4, 2011 memorandum concerning such valuation, Michael Smith, would be far more knowledgeable than he would, even though he signed the memorandum. Armstrong also suggests that it would be more reasonable to seek answers via interrogatories to the two questions with respect to which plaintiffs claim that Armstrong has unique knowledge. Those two issues are what Armstrong personally valued about the Huffington Post, and what he said regarding that subject in his telephone conversations with Huffington.

All the parties acknowledge that senior executives cannot be subpoenaed to testify in order to harass a corporation, but senior executives are also not immune per se from discovery or from depositions. Armstrong maintains that the additional layer of protection for senior corporate executives subject to

deposition should be employed here (apex deposition rule), and that plaintiffs have not demonstrated that he has any unique knowledge that warrants his being deposed (*Colicchio v City of New York*, 181 AD2d 528, 529 [1st Dept 1992]; *Arendt v General Elec. Co.*, 270 AD2d 622, 622-623 [3d Dept 2000]; *Defina v Brooklyn Union Gas Co.*, 217 AD2d 681, 682 [2d Dept 1995]; *Saieh v Demetro*, 201 AD2d 477 [2d Dept 1994]).

Armstrong further maintains that plaintiffs have failed to show that the disclosure that they seek cannot be obtained from another source (*Kooper v Kooper*, 74 AD3d 6, 16-17 [2d Dept 2010]). Armstrong points to the fact that when Huffington was deposed, she stated that she did not discuss this litigation with him. Thus, there is no basis upon which to conclude that Armstrong has any information regarding this litigation.

With respect to AOL's interest in purchasing the Huffington Post, there is a memorandum dated February 4, 2011, prepared for the AOL board, which sets forth the rationale for the purchase. Armstrong did not prepare that memorandum. It was drafted by a combination of the corporate development staff. Thus, Armstrong's knowledge of how AOL valued the Huffington Post is not restricted to him; the issues were presented to AOL's board, and the written report was provided to plaintiffs.

Plaintiffs assert that, even without disputing Armstrong's characterization of the law regarding so-called "apex

depositions," or depositions of the head of a major corporation, they have established that Armstrong has unique knowledge with respect to the private conversations that he had with Huffington, which included the topic of why AOL chose to purchase the Huffington Post.

While it is undoubtedly true that only Huffington and Armstrong can testify with respect to the conversations that they had only with each other, plaintiffs have not demonstrated that Armstrong had any information other than that of his company, AOL, regarding the reasons for purchasing the Huffington Post. In view of the fact that AOL drafted a detailed memorandum regarding the reasons for the purchase, which was compiled by people other than Armstrong, and was provided to plaintiffs, even if Armstrong said something that was at variance with the information contained in the memorandum, there is no basis to assume that it was the reason for AOL's decision.

Plaintiffs' conclusory statement that "propounding written interrogatories is not a reasonable means of obtaining sworn testimony concerning actual, spoken conversations" also fails to explain why interrogatories would not be an appropriate first step, at the very least, for obtaining the sought information.

Consequently, plaintiffs have failed to demonstrate their need for an apex deposition of a nonparty at this time.

Accordingly, it is hereby

ORDERED that, in motion sequence number 003, defendants' motion to dismiss is granted only to the extent that the third cause of action for breach of implied contract is dismissed and the motion is otherwise denied; and it is further

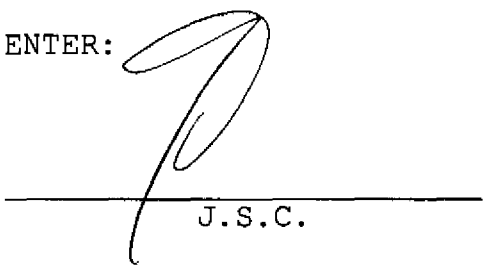
ORDERED that, in motion sequence number 004, nonparty Timothy Armstrong's motion to quash plaintiffs' subpoena is granted and the subpoena is quashed; and it is further

ORDERED that defendants are directed to serve an answer to the amended 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 appear for a status conference in Room 238, 60 Centre Street, on April 10, 2013, at 10AM.

Dated: February 13, 2013

ENTER:



J.S.C.