Petnet Direct, LLC v Petflow, Inc.
2013 NY Slip Op 33128(U)
December 9, 2013
Supreme Court, New York County
Docket Number: 653675/2012
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD, *Justice* PART 49

PETNET DIRECT, LLC, MARC A. KRAVITZ, and ANDREAS TSARTSALIS,

Plaintiffs,

-against-

PETFLOW, INC., WESTWOOD VENTURES, LLC, JOSEPH SPEISER, and ALEX ZHARDANOVSKY,

Defendants.

INDEX NO. 653675/2012

MOTION DATE Dec. 5, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss action.

	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 to dismiss action is decided in accordance with the accompanying decision and order.

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

Dated: December 9, 2013

O. PETER SHERWOOD, 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 PART 49
--X
PETNET DIRECT, LLC, MARC A. KRAVITZ,
and ANDREAS TSARTSALIS,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 653675/2012

PETFLOW, INC., WESTWOOD VENTURES, LLC,
JOSEPH SPEISER, and ALEX ZHARDANOVSKY,

Defendants.
--X
O. PETER SHERWOOD, J.:

Defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss all but the fifth (breach of contract) cause of action of the Third Amended Verified Complaint ("TAC").[1] Because this is a motion to dismiss, the allegations in the TAC are taken as true with all reasonable inferences drawn in favor of plaintiff.

I. Background

Plaintiff, Petnet Direct, LLC ("Petnet"), is a New York limited liability company founded in 2005 and provides internet-based sales of pet supplies and other pet-related products. Plaintiff, Marc A. Kravitz ("Kravitz") is the founder of Petnet. Plaintiff, Andreas Tsartsalis ("Tsartsalis") has worked with Kravitz in Petnet since 2007 and has invested in Petnet.

Defendant, Petflow Inc. ("Petflow"), is a Delaware corporation registered in New York State as a foreign business corporation. Defendants, Joseph Speiser ("Speiser"), and Alex ("Zhardanovsky") are shareholders, officers and/or directors of Petflow. Defendant Westwood Ventures, LLC ("Westwood"), is a New York limited liability company founded in 2008.

A. Petnet's History

Kravitz founded Petnet to provide pet supplies over the Internet using the existing infrastructure of brick and mortar stores in New York City. However, Petnet did not obtain an affiliate to put this business model into action. Instead it established a warehouse and delivery system

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[1]The TAC which is over sixty pages long, consists of 239 separately numbered paragraphs.

by January of 2006 and launched an Internet site in February 2006. Petnet's services eventually covered all of Manhattan.

B. Petnet Expands

In July 2006, Kravitz was introduced to Tsartsalis, who owned a brick and mortar pet specialty store, "Pet Central." Tsartsalis agreed to fill Petnet's orders and Pet Central became Petnet's first affiliate. Tsartsalis eventually invested $250,000 in Petnet for a 25% equity stake. In 2007 Petnet expanded its services into Brooklyn, Queens, and Long Island, through Pet Central and other affiliates. Petnet also moved towards a flat-rate, nationwide shipping model, while maintaining same-day delivery in New York City through Pet Central.

To combat increased Internet competition, increased customer acquisition costs, increased shipping costs, and repetitive advertising costs, Petnet considered applying and incorporating an "auto-ship" feature. Auto-ship is a subscription delivery service which would allow customers to have pet food and supplies delivered automatically on a regular basis. This provided Petnet with a continuity of regular sales without additional marketing costs. Throughout its expansion, Petnet developed a body of confidential business information and trade secrets. To maintain the confidentiality of this information, Petnet required potential investors to sign non-disclosure agreements.

C. Petnet's Involvement with Petflow

In 2009, Petnet began looking for a partner. In October 2009, Kravitz and Tsartsalis were introduced to Speiser and Zhardanovsky, who were seeking a new venture. Kravitz originally thought that Speiser and Zhardanovsky would be strategic investors in Petnet who would help with customer acquisition. However, Speiser and Zhardanovsky wanted to create a new company, and have Petnet run the front-end operation. Kravitz told Speiser and Zhardanovsky that in such an arrangement, plaintiffs would insist on an equity interest in the new company. Speiser and Zhardanovsky replied that they did not want partners. Kravitz reiterated that without an equity interest, the discussion would go no further (TAC, ¶¶ 28-9). At this point, Speiser and Zhardanovsky agreed that plaintiffs would have an equity interest in the new enterprise and that the specific details would be worked out later (TAC, ¶¶ 29-30).

At Kravitz's request, Speiser executed a non-disclosure agreement (the "NDA") on October 22, 2009 on behalf of Westwood. The NDA recites that Petnet "owns or controls certain trade secrets and proprietary and confidential information acquired through the expenditure of time, effort and money, of a technical and business nature relating to Petnet Direct, LLC." The NDA specified that the disclosure of the information was "solely for the purpose of investigating a Joint Venture" and that "all right, title and interest to the Information shall remain the exclusive property of [Petnet] and Information shall be held in trust and confidence by [Westwood] for [Petnet]." Petnet then opened its books and operations to Speiser and Zhardanovsky, sending detailed reports including vendor lists, customer lists, sales records, inventory, prices, margins, average order size, breakout for food orders, product information, and operating responsibilities. Petnet also disclosed confidential information about Petnet's business concept and model.

After reviewing the information, Speiser and Zhardanovsky insisted that the new enterprise sell dog and cat food only using the auto-ship feature only. Kravitz wanted to combine auto-ship with traditional static sales and to cover a broader range of pet products. Defendants sought additional sales information from plaintiffs and developed the Petflow website.

On November 19, 2009, Speiser told plaintiffs that the Petflow page was complete and up and running as a front to collect data and run an ad campaign. Speiser then sought to obtain the information necessary to integrate the Petflow website with the Petnet database in anticipation of the website's official launch.

Meanwhile, plaintiffs sought to determine the parties' respective roles in the business venture. On November 30, 2009 Speiser sent an email asking: "[W]hen you get a chance shoot over the list of things you will be handling in the partnership so we can start work on the contract." In another email sent December 6, 2009, Speiser reminded plaintiffs: "Don't forget to send over the things you will be covering in our agreement. We need to put together a contract." The parties met on December 22, 2009 and orally agreed on at least a 10% aggregate interest in Petflow. The parties also discussed the use of Petnet as a supplier to the new company, which would remain a viable company in event Petflow failed.

Speiser sent another email to Kravitz on December 14, 2009 stating that he was "[s]tanding by for data on the contract. Once you send that we will engage a lawyer to draft up the agreement."

Kravitz replied setting forth a list of plaintiffs' responsibilities, reiterating the arrangement where Petnet would remain a direct supplier to Petflow.

In January 2010, the parties visited Petnet's fulfillment center in Wallingford, Connecticut. While there, Speiser and Zhardanovsky indicated that the written agreement would be forthcoming. However, on January 11, 2010, Speiser indicated in an email that no contract was needed because "we aren't really doing anything outside of a wholesaler agreement." Kravitz replied: "yes I agree however . . . the relationship is more than just wholesale." In response, Speiser said: "Yes, but if you remember, this was before you decided you wanted to do the wholesale markup, vs sharing on the upside/downside." Speiser offered a six month exclusivity agreement.

On January 13, 2010 the parties had a conference call. On that call Speiser and Zhardanovsky confirmed plaintiffs' interest in Petflow in addition to the wholesaling arrangement. Speiser and Zhardanovsky agreed to give Kravitz and Tsartsalis collectively a 10% equity in Petflow. On January 20, 2010, Speiser sent an email stating that: "The goal here is to be partners" and that Petnet would receive a five percent commission "for the management of the backend process/ordering/inventory etc."

On January 26, defendants provided a term sheet that did not include an equity stake for plaintiffs. In an accompanying email, Speiser stated that: "While we were not able to offer equity, we did include a substantial severance package to fully protect your time and rolodex investment. Alex [Zhardanovsky] and I truly believe that under these terms, our partnership will have the potential to yield the greatest possible results. On February 3, 2010, Kravitz responded to the term sheet with several discussion points, including under "Upside" a provision for "10% stock." Sixteen minutes later, Zhardanovsky replied stating that: "When we put together our proposal, we thought that we were extremely generous and while I do believe that you and Andrew [Tsartsalis] could add value to us, the amount you're asking us to give up is just not something that we are comfortable with."

No agreement was consummated. Petflow launched approximately one month later, using the auto-ship feature. Petflow contacted all of Petnet's vendors to set up accounts and sought to use Petnet's fulfillment center.

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D. Petnet Sues

On October 21, 2012, Petnet brought instant action. The Third Amended Complaint was filed on May 1, 2013, alleging ten causes of action as follows:

1. Promissory Estoppel/Specific Performance
2. Equitable Estoppel/Specific Performance
3. Misappropriation of Trade Secrets
4. Misappropriation of Confidential Information and Trade Secrets (Injunctive Relief)
5. Breach of Contract
6. Breach of Fiduciary Duty
7. Breach of Good Faith and Fair Dealing
8. Conversion
9. Fraud, Deceit, and/or Mispresentation
10. Unjust Enrichment

Defendants now move to dismiss all the causes of action except the fifth (breach of contract).

II. Discussion

A. Motion to Dismiss Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]. Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a CPLR 3212 motion for summary judgment, the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they establish conclusively that [plaintiff] has no . . . cause of action" (*Lawrence v Groubard Miller*, 11 NY 3d 588, 595 [2008], [citing *Rovello*, 40 NY2d at 636]). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

B. Promissory Estoppel/Equitable Estoppel/Specific Performance

The first and second causes of action seek a declaration that defendants are estopped from denying the existence of a joint business partnership with plaintiffs. "The indicia of the existence of a joint venture are: (1) acts manifesting the intent of the parties to be associated as joint venturers, (2) mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, (3) a measure of joint proprietorship and control over the enterprise, and (4) a provision for the sharing of profits and losses" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]).A "definite agreement with respect to the sharing of profits and losses . . . is an indispensable element of any joint venture agreement, oral or written" (*Schnur v Marin*, 285 AD2d 639, 640 [2d Dept 2001]). Where "documentary evidence in the form of e-mails conclusively establishe[s] that the parties intended to finalize their agreement in a writing, which never materialized, inasmuch as negotiations had been ongoing and were eventually discontinued," there is "no mutual assent or meeting of the minds as to the proposed joint venture" (*Langer v. Dadabhoy*, 44 AD3d 425, 426 (1st Dept 2007).

The NDA manifests an intention of the parties to pursue a joint venture arrangement. By its terms the confidential information and know-how plaintiffs disclosed was "solely for the purpose of investigating a Joint Venture" (TAC¶ 33). The TAC does not allege any agreement over joint proprietorship and control, nor does it allege that any agreement was ever made providing for the sharing of profits *and* losses. Instead, the TAC alleges that defendants promised plaintiffs a 10%

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equity stake in the new corporation. The TAC also alleges that defendants repeatedly sought to negotiate a contract regarding the new venture. Although the parties exchanged outlines of their respective proposals for the arrangement, no final agreement was ever reached. As such, the TAC does not allege facts sufficient to establish the existence for a joint venture. There are no allegations concerning an agreement to share profit and losses. Although, the TAC reveals an intention to memorialize an agreement, no agreement was reached and no writing reflected the parties' agreement is alleged. No joint venture was formed.

The case of *Daou v. Huffington* (651997/2010 Doc. No. 26 [Sup Ct NY County Oct. 25, 2011]), relied on by both parties, supports this conclusion. In that case, Justice Ramos granted the motion to dismiss where the plaintiff, who allegedly provided Ariana Huffington with the idea and business plan for the Huffington Post, held that the alleged joint venture agreement did "not rise to the level of an agreement to join property, skills and risk" (*id.* at *6). Justice Ramos further noted that the plaintiff in that action "fail[ed] to allege that there was an agreement to share in profits or losses" (*id.*). As in this case, there was "no suggestion as to any of the pertinent and necessary details such as control over the enterprise" (*id.* at *7).[2]

The first and second causes of action (promissory and equitable estoppel) must be dismissed. The sixth cause of action, breach of fiduciary duty, necessarily relies on the existence of a joint venture and must also be dismissed as well (*see Frutico, S.A. de C.V. v Bankers Trust Co.*, 833 F Supp 288, 301 [SDNY 1993]).

C. Misappropriation of Trade Secrets/Confidential Information

Plaintiff's third and fourth causes of action alleges that defendants misappropriated their trade secrets and confidential information, including business concept, business model and strategy, retail prices, sales and costs, actual orders, point of sale system, product list, vendor information, movement reports, list of best sellers, vendors used, vendor costs, marketing and ad pricing, promotion concepts, Amazon.com statistics, Google analytics, private labeling trends, revenue,

[2]Following this decision, plaintiff amended the complaint to add facts. In a Decision and Order, dated February 13, 2013, Justice Ramos again dismissed the joint venture claim, finding at pages 10-11 that "[t]here is noting 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])".

industry trends, costs, profit margin, distributor zones, distributor information, UPS contracts, introduction to third party warehouse and fulfillment center, product rotations and recommended quantities, cost per acquisition trends, application and incorporation of auto-ship feature, application programming interface, and know-how. The third cause of action seeks damages for the misappropriation and the fourth cause of action seeks injunctive relief.

Although "[t]here is no generally accepted definition of a trade secret, that found in section 757 of Restatement of Torts, comment b has been cited with approval by [the Court of Appeals]" (*Ashland Mgmt. v Janien*, 82 NY2d 395, 407 [1993]). A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*id.,* quoting Restatement of Torts § 757 Comment *b*). One is liable for the tort of misappropriation if "his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him" (Restatement of Torts § 757). When evaluating a trade secret claims, courts should consider:

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others

(*Ashland Mgmt.*, 82 NY2d at 407 quoting Restatement of Torts § 757 Comment *b*).

Defendants argue that the alleged trade secrets do not constitute a formula, process, device or a complication of information. Whether specific information qualifies as a trade secret "is generally a question of fact" (*Ashland Mgmt.*, 82 NY2d at 407, *see also Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 666 [2d Dept 2004]). Here, the TAC sufficiently alleges that plaintiffs provided confidential information and trade secrets to the defendants and that the defendants breached plaintiff's confidence in misusing that information. The allegation is supported by the NDA, executed by both parties, which specifically recites the confidential nature of the information disclosed to the defendants.

The motion to dismiss the third and fourth causes of action must be denied.

D. Claims Duplicative of Breach of Contract Claim

The motion does not seek to dismiss the fifth cause of action for breach of contract. The seventh, eighth, ninth, and tenth causes of action are duplicative of the breach of contract claim and must be dismissed. "It is well settled that a party to a contract may not interpose a tort claim unless a legal duty independent of the contract has been breached" (*TAG 380, LLC v ComMet 380, Inc.*, 40 AD3d 1 [1st Dept 2007], *affd as modified* 10 NY3d 507 [2008]). Plaintiff argues that these causes of action are pled in the alternative. However, where, as here, defendant does not deny the existence of a valid contract, duplicative tort and quasi-contract claims may be dismissed (*See Richbell*, 309 AD2d at 306).

1. Breach of Good Faith and Fair Dealing

The seventh cause of action alleges that defendants breached the duty of good faith and fair dealing by using the confidential information provided pursuant to the NDA."The duty of good faith and fair dealing is implicit in the performance of contractual obligations to the extent that a separately stated cause of action asserting breach of that duty is routinely dismissed as redundant" (*ERE LLP v Spanierman Gallery, LLC*, 94 AD3d 492, 493, 942 N.Y.S.2d 472, 473 [1st Dept 2012]). Here, the seventh cause of action merely restates the breach of contract claim and must be dismissed.

2. Conversion

The eighth cause of action allege that defendants converted plaintiffs confidential information in violation of the NDA. As with the breach of duty of good faith and fair dealing, "an action for conversion can not be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 A.D.2d 883, 884 [1st Dept 1982]). Here, the eighth cause of action seeks damages for the breach of the NDA. As such, the claim is duplicative and the eighth cause of action must be dismissed.

3. Fraud, Deceit, and/or Mispresentation

The ninth cause of action alleges that defendants promised to form a joint venture with defendants, when in reality they had no intention of ever forming a joint venture. The plaintiffs allegedly reasonably relied on these promises, providing confidential information to defendants which was later used, in contravention of the NDA, to plaintiff's detriment.

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). The plaintiff must set forth the circumstances of the fraud with particularity (CPLR 3016 [b]). To plead scienter, a plaintiff must offer more than conclusory allegations of intent. (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495. 495-496 [1st Dept 2006]). Further, a plaintiff may not claim justifiable reliance if he could have discovered the truth "by ordinary intelligence or with reasonable investigation" (*id.* at 496). Furthermore, the fraudulent statement must be more than a concealed lack of intent to perform the contract. "To say that a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract" (*Briefstein v P.J. Rotondo Constr. Co.*, 8 AD2d 349, 351 [1st Dept 1959]).The "fraud" must therefore "allege fraud extraneous and collateral to the contract" (*International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 527 [1st Dept 2009]).

Here the fraud claim merely restates the breach of contract claim. The TAC alleges that defendants never intended to form a joint venture, notwithstanding the NDA's stated intent of exploring a joint venture. There is no fraud collateral to the contract and the ninth cause of action must be dismissed.

4. Unjust Enrichment

The tenth cause of action seeks to recover for the defendants' alleged wrongful was of plaintiffs' confidential information on a theory of unjust enrichment. "[T]he existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment" *Cornhusker Farms, Inc. v. Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 206, (1st Dept 2003). Here, the NDA covers the defendants' actions and a cause of action for unjust enrichment will not lie. The tenth cause of action must be dismissed.

Accordingly, it is hereby

ORDERED that the portions of the motion seeking to dismiss the first, second, sixth, seventh, eighth, ninth, and tenth causes of action is GRANTED; and it is further

ORDERED that the portions of the motion seeking to dismiss the third and fourth causes of action is DENIED; and it is further

ORDERED that defendants shall answer the third amended complaint within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that counsel shall appear at a preliminary conference on Wednesday, January 22, 2014 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: December 9, 2013

E N T E R,

O. PETER SHERWOOD
J.S.C.