

Landmark Ventures, Inc. v Insightec, Ltd.

2017 NY Slip Op 30626(U)

March 30, 2017

Supreme Court, New York County

Docket Number: 653761/2016

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

LANDMARK VENTURES, INC. and LANDMARK VENTURES (USA) INC.,

-against- Plaintiff,

INSIGHTEC, LTD. and KREISBERG & MAITLAND, LLP,

Defendants.

INDEX NO. 653761/2016
MOTION DATE 02-01-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on Insightec Ltd.'s motion pursuant CPLR §3211[a][7], to dismiss:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and values 1-4, 5-7, 8

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that this motion pursuant to CPLR §3211[a][7], to dismiss the causes of action asserted against defendant Insightec, Ltd. in the complaint, is granted. The motion pursuant to CPLR §3211[a][1],[5],[7], to dismiss the causes of action asserted in the complaint against defendant, Kreisberg & Maitland, LLP, filed under Motion Sequence 002, is granted.

Landmark Ventures, Inc. (hereinafter referred to individually as LMV) is a strategic and financial advisory firm offering venture development and global investment banking services. Landmark Ventures, Inc. (U.S.A.) (hereinafter referred to individually as LMV USA), is an entity created by LMV. Insightec, Ltd. (hereinafter referred to as Insightec) is a medical device company located in Israel with a principal place of business in Dallas, Texas. Kreisberg & Maitland, LLP (hereinafter referred to as K&M) is a law firm retained in unrelated actions brought by plaintiffs' former employee. Gabriel Mendelberg, Esq., a non-party to this action is of counsel to K&M and represented Insightec in a special proceeding.

Insightec obtained a Final Award from the International Court of Arbitration (ICA) dated October 8, 2013, for attorney fees totaling \$208,948.49, in a matter titled, Landmark Ventures, Inc. (U.S.A.) v. Insightec Ltd.. On November 26, 2014 a judgment in favor of Insightec Ltd. confirming the arbitration award and granting pre-judgment interest in the amount of \$21,329.92, against LMV was entered in an action commenced in the Federal District Court, Southern District. On December 11, 2014, Insightec's judgment in the total amount of \$230,278.41 was docketed in New York County.

On January 28, 2016 Insightec, Ltd. commenced a special proceeding against LMV and LMV USA, in Supreme Court, New York County under Index No. 150339/2016, in part seeking: (1) to set aside and void fraudulent transfers and reinstating LMV's interest in transferred funds, (2) directing a judgment in the amount of \$230,278.42 with interest at 9% from November 26, 2014, (3) directing both LMV and LMV USA to turnover the amount of the judgment, and (4) for an Order of Attachment and temporary restraining order against LMV's assets and any interest LMV, U.S.A., may have in any personal property or debt situated in New York State.

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

LMV and LMV USA did not timely serve and file an answer to the petition in the special proceeding, did not oppose the relief sought, or appear on the February 10, 2016 return date, resulting in Insightec obtaining a judgment on default under Motion Sequence 001. A subsequent motion by LMV and LMV USA, as Respondents in the special proceeding, to vacate the default and dismiss the special proceeding filed under Motion Sequence 004, was denied. LMV and LMV USA under Motion Sequence 005 in the special proceeding, sought a default judgment on counterclaims: (1) for tortious interference with the settlement agreement in two actions involving a former employee, (2) for tortious interference with Prospective Economic Advantage and (3) Attorney Fees. The Decision and Order of this Court dated July 6, 2016, denied Motion Sequence 005 in the special proceeding.

On July 18, 2016, plaintiffs commenced this action alleging that settlement agreements in two actions filed in Supreme Court, New York County under Index Nos. 155538/2015 and 158137/2015 involving John Doe contained non-disclosure and confidentiality provisions, and were sealed by Court Order. Plaintiffs allege that K&M through its associate, non-party Gabriel Mendelberg, Esq. represented John Doe and signed the stipulations of settlement on John Doe's behalf, therefore K&M was bound by the sealing order, nondisclosure and confidentiality provisions of the settlement agreements.

The complaint asserts three causes of action. The first cause of action is for breach of contract alleging that K&M violated and revealed confidential information to Insightec that was in the settlement agreements. The second cause of action is for unjust enrichment for the legal fees K&M collected through non-party Gabriel Mendelberg, Esq., for work performed on behalf of Insightec as a result of the breach of the agreements. The third cause of action is against Insightec for "inducement of breach/tortious interference with contract and/or contractual relations," alleging that Insightec as a client encouraged and induced K&M's breach of the settlement agreements.

This motion pursuant to CPLR §3211[a][7], seeks to dismiss the causes of action asserted against Insightec, for failure to state a cause of action.

It is argued by Insightec that the cause of action for tortious interference with a contract, and inducement and tortious interference with prospective contract rights, relies on speculation and bare legal conclusions that are not specifically stated, warranting dismissal.

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions with no specificity and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (*Godfrey v. Spano*, 13 N.Y. 3d 358, 920 N.E. 2d 328, 892 N.Y.S. 2d 272 [2009]).

Insightec, Ltd. argues that this lawsuit is retaliatory because of the results in the special proceeding, and an attempt to forestall payment on the judgments obtained in the special proceeding. Insightec also argues that plaintiffs have not stated the element of intent required for tortious interference, or specifically identified acts that induced K&M to violate any agreement.

The elements of a cause of action for tortious interference with a contractual relation are (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages (*White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y. 3d 422, 867 N.E. 2d 381, 835 N.Y.S. 2d 530 [2007] and *Barns & Farms Realty LLC v. Novelli*, 82 A.D. 3d 689, 917 N.Y.S. 2d 691[2nd Dept., 2011]).

“A necessary element is the intentional and improper procurement of the breach and damages.” The facts alleged should be sufficient to show that the communications with the attorneys involved more than just securing fees, but intent to procure a breach of the stipulation of settlement” (Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc., 131 A.D. 3d 583, 15 N.Y.S. 3d 814 [2nd Dept., 2015]).

Plaintiffs’ argument that the delay of two months in seeking to bring the special proceeding establishes an intent to use K&M and influence non-party Gabriel Mendelberg, Esq., to violate the settlement agreements, is conclusory, speculative and does not show the intent element necessary to sustain the claims asserted. Insightec has shown that the settlement agreements with John Doe were not due to an unfair advantage. Plaintiffs failed to make a showing that Insightec was aware of the material terms of the settlement agreements, induced K&M to provide confidential information, or that the outcome of the special proceeding was solely the result of Insightec’s undue influence, given that a judgment was obtained before the special proceeding was brought and plaintiffs’ defaulted in the special proceeding.

A cause of action for tortious interference with prospective contract rights requires the plaintiff to allege specific facts in support of the claim that, “...the defendant directly interfered with a third-party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff” (Posner v. Lewis, 80 A.D. 3d 308, 912 N.Y.S. 2d 53 [1st Dept., 2010]). The plaintiff is required to establish culpable conduct on the part of the defendant, mere persuasion is not enough where the defendant’s motivation for the alleged interference is legitimate economic self-interest (Carvel Corp. v. Noonan, 3 N.Y. 3d 182, 818 N.E. 2d 1100, 785 N.Y.S. 2d 359 [2004]). Conclusory allegations that a lawfully issued restraining notice on a default judgment “is an abuse of process or tortious interference with prospective economic advantage” does not support a cause of action (Lambe v. Lenox Hill Hospital, 100 A.D. 3d 518, 953 N.Y.S. 2d 856 [1st Dept. 2012] and Caplan v. Tofel, 65 A.D. 3d 1180, 886 N.Y.S. 2d 182 [2nd Dept., 2009]).

Insightec has shown that plaintiffs allegations of inducing K&M to disclose trade secrets, commence and maintain a collection action, and restrain plaintiffs’ banks are speculative and fail to include factual specifics. The conclusory statements made by plaintiff do not establish a claim for tortious interference with prospective contract rights. Plaintiffs have not pled “culpable conduct” on the part of Insightec, they failed to show a desire to harm the plaintiffs and the settlement agreements with John Doe, or an independent tort, warranting dismissal of the third cause of action.

K&M under Motion Sequence 002 seeks to dismiss the first and second causes of action pursuant to CPLR §3211[a][1],[5],[7].

A breach of contract claim requires that plaintiff allege, “(1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages” (VisionChina Media, Inc. v. Shareholder Representative Services LLC, 109 A.D. 3d 49, 967 N.Y.S. 2d 338 [1st Dept., 2013]).

K&M did not represent Insightec in the special proceeding and could not have breached the agreement. K&M represented John Doe and the settlement agreements are signed by non-party Gabriel Mendelberg, Esq., on K&M’s behalf. K&M has stated that Gabriel Mendelberg, Esq. acted as “of counsel,” and not an “associate” of K&M as alleged by the plaintiffs. The special proceeding brought on behalf of Insightec was brought solely by non-party Gabriel Mendelberg, Esq., on behalf of his own firm, Law Offices of Gabriel Mendelberg, P.C., not K&M. Plaintiff has not shown that K&M breached the settlement agreement with John Doe by commencing the special proceeding, and the conclusory references to Gabriel Mendelberg, Esq. as an “associate” of K&M prior to bringing the special proceeding, do not sustain the first cause of action.

A claim for unjust enrichment requires a showing that “(1) a party was enriched (2) at the other party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (Mandarin Trading Ltd. v. Wildenstein, 16 N.Y. 3d 173, 944 N.E. 2d 1104, 919 N.Y.S. 2d 465 [2011]). Unjust enrichment is not a, “catchall cause of action to be used when others fail.” “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...An unjust enrichment claim is not available where it simply duplicates or replaces a conventional contract or tort claim.” An unjust enrichment claim cannot be sustained when it is being used to remedy potential defects in a pleading (Corsello v. Verizon New York, Inc., 18 N.Y. 3d 777, 967 N.E. 2d 1177, 944 N.Y.S. 2d 732 [2012]).

Plaintiffs have not stated a cause of action for unjust enrichment, that is separate from the claim of breach of contract. Plaintiffs have not provided more than conclusory assertion that K&M was enriched by collecting fees when Insightec was not K&M’s client, and only paid fees to Law Offices of Gabriel Mendelberg, P.C., warranting dismissal of the second cause of action for unjust enrichment.

There is no need to address the remainder of the arguments made in Motion Sequence 002 for dismissal pursuant to CPLR §3211[a][1] and [5]. The complaint fails to state sustainable causes of action for breach of contract or unjust enrichment.

Accordingly, it is ORDERED that this motion pursuant to CPLR §3211[a][7], to dismiss the causes of action asserted in the complaint against defendant Insightec, Ltd., is granted, and it is further,

ORDERED that the third cause of action asserted against Insightec, Ltd., is severed and dismissed, and it is further,

ORDERED that the motion filed under Motion Sequence 002, pursuant to CPLR §3211[a][1],[5],[7], seeking to dismiss the remaining causes of action asserted in the complaint against defendant, Kreisberg & Maitland, LLP, is granted, and it is further,

ORDERED that the first and second causes of action asserted in the complaint against defendant, Kreisberg & Maitland, LLP, and this action are dismissed, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

Dated: March 30, 2017



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE