Mercy Abundance, LLC v Chapman
2016 NY Slip Op 31190(U)
June 20, 2016
Supreme Court, New York County
Docket Number: 653016/2014
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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MERCY ABUNDANCE, LLC, a Delaware limited liability company,

Plaintiff,

- against -

GREG CHAPMAN, an individual, ROGEL PATAWARAN, an individual, OCEANSBLUE SYSTEMS, LLC, a Nevada limited liability company, RP FAMILY TRUST, a Wyoming trust, FLASHTEXT, LLC, a Nevada limited liability company, PHILMORE ANDERSON, IV, an individual, CLIFFORD H. FERNANDEZ, an individual, and JOHN DOES 1-99,

Defendants.

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DECISION AND ORDER

Index No. 653016/2014
Motion Seq. No. 001

SCARPULLA, J:

In this action arising out of an alleged fraud concerning an investment in a technology company, defendants OceansBlue Systems, LLC ("OceansBlue"), Greg Chapman, Rogel Patawaran, Philmore Anderson, IV, Clifford H. Fernandez, the RP Family Trust, Flashtext, LLC, and John Does 1-99 move to dismiss plaintiff Mercy Abundance, LLC's ("Mercy") complaint pursuant to CPLR § 3211(a)(7) and (8).

In the amended complaint, Mercy alleges that the individual defendants Greg Chapman, Rogel Patawaran, Philmore Anderson, IV, and Clifford H. Fernandez convinced it to invest in OceansBlue, a limited liability company. Mercy alleges that the defendants portrayed OceansBlue as "a cutting-edge technology firm that owned important intellectual property which would form the basis of a product that could secure confidential electronic information." In addition, the defendants allegedly represented to

Mercy that "OceansBlue's technology was close to market and that government agencies and large corporations were interested in acquiring the technology."

On or about February 12, 2013, Mercy invested $5,000,000 in exchange for a 10% interest in OceansBlue, pursuant to a Subscription Agreement. Mercy also entered into an Amended and Restated Operating Agreement for OceansBlue on February 12, 2013, with RP Family Trust, Patawaran, Fernandez, and Anderson.

Mercy asserts that, despite the defendants' representations, its capital investment was "never used to create any systems software, network operating software for virtual private networks, computer software or other technological solutions as was promised." Mercy claims that the individual defendants instead diverted OceansBlue's funds to themselves or third party businesses that they controlled. Mercy also alleges that Fernandez permitted Flashtext employees to misappropriate OceansBlue's hardware and intellectual property.

In the amended complaint plaintiff asserts sixteen causes of action, for breach of contract, breach of fiduciary duty of loyalty, tortious interference with fiduciary duties, unfair competition, fraud and deceit, civil RICO, conversion, unjust enrichment, constructive trust, and injunctive relief. The defendants now move to dismiss the complaint based on lack of personal jurisdiction and failure to state a claim.

Discussion

I. Personal Jurisdiction

Upon a motion to dismiss pursuant to CPLR § 3211(a)(8), the plaintiff, "[a]s the party seeking to assert personal jurisdiction . . . bears the ultimate burden of proof on this issue." *Doe v. McCormack,* 100 A.D.3d 684, 684 (2d Dep't 2012); *see also Copp v. Ramirez*, 62 A.D.3d 23, 28 (1st Dep't 2009). "[I]n deciding whether the plaintiff[] ha[s] met [its] burden, the court must construe the pleadings and affidavits in the light most favorable to [it] and resolve all doubts in [its] favor." *Brandt v. Toraby*, 273 A.D.2d 429, 430 (2d Dep't 2000); *Wilson v. Dantas*, 128 A.D.3d 176, 182 (1st Dep't 2015).

In opposing the motion, the plaintiff is not required to make a *prima facie* showing of jurisdiction, but only a "sufficient start" in demonstrating a basis for personal jurisdiction over the defendant "to warrant further discovery." *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, 85 A.D.3d 665, 666 (1st Dep't 2011).

CPLR § 302(a)(1)

CPLR § 302(a)(1) provides that for "a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state."

For jurisdiction to attach under § CPLR 302(a)(1), two requirements must be satisfied: "the defendant's New York activities [must be] purposeful *and* substantially related to the claim." *Id.* (emphasis added); *Wilson*, 128 A.D.3d at 182. "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 90 A.D.3d 403, 404 (1st Dep't 2011); *see also Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014).

The defendants argue that the complaint should be dismissed because the court lacks personal jurisdiction over them under CPLR § 302(a)(1).[1] The defendants contend that Mercy fails to allege any activities that they conducted in New York related to Mercy's investment in OceansBlue. In opposition, Mercy argues that personal jurisdiction exists over the defendants because they engaged in purposeful activities in New York in connection with securing its investment.[2]

In the complaint, Mercy alleges that the defendants solicited it to invest $5 million in OceansBlue, which the defendants represented as a cutting edge technology company with a product that was close to market. In an affidavit, Mercy's manager Sana Sabbagh states that she attended approximately ten meetings with the defendants in New York related to Mercy's investment. Specifically, Sabbagh states that she attended five

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[1] It is undisputed that the defendants are non-domiciliaries of New York. OceansBlue and Flashtext are Nevada limited liability companies, with their principal place of business in California. The RP Family Trust is a Nevada and/or a Wyoming trust. Patawaran, Fernandez and Chapman are California residents. Although Mercy alleges that Anderson is a New York resident, Mercy did not dispute Anderson's affidavit in which he states that he is a California resident.

[2] In addition, Mercy argues that OceansBlue's citizenship is determined by the citizenship of its members. However, Mercy is referring to the citizenship test to determine whether federal diversity jurisdiction exists, which is not determinative of personal jurisdiction.

meetings with Chapman, one meeting with Patawaran, four meetings with Anderson, and two meetings with Fernandez in New York.

In addition, Mercy alleges that the Subscription Agreement and the Operating Agreement were executed in New York; that both contracts contain a New York choice of law clause; and the Subscription Agreement contains a New York forum selection clause.

Based on the allegations that the defendants visited New York to attend multiple meetings with Mercy concerning the investment, and that the parties executed two agreements in New York that selected New York choice of law, I find that Mercy has made a sufficient start to warrant jurisdictional discovery. *American BankNote Corp. v. Daniele*, 45 A.D.3d 338, 340 (1st Dep't 2007) (finding a sufficient start where the complaint alleged that the defendant traveled to New York to conduct business with plaintiffs). Although the defendants contend that this court lacks personal jurisdiction over them, they did not submit any affidavits denying that they had any contacts with New York. In fact, at oral argument, counsel for the defendants stated that "[t]here's no dispute that meetings took place . . . just the extent and the number and when and how they occur." Transcript, December 16, 2015, p. 5-6.

For the reasons stated above, the defendants' motion to dismiss the complaint pursuant to CPLR § 302(a)(1) is denied without prejudice to renew upon completion of jurisdictional discovery. *Expert Sewer & Drain, LLC v. New England Mun. Equip. Co., Inc.*, 106 A.D.3d 775, 776 (2d Dep't 2013).

CPLR § 302(a)(3)

CPLR § 302(a)(3) provides that long-arm personal jurisdiction exists over a non-domiciliary defendant who "commits a tortious act without the state causing injury to person or property within the state," provided that he or she:

> "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

To invoke jurisdiction under CPLR § 302(a)(3), the plaintiff "must show both that an injury occurred 'within the state,' and that the elements of either clause (i) or (ii) have been satisfied." *Ingraham v. Carroll*, 90 N.Y.2d 592, 596 (1997).

Mercy fails to sufficiently allege that defendants committed any tortious conduct outside of New York, or that it suffered injury in New York as required by CPLR § 302(a)(3). *Fantis Foods v Standard Importing Co.*, 49 N.Y.2d 317, 326 (1980); *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 303 (2011). Further, Mercy does not allege that the defendants regularly engaged in business in New York, or that they should have reasonably expected consequences in New York and derived substantial revenue from interstate commerce. *Ingraham*, 90 N.Y.2d at 597. Accordingly, I find that Mercy failed to make a sufficient start to warrant discovery on personal jurisdiction under CPLR § 302(a)(3).

II. Failure to State A Claim

The defendants next move to dismiss the sixteen causes of action in the complaint based on failure to state a claim.

Breach of Contract

The defendants argue that the first cause of action for breach of contract should be dismissed because Mercy failed to allege any specific contractual provisions in the Operating Agreement that were breached. The defendants also contend that Mercy failed to state a breach of contract claim against Chapman and Flashtext because they are not parties to the Operating Agreement.

In the complaint, Mercy asserts that the defendants breached the Operating Agreement in five ways: (a) by engaging in fraudulent schemes; (b) violating state and federal securities law; (c) failing to disclose Chapman and Patawaran's adverse litigation history; (d) failing to remit Mercy's funds for a proper accounting; and (e) failing to provide accurate financial information.

The Operating Agreement does not contain any specific contractual provisions requiring the defendants to disclose adverse litigation history, remit Mercy's funds for an accounting, provide financial information, or refrain from engaging in fraudulent schemes or from violating securities laws. In addition, Mercy may not maintain a breach of contract claim against Chapman and Flashtext because they are not parties to the Operating Agreement. Accordingly, I grant the defendants' motion to dismiss the first cause of action for breach of contract.

Breach of Fiduciary Duty of Loyalty

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR § 3016(b). *Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 684 (2d Dep't 2011). The elements of a cause of action of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).

In the second cause of action, Mercy alleges that each of the individual defendants breached their fiduciary duty of loyalty to OceansBlue by failing to produce a deliverable product, encouraging other individual defendants to violate their duties to OceansBlue, diverting corporate opportunities from OceansBlue, and misappropriating confidential information from OceansBlue. Mercy claims that the defendants' breaches caused damage to OceansBlue that cannot be remedied at law, and Mercy therefore seeks a constructive trust over OceansBlue. In addition, Mercy alleges that it suffered $5,000,000 in damages resulting from the defendants' breach of their fiduciary duty of loyalty to OceansBlue.

Mercy's claim that the individual defendants breached their fiduciary duty of loyalty to OceansBlue is a derivative claim, which must be dismissed based on Mercy's failure to plead that it made a pre-suit demand or demand futility. *Barone v. Sowers*, 128 A.D.3d 484, 484 (1st Dep't 2015). Further, Mercy fails to state a direct claim for damages because its alleged loss derives solely from harm to OceansBlue. *Yudell v. Gilbert*, 99 A.D.3d 108, 113 (1st Dep't 2012) (finding that a plaintiff's claim for breach

of fiduciary duty is derivative when plaintiff's pecuniary loss is derived from a breach of duty and harm to the business entity). Therefore, the defendants' motion to dismiss the second cause of action for breach of fiduciary duty of loyalty is granted.

Aiding and Abetting Breach of Fiduciary Duties

To state a cause of action for aiding and abetting the breach of fiduciary duty, a plaintiff must plead a breach of fiduciary duty; that the defendant knowingly induced or participated in the breach; and damages resulting therefrom. *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 464 (1st Dep't 2007). A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator. *Id.*

In the third through seventh causes of action, Mercy alleges that the individual defendants tortiously interfered with other members' fiduciary duties to OceansBlue. Specifically, Mercy alleges that each individual defendant induced others to violate their fiduciary duties by misappropriating funds, confidential business information, intellectual property, and other assets from OceansBlue.

I construe the third through seventh causes of action as claims for aiding and abetting the breach of fiduciary duties against the individual defendants. Mercy's claim that the individual defendants aided and abetted the breach of fiduciary duties owed to OceansBlue is a derivative claim, which fails because Mercy did not plead that it made a pre-suit demand or that demand was futile. I therefore grant the defendants' motion to dismiss the third through seventh causes of action for aiding and abetting the breach of fiduciary duty against Chapman, Patawaran, Fernandez, and Anderson, and Does 1-99.

Unfair Competition

To prevail on an unfair competition claim, a plaintiff must show "the bad faith misappropriation of a commercial advantage which belonged exclusively to him." *LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006); *Ahead Realty LLC v. India House, Inc.*, 92 A.D.3d 424, 425 (1st Dep't 2012).

In the eighth cause of action for unfair competition, Mercy alleges that the individual defendants unfairly competed with OceansBlue. Because this is a derivative claim asserted on behalf of OceansBlue, I dismiss it based on Mercy's failure to plead a pre-suit demand or demand futility.

Fraud

CPLR § 3016(b) provides that where a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail." To establish a fraud claim, a "plaintiff must show a material representation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." *Lemle v. Lemle*, 92 A.D.3d 494, 496 (1st Dep't 2012).

In a fraud action, a plaintiff must allege a misrepresentation of fact. *Id.* An opinion or prediction of something which is hoped or expected to occur in the future does not constitute a misrepresentation of fact. *Marx v. Mack Affiliates*, 265 A.D.2d 202, 203 (1st Dep't 1999); *Chase Investments, Ltd. v. Kent III*, 256 A.D.2d 298, 299 (2d Dep't 1998).

In the ninth cause of action, Mercy alleges that the individual defendants committed fraud through misrepresentations that OceansBlue was "a cutting-edge

technology firm that owned important intellectual property" and that OceansBlue's "technology was close to market and that government agencies and large corporations were interested in acquiring the technology." In the tenth cause of action, Mercy claims that the defendants committed fraud through: (a) concealment of their intent to misappropriate Mercy's investment by falsely stating that a Flashtext employee took OceansBlue's sole copy of its software; and (b) by knowingly misrepresenting that financial information for OceansBlue is unavailable.

Mercy fails to state a claim for fraud because it did not allege facts showing justifiable reliance, or that the defendants made the representations concerning OceansBlue's technology with knowledge of their falsity. Further, the defendants' alleged representations that OceansBlue was "a cutting-edge technology firm that owned important intellectual property" and that the product was "close to market" are statements of opinion and future expectations that cannot form the basis of a fraud claim. Accordingly, I grant the defendants' motion to dismiss the ninth and tenth causes of action for fraud.

RICO

"'Because the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement." *Houses of Spices (India), Inc. v. SMJ Services, Inc.*, 103 A.D.3d 848, 851 (2d Dep't 2013) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). I grant the defendants' motion to dismiss the civil RICO

claim based on Mercy's failure to allege any conscious agreement between the defendants to commit predicate acts as part of a conspiracy.

Conversion

To establish a conversion claim, a plaintiff must demonstrate: (1) legal ownership or an immediate superior right of possession to a specific identifiable thing; and (2) that the defendant exercised an unauthorized dominion over that property to the exclusion of plaintiff's rights. *Lemle*, 92 A.D.3d at 494; *Meese v. Miller*, 79 A.D.2d 237, 243 (4th Dep't 1981).

Mercy fails to allege that it maintained legal ownership or an immediate superior right of possession to the $5 million that it invested in OceansBlue. Once Mercy invested money into OceansBlue, the money became OceansBlue's property. Accordingly, I grant the defendants' motion to dismiss the twelfth cause of action for conversion.

Unjust Enrichment

A cause of action for unjust enrichment requires a showing that: (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Georgia Malone & Co. Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011); *Clifford R. Gray, Inc. v. LeChase Constr. Servs., LLC*, 31 A.D.3d 983, 987-88 (3d Dep't 2006).

In the thirteenth and fourteenth causes of action, Mercy alleges that it invested $5 million in OceansBlue to be used to develop products and services; that the defendants and OceansBlue benefited from the investment; and that it would be inequitable for the defendants and OceansBlue to retain this investment. Mercy claims that, despite the

individual defendants' representations, the capital investment was never used to create any products or services, and that the individual defendants siphoned off the funds that Mercy invested in OceansBlue to themselves or third party businesses that they controlled.

The allegations in the complaint are sufficient to state a claim for unjust enrichment. The "basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (internal citation omitted). A claim for unjust enrichment may exist in such cases where "though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* I find that the specific circumstances alleged may have created an equitable obligation for the defendants and OceansBlue to return the money that Mercy invested. *Philips Intern. Investments, LLC v. Pektor*, 117 A.D.3d 1, 7 (1st Dep't 2014) (finding that the complaint stated a claim for unjust enrichment where plaintiff alleges that the defendants created partnership entities in order to appropriate the venture's business opportunity); *Balance Return Fund Ltd. v. Royal Bank of Canada*, 83 A.D.3d 429, 431 (1st Dep't 2011).

Accordingly, defendants' motion to dismiss the thirteenth and fourteenth causes of action for unjust enrichment is denied.

Constructive Trust

A constructive trust may be imposed when "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976) (internal citation omitted); *Maiorino v. Galindo*, 65 A.D.3d 525, 526 (2d Dep't 2009). Under New York law, a party claiming entitlement to a constructive trust must ordinarily establish four elements: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment. *Sharp*, 40 N.Y.2d at 121.

Mercy seeks to assert a constructive trust over OceansBlue. In the complaint, Mercy alleges that the defendants obtained the capital investment through fraud, and that they were unjustly enriched as a result. I dismiss this claim based on Mercy's failure to plead the existence of a confidential or fiduciary relationship. Accordingly, the defendants' motion to dismiss the fifteenth cause of action for a constructive trust is granted.

Injunctive Relief

In the sixteenth cause of action, Mercy seeks: (a) an accounting, (b) an injunction restraining defendants from converting any funds, (c) a constructive trust, and (d) an injunction restraining the defendants from operating the OceansBlue fraudulent scheme.

To establish a right to an equitable accounting, a plaintiff must demonstrate the existence of a fiduciary or confidential relationship and a breach of the duty imposed by

that relationship respecting property in which the plaintiff has an interest. *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242 (1st Dep't 1997).

While Mercy alleges that it is a member of OceansBlue, Mercy fails to sufficiently allege a breach of fiduciary duty to establish a right to an accounting. I therefore dismiss Mercy's claim for an accounting. I further dismiss the claim for an injunction to impose a constructive trust because it is duplicative of the fifteenth cause of action.

Mercy also seeks an injunction to restrain the defendants from operating their fraudulent scheme of diverting funds from OceansBlue. To state a claim for a permanent injunction, a plaintiff must allege "a violation of a right presently occurring, or threatened or imminent." *Elow v. Svenningsen*, 58 A.D.3d 674, 675 (2d Dep't 2009); *Lemle v. Lemle*, 92 A.D.3d at 500. A plaintiff seeking a permanent injunction must also allege that he or she will suffer irreparable harm absent the injunctive relief. *Ovitz v. Bloomberg L.P.*, 18 N.Y.3d 753, 760 (2012); *Parry v. Murphy*, 79 A.D.3d 713, 715 (2d Dep't 2010). Mercy fails to state a claim for a permanent injunction because it does not allege any violation of a right presently occurring or that it will suffer irreparable harm. For the above reasons, I grant the defendants' motion to dismiss the sixteenth cause of action for injunctive relief.

In accordance with the foregoing, it is hereby

ORDERED that defendants Greg Chapman, Rogel Patawaran, OceansBlue Systems, LLC, RP Family Trust, Flashtext, LLC, Philmore Anderson, IV and Clifford H. Fernandez, and John Does 1-99's motion to dismiss the amended complaint is granted with respect to the first through twelfth, fifteenth, and sixteenth causes of action, and

denied with respect to the thirteenth and fourteenth causes of action for unjust enrichment; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference at 60 Centre Street, Room 208, on July 27, 2016 at 2:15pm.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 20, 2016

ENTER:

Saliann Scarpulla, J.S.C.