BEC Capital, LLC v Bistrovic
2017 NY Slip Op 30217(U)
January 27, 2017
Supreme Court, New York County
Docket Number: 153737/2016
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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BEC CAPITAL, LLC, KELP CAPITAL, LLC,
DREW MYERS, and JEFF FEINGLAS,

Plaintiffs,

Index No. 153737/2016

- against -

BOJAN BISTROVIC, MARSONIA CAPITAL
MANAGEMENT, LLC and MARSONIA
INVESTMENT MANAGEMENT, LLC,

Defendants.
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Hon. C. E. Ramos, J.S.C.:

In motion sequence 001, Defendants Bojan Bistrovic ("Bistrovic"), Marsonia Capital Management, LLC ("MCM"), and Marsonia Investment Management LLC ("MIM") (collectively, "Defendants") move to dismiss the amended complaint ("Amended Complaint") filed by BEC Capital, LLC ("BEC"), Kelp Capital LLC ("Kelp"), Drew Myers ("Myers"), and Jeff Feinglas ("Feinglas")(collectively, "Plaintiffs"), pursuant to CPLR 3211(a)(7), CPLR 3016, and CPLR 3013, and for an award of sanctions, attorneys' fees, and costs.

On November 14, 2016, this Court held oral argument and denied Defendants' motion, in part, to the extent of sustaining the causes of action for defamation and breach of the non-disclosure agreement ("NDA") and denying Defendants' motion for sanctions, attorneys' fees, and costs. The Court reserved decision on that portion of the motion which seeks to dismiss Plaintiffs' causes of action for tortious interference with

contractual relations and tortious interference with prospective business advantage, both of which are addressed below.

Background

In December 2014, Bistrovic, on behalf of MCM, and BEC entered into an Investment Management Sub-Advisory Agreement (the "Agreement"), which set forth the terms and conditions under which MCM and Bistrovic would trade a portion of BEC's proprietary capital.

In January 2015, Bistrovic started to integrate his trading algorithm onto the BEC platform (the "Strategy"). Purportedly as a result of Bistrovic's poor work ethic and delay in integrating the Strategy, BEC decided that it was no longer feasible for Bistrovic to be supported by BEC capital.

Plaintiffs allege that since BEC hoped that the Strategy's performance would improve, it did not immediately terminate the IMA, and instead allowed Bistrovic to continue trading his own personal capital on BEC's platform.

By December 2015, with BEC's approval, Bistrovic ceased trading at BEC. After the final accounting and payment of net proceeds to Bistrovic, Bistrovic purported to object to the allocation of 2015 losses and allegedly threatened to defame Plaintiffs if they did not appropriate the losses in the manner in which he demanded.

In January 2016, Bistrovic allegedly accused Myers of

"intent to defraud" and "criminal conspiracy" and threatened to report BEC to every regulatory body and criminal agency throughout the United States for its alleged improper allocation of 2015 losses (*See* Amended Compl. ¶¶ 49, 50). Plaintiffs assert that Bistrovic notified Myers that he would be "meeting with lots and lots of people" in the upcoming months and planned to inform each of them that he reported BEC's manager to the SEC and FINRA (*See Id.* ¶ 48).

On February 1, 2016, Plaintiffs' business partner and John Gu ("Gu") entered into an agreement to create a joint venture ("Joint Venture Agreement") in which Gu would trade in various markets in Asia. Plaintiffs allege that Bistrovic was aware of Plaintiffs' ownership interests in the Joint Venture.

In February 2016, Bistrovic allegedly made additional slanderous statements about BEC to Gu and other third parties. In late February 2016, Gu notified BEC and Myers of the slanderous statements. Shortly thereafter, Gu terminated the Joint Venture Agreement and acknowledged in writing that the slanderous statements that he heard from Bistrovic prompted the termination.

Plaintiffs allege that in April 2016, Bistrovic made slanderous statements to third parties, which were relayed directly to Peter Friedman ("Friedman"), the former head of recruiting for Teza Group, LLC ("Teza"), a major electronic trading company with whom Kelp, Myers and Feinglas have an

ongoing business relationship. In April 2016, Friedman notified Myers that Bistrovic was telling other key players in the industry that Plaintiffs stole Bistrovic's money.

In February and March 2016, Myers and Feinglas worked with Bistrovic to resolve the dispute involving the allocation of the 2015 losses and the threats of slanderous statements. The parties were unable to reach an agreement. On March 17, 2016, Bistrovic emailed Myers, notifying him that he would report BEC to the "DA's financial crimes task force for securities fraud tomorrow, and [also to the] SEC."

On March 17, 2016, Plaintiffs sent a cease and desist letter to Bistrovic. Plaintiffs allege that Bistrovic continued to make threats to them and slanderous statements about them to third parties.

On August 4, 2016, Plaintiffs filed the Amended Complaint, seeking to recover under theories of defamation, breach of the NDA, tortious interference with contractual relations, and tortious interference with prospective business advantage.

Discussion

In deciding a motion to dismiss under CPLR 3211(a)(7), a court must consider whether the complaint states a cause of action (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). On a motion to dismiss, a court must accept the facts as alleged to be true and determine whether the

[defendant's] facts fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980])(internal quotations omitted).

A. Tortious interference with contractual relations

In order to recover under a theory of tortious interference with contractual relations, a plaintiff must establish: (1) the existence of a valid contract between plaintiff and a third-party; (2) defendant's knowledge of the contract; (3) defendant's intentional interference with the contract and a resulting breach; and (4) damages (*AREP Fifty-Seventh, LLC v PMGP Associates, L.P.*, 115 AD3d 402, 402 [1st Dept 2014]).

Plaintiffs maintain that the Amended Complaint sufficiently alleges each of the abovementioned requirements. According to Plaintiffs, Defendants were clearly aware of the purpose of the Joint Venture Agreement as well as Plaintiffs' ownership interest in the entities that would be formed as a result (*See* Amended Compl. ¶¶ 53, 57). Plaintiffs allege that Bistrovic, with knowledge of the Joint Venture Agreement, made slanderous statements to Gu, resulting Gu's breach of the Joint Venture Agreement by his termination.

In support of their motion, Defendants assert that Plaintiffs have not set forth a valid cause of action because Plaintiffs were not a party to the Joint Venture Agreement and therefore lack standing. Further, Defendants argue that

Plaintiffs fail to allege that Defendants were aware of the specific terms of the Joint Venture Agreement, and failed to attach a copy of the Joint Venture Agreement to the Amended Complaint. Defendants cite to *Burrowes v Combs*, (25 AD3d 370 [1st Dept 2006]), and assert that Plaintiffs fail to allege that but for Defendant's conduct, Gu would not have terminated the Joint Venture Agreement. Defendants maintain that Plaintiffs' allegations do not exclude the possibility that the Joint Venture Agreement could have been terminated for additional independent reasons.

Although Plaintiffs have established the existence of the Joint Venture Agreement, it is undisputed that Plaintiffs were not a party to the contract. Therefore, Plaintiffs do not have standing to bring a cause of action for tortious interference with contractual relations (*See Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002]).

B. Tortious interference with prospective business advantage

A claim for tortious interference with prospective advantage must include: (1) the existence of business relations with a third party; (2) defendant's interference with the business relations through improper or unlawful means; (3) with the sole purpose of harming plaintiff (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]). To establish

interference with prospective business advantage, plaintiff must show "culpable conduct on the part of the defendant" (*NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 621 [1996]).

Defendants assert that Plaintiffs have failed to plead the requisite elements of a tortious interference with prospective business advantage claim. Defendants maintain that Plaintiffs fail to provide "specific factual support" of a concrete contractual offer, which Defendants were specifically aware of.

The Court is persuaded that Plaintiffs have sufficiently alleged the existence of a business relationship between themselves and Friedman, Mr. Teza, and other individuals in the electronic trading industry (*See* Lippman Aff., Exh. A.¶¶ 61-62). Plaintiffs also allege that Defendants, well aware of such relationships, intentionally told such individuals that "Plaintiffs stole money from [Bistrovic], were dishonest, and that no one should do business with them." (*Id.* ¶ 62). Plaintiffs also allege in detail that Defendants were motivated by malice and engaged in wrongful means to make slanderous statements to harm Plaintiffs, without any economic justification.

Defendants cite to *Pehzman v Chanel*, 2014 WL 1883217, 9 [Sup Ct, NY County 2014] in support of their argument that Plaintiffs have not established the existence of a contract that Defendants were aware of However, Defendants reliance on *Pehzman v Chanel,*

Inc., is misguided. As Plaintiffs correctly assert, *Pehzman* involves a claim by an at-will employee for tortious interference with her future employment contract (*See Id.*). Most significantly, *Pehzman* does not involve a claim for tortious interference with prospective business relations and therefore cannot be used to discredit such a claim (*See Id.*).

A claim for tortious interference with prospective business advantage simply requires Defendants' interference with existing business relationships with the main goal of harming Plaintiff, thereby resulting in the deterioration of said relationship (See *Carvel Corp v Noonan*, 3 NY3d 182 [2004]). Since Plaintiffs have established exactly that, dismissal is inappropriate.

Defendants also argue that Plaintiffs' cause of action for tortious interference with business advantage is duplicative because it is premised on the same purported factual allegations as Plaintiffs' first cause of action for defamation.

Although Plaintiffs will not have a right to double recovery, it is permissible for Plaintiffs to plead duplicative theories of recovery at this early stage of litigation (*Allenby, LLC v Credit Suisse, AG,* 134 AD3d 577 [1st Dept 2015]). In addition, the claims are not wholly duplicative, as the tortious interference claims and defamation claim involve different unrelated elements.

Accordingly, it is further

ORDERED that the motion to dismiss is granted as to the tortious interference with contract claim and otherwise denied; 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.

Dated: January 27, 2017

ENTER:

J.S.C.

CHARLES E. RAMOS