TC Tradeco, LLC v Karmaloop Europe, AG
2017 NY Slip Op 31217(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 651631/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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TC TRADECO, LLC,

Plaintiff,

-against-

KARMALOOP EUROPE, AG, CAPSTONE PARTNERS, LLC, BRIAN DAVIES, AND GREG SELKOE,

Defendants.

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Index No.: 651631/2015

Mtn Seq. No. 004

DECISION AND ORDER

JEFFREY K. OING, J.

Plaintiff, TC Tradeco, LLC, moves, pursuant to CPLR 3025(b), for leave to file a second amended complaint.

Defendant, Greg Selkoe ("Selkoe"), cross-moves, pursuant to 22 NYCRR § 130-1.1, for the imposition of sanctions in the form of costs and attorneys' fees incurred in opposing plaintiff's motion.

Factual Background

This action stems from a dispute relating to an Inventory Supply Agreement ("ISA") between Karmaloop, Inc., Karmaloop TV, defendant Karmaloop Europe, AG ("Karmaloop Europe") (all three Karmaloop entities, collectively referred to as "Karmaloop") and plaintiff. The dispute also implicates an alleged "Payment Protection Agreement" ("PPA") between plaintiff, Karmaloop, and defendants Capstone Partners, LLC ("Capstone Partners") and defendant Selkoe (NYSCEF Doc. No. 10). The parties allegedly entered into the PPA to provide plaintiff with security after

Karmaloop had defaulted on their payment obligations pursuant to the ISA (Proposed Second Amend. Compl., ¶ 32) (NYSCEF Doc. No. 82). Defendant Brian Davies ("Davies") signed the PPA on behalf of Capstone Partners (NYSCEF Doc. No. 10). Defendant Selkoe signed a personal guarantee agreeing to be liable for any breach by Karmaloop of the PPA (Id., p. 2).

Familiarity with the underlying facts is presumed. As relevant to the instant motion, in its first amended complaint, plaintiff asserted the following causes of action: 1) breach of the ISA Agreement against Karmaloop Europe; 2) breach of the PPA Agreement against Karmaloop Europe; 3) breach of the PPA Agreement against Capstone Partners; 4) breach of the PPA Agreement against Selkoe; and 5) breach of fiduciary duty against Davies (NYSCEF Doc. No. 12).

This Court denied defendant Selkoe's motion to dismiss the fourth cause of action against him (NYSCEF Doc. No. 53). This Court also granted plaintiff's motion for a default judgment against defendant Karmaloop Europe on the issue of liability (Id.). The other defendants interposed individual answers (NYSCEF Doc. Nos. 17, 18 & 57).

In this motion to serve a second amended complaint, plaintiff seeks to add as a defendant CRS Capstone Partners, LLC ("CRS Capstone"), and to interpose four additional causes of action: 1) unjust enrichment against Capstone Partners, CRS

Capstone, Davies and Selkoe (the sixth cause of action); 2) negligent misrepresentation against Davies, CRS Capstone and Capstone Partners (all three defendants, collectively, the "Capstone Defendants") (the seventh cause of action); 3) tortious interference with contract against Davies (the eighth cause of action); and 4) equitable estoppel against the Capstone Defendants (the ninth cause of action). Additionally, plaintiff seeks to revive its factual allegations to reflect that CRS Capstone, and not Capstone Partners, is the entity responsible for providing corporate restructuring services to Karmaloop.

The parties have stipulated to the addition of CRS Capstone as a defendant herein (NYSCEF Doc. No. 85). Accordingly, that branch of the motion to amend the complaint to add CRS Capstone is granted on consent.

Discussion

Turning to that branch of the motion to interpose the four additional causes of action, the principle is well settled that "[m]otions for leave to amend pleadings should be freely granted ... absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010] [internal citation omitted]). As such, the "[m]ovant need not establish the merit of the proposed new allegations" (Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]).

Also, the mere lateness of an amendment is not sufficient to bar it, as it must be lateness combined with significant prejudice to the other side to warrant denial (Jacobson v Croman, 107 AD3d 644, 645 [1st Dept 2013] [internal citation omitted]). To constitute the kind of prejudice necessary to defeat the amendment, there must not only be prejudice to the other party from the amendment itself, but the other party must also have suffered some "[s]pecial right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (Id., quoting Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]).

Here, the record demonstrates that defendants will not suffer any prejudice. Indeed, defendants have not advanced any such contention. The question that remains is whether the proposed amendments are palpably insufficient or patently devoid of merit.

A. Unjust Enrichment Against the Capstone Defendants and Selkoe

In the context of commercial cases where there is a valid and enforceable contract, courts have generally precluded pleading quasi-contractual claims, such as unjust enrichment (IIG Capital LLC v Archipelago, L.L.C., 36 AD3d 401, 404-405 [1st Dept 2007]). In circumstances where the very existence of a contract is contested, however, or the contract does not cover the

disputed issue, a party may plead such equitable relief in the alternative (Id.).

Here, the Capstone Defendants dispute that they ever entered into a contract, and thus dispute the very existence, enforceability, and validity of the contracts (Capstone Partners Answer, ¶¶ 29-35 [NYSCEF Doc. No. 18]; Davies Answer, ¶¶ 29-35 [NYSCEF Doc. No. 17]). Although Selkoe does not dispute the existence of the PPA, he does dispute the terms of the contract (Selkoe Answer, ¶¶ 31-35[NYSCEF Doc. No. 57]). Under these circumstances, a "bona fide dispute" exists concerning the PPA, and, as such, plaintiff may assert, as an alternative claim, an unjust enrichment cause of action (IIG Capital LLC, supra, 36 AD3d at 401).

To successfully plead an unjust enrichment cause of action, a plaintiff must allege that: 1) the defendant was enriched; 2) at the plaintiff's expense; and 3) that it is "against equity and good conscience" to allow the defendant to retain the benefits sought to be recovered (Schroeder v Pinterest Inc., 133 AD3d 12, 26 [1st Dept 2015] [internal quotation marks and citations omitted]). Plaintiff must also plead a sufficiently close relationship with the defendant that, although not amounting to privity, must be one in which there could have been reliance or inducement (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182

[2011]; Joseph P. Carroll Ltd. v Ping-Shen, 140 AD3d 544, 544 [1st Dept 2016]).

The Capstone Defendants and Selkoe both argue that the entirety of their alleged conduct is related to, and reliant upon, the PPA and their alleged breach of that agreement. As such, they argue the existence of the PPA precludes recovery for unjust enrichment. Selkoe further argues that this same principle applies to personal guarantors of contracts and, as a result, plaintiff cannot assert an unjust enrichment claim against him in his capacity as personal guarantor of the PPA. He argues that any potential claims against the guarantor are covered under the guarantee. Selkoe separately argues that if he had not guaranteed Karmaloop's performance under the PPA, or if the guarantee was invalid, he could not be held liable under a claim of unjust enrichment for Karmaloop's or Capstone's alleged breaches as an entity's officers and directors are not responsible in contract or tort for an entity's breach of contract. These arguments are unavailing.

Here, plaintiff has pleaded that the Capstone Defendants and Selkoe were enriched at plaintiff's expense as evidenced by plaintiff's continued sourcing of products for Karmaloop, an effort for which plaintiff was allegedly not compensated (Proposed Second Amend. Compl., ¶¶ 111-116 [NYSCEF Doc. No. 82]). Plaintiff further pleads that Karmaloop was able to remain in

business longer than it would have otherwise been able to due to plaintiff's sourcing of products to Karmaloop, and that Karmaloop benefitted from an extended business life. Further, plaintiff alleges it would be against equity and good conscience if defendants were allowed to retain the financial benefits of plaintiff's continued uncompensated sourcing of products. With respect to the requisite direct relationship, plaintiff set forth allegations that such relationship arose by virtue of the parties' negotiations, executions and implementations of the ISA and PPA agreements.

Based on the foregoing, plaintiff has sufficiently pleaded a claim for unjust enrichment. For those same reasons, the claim is not patently devoid of merit. Accordingly, that branch of the motion to assert such a claim is granted. Under these circumstances, defendant Selkoe's cross motion for an the imposition of sanctions pursuant to 22 NYCRR § 130-1.1 is denied.

B. Negligent Misrepresentation against the Capstone Defendants

A claim for negligent misrepresentation requires the following allegations: 1) the existence of a special or privity-like relationship that imposes a duty on the defendant to provide accurate information to the plaintiff; 2) that the information provided was incorrect; and 3) that plaintiff reasonably relied on that information (Parrott v Coopers & Lybrand, 95 NY2d 479 [2000]). "In the commercial context, a duty to speak with care

exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information" (J.P. Morgan Sec. Inc. v Ader, 127 AD3d 506, 506 [1st Dept 2015] [internal quotation marks and citations omitted]). Not all representations between buyer and seller give rise to this relationship. There must be an independent special duty of care between the parties to the business transaction (Id.). The relationship must be one so close "as to approach that of privity" and will be imposed only on those persons who have unique or specialized expertise or maintain a position of confidence and trust with the injured party (Id. at 507). An arms-length business relationship between sophisticated parties will not give rise to the requisite confidential and fiduciary duty necessary to plead negligent misrepresentation claim (Id. at 506). Although, generally speaking, prior business dealings may be sufficient to give rise to this requisite relationship (AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6 [2d Dept 2008]), a conventional business relationship is not enough to create this relationship absent additional factors (Feigen v Advance Capital Mgt. Corp., 150 AD2d 281, 283 [1st Dept 1989] [citations omitted]).

Here, with respect to the requisite relationship element for a negligent misrepresentation claim, the second amended complaint sets forth the following allegations:

> By virtue of the negotiation and execution of the Payment Protection Agreement, as well the contractual relationship established by the Payment Protection Agreement, Defendant Davies, Defendant CRS and Defendant Capstone Partners each had a special relationship of trust or confidence vis a vis Plaintiff, and were therefore under a duty to impart correct information to Plaintiff

(Proposed Second Amend. Compl., ¶ 122). These allegations, without more, are palpably insufficient to demonstrate the requisite relationship of trust or confidence between the parties that is different from that arising between a typical, arms-length business relationship between sophisticated parties.

Accordingly, that branch of plaintiff's motion to assert a claim for negligent misrepresentation is denied.

C. Tortious Interference with Contract Against Defendant Davies

A claim for tortious interference with contract requires the following allegations: the existence of an enforceable contract, defendant's knowledge of the contract, defendant's intentional procurement of the breach of that contract, a breach of that contract, and resultant damages to plaintiff (RLR Realty Corp. v Duane Reade Inc., 145 AD3d 444, 445 [1st Dept 2016] [internal citations omitted]). Further, there is an "enhanced pleading standard" when a claim seeks to hold a corporate officer liable for inducing a breach of contract between a corporation and a

third party (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108-109 [1st Dept 2002]; Petkanas v Kooyman, 303 AD2d 303, 305-306 [1st Dept 2003]). There must be more than just a plausible claim for inducing a breach of contract against the officer (Id.). Thus, to plead liability for tortious interference with contract against a corporate officer, the complaint must allege that the individual officer's acts were either outside the scope of his or her employment, or, if within the scope of employment, that the officer personally profited from these acts in contravention of the corporation's interests (Hoag v Chancellor, 246 AD2d 224, 228 [1st Dept 1998]). Moreover, "[a] pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant" (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., supra, 296 AD2d at 110 [internal citations omitted]; Lau v Lazar, 130 AD3d 413, 413-414 [1st Dept 2015]).

Here, plaintiff has failed to plead sufficient facts to show that Davies acted for personal profit, independent of any benefit bestowed on CRS Capstone as a corporate entity. In its second proposed amended complaint, plaintiff merely alleges that both "defendant Capstone Partners and/or Defendant CRS agreed [in the

PPA] that 'it shall not pre-approve or authorize Karmaloop to make any payment to any person or entity if Karmaloop is not then current on any and all sums then owed" (Proposed Second Amend. Compl., ¶ 38 [NYSCEF Doc. No. 82]). Such an allegation, standing alone, is insufficient to subject defendant Davies to a tortious interference claim. Plaintiff's allegation that "Davies personally profited from his procurement of the breach of the [PPA]" (Proposed Second Amend. Compl., ¶ 30) does not eliminate the above-noted pleading deficiency. Without more, the proposed pleading is palpably insufficient.

Accordingly, that branch of the motion to assert a claim for tortious interference with contract against defendant Davies is denied.

D. Equitable Estoppel Against the Capstone Defendants

An equitable estoppel claim requires a party to plead: 1) conduct amounting to false representation or concealment of material facts "[w]hich is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks [sic] to assert"; 2) an intention or expectation that the relying party will act upon the conduct; and 3) actual or constructive knowledge of the true facts (757 3rd Ave. Assoc., LLC v Patel, 117 AD3d 451, 453 [1st Dept 2014] [internal quotation marks and citations omitted]). The party asserting estoppel must establish that he: 1) lacked

knowledge of the true facts; 2) relied upon the party estopped; and 3) experienced a prejudicial change in his position (BWA Corp. v Alltrans Express U.S.A., 112 AD2d 850, 853 [1st Dept 1985]). Equitable estoppel, however, is technically not an independent cause of action, but is typically an affirmative defense.

Here, plaintiff alleges that the Capstone Defendants falsely represented that defendant Davies was signing on behalf of Capstone Partners and that they expected that plaintiff would act upon these representations by entering into the PPA and not terminate the ISA. Plaintiff further alleges that the Capstone Defendants had actual knowledge that defendant Davies was not authorized to sign the PPA on Capstone Partners' behalf, as he was not employed by Capstone Partners, but rather CRS Capstone. Plaintiff then alleges that it relied on these false representations by entering into an agreement with an individual who lacked contractual authority, namely, defendant Davies, and was subsequently harmed, while the defendants benefitted. Based on these allegations, plaintiff has sufficiently pleaded a cause of action sounding in misrepresentation.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion to add CRS Capstone Partners, LLC as a defendant is granted on consent; and it is further

ORDERED that defendant CRS Capstone Partners, LLC shall move or answer with respect to the second amended complaint within twenty (20) days after service of such pleading; and it is further

ORDERED that plaintiff's motion for leave to amend the complaint is granted to the extent indicated: leave is granted to add the sixth (unjust enrichment), and ninth (equitable estoppel) causes of action, and plaintiff is directed to serve the amended complaint in the form annexed to the moving papers but conformed to this decision and order, within ten (10) days of this decision and order, together with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed seventh (negligent misrepresentation) and eighth (tortious interference) causes of action; and it is further

ORDERED that defendant Selkoe's cross motion for sanctions is denied; and it is further

ORDERED that defendants shall move or answer the second amended complaint within twenty (20) days of service of such pleading.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.