

Hyperlync Tech., Inc. v Verizon Sourcing LLC

2018 NY Slip Op 33123(U)

December 5, 2018

Supreme Court, New York County

Docket Number: 650151/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

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HYPERLYNC TECHNOLOGIES, INC., HYPERLYNC MULTIMEDIA ISRAEL, LTD.

Plaintiff,

- v -

VERIZON SOURCING LLC, SYNCHRONOSS TECHNOLOGIES, INC.,

Defendant.

INDEX NO. 650151/2015

MOTION DATE 08/01/2018

MOTION SEQ. NO. 009

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is

In this action to recover damages for, among other things, breach of contract, defendant Verizon Sourcing LLC ("Verizon") moves for summary judgment dismissing the complaint of plaintiffs Hyperlync Technologies, Inc. and Hyperlync Multimedia Israel, Ltd. (collectively "Hyperlync").

Hyperlync, which specializes in information technology, has provided software products to Verizon since 2010. On or about October 12, 2012, Hyperlync and Verizon entered into a Nondisclosure Agreement (the "NDA"). The NDA provides that

- 1. ...All information of any type or character that is either disclosed to the other party or with which the other party comes into contact shall be considered as the confidential information of the disclosing party including without limitation technical, customer, personnel and/or business

information in written, graphic, oral or other tangible or intangible form (“Confidential Information”).

3. Each party acknowledges and agrees as follows:

c. Information which is disclosed orally shall not be considered Confidential Information unless it is reduced to writing or to a written summary which identifies the specific information to be considered as Confidential Information, and such writing is provided to the receiving party at the time of disclosure or within thirty (30) days;

e. To limit access to such Confidential Information to a party’s employees, contractors, and agents who (i) have a need to know the Confidential Information in order for such party to participate in the matter of mutual interest described above; and (ii) have also entered into a written agreement with the receiving party which provides the same or greater protections to any confidential Information provided hereunder

In 2013, Hyperlync developed a peer-to-peer phone provisioning app named Phone Cloner (“Phone Cloner”). Hyperlync argues that Phone Cloner was an improvement over other apps because it allowed users to copy content from one mobile device to another via a Wi-Fi network rather than utilizing hard-wire connections or cloud services to perform the data transfers.

Hyperlync presented the concept of the Phone Cloner to Verizon and employee, Joseph Berger (“Berger”), in March of 2013. Thereafter, Berger told Hyperlync that Verizon was interested in Phone Cloner and Hyperlync gave a PowerPoint presentation and had additional meetings with Verizon regarding Phone Cloner in which Hyperlync gave functioning versions of the app as well as technical information for testing. Hyperlync alleges that it disclosed its Phone Cloner secret phone-to-phone transfer process to Verizon pursuant to the NDA.

In August 2013, Verizon employee Vishal Grover (“Grover”) gave a demonstration of Phone Cloner at a Verizon “innovation fair” in Walnut Creek, California (the “Walnut Creek Meeting”). Prior to the Walnut Creek Meeting, Grover was trained by Hyperlync on the operation of the Phone Cloner. At the meeting, Grover displayed a poster containing screen shots of Phone Cloner’s interface.

The Walnut Creek Meeting was attended by Verizon employees and an outside guest, Sanjeev Bhalla (“Bhalla”), owner of Strumsoft, a Verizon vendor at the time of the meeting. At his deposition, Bhalla testified that at this demo day, like at other Verizon demo days that he attended, the presentations consisted of demonstrations of user functionality.

Following the Walnut Creek Meeting, Bhalla sent an email to two employees of defendant Synchronoss Technologies, Inc. (“Synchronoss”)¹, a competitor of Hyperlync, informing them that a “content transfer” app was demonstrated at the meeting. The email did not reference Hyperlync or Phone Cloner. Synchronoss ultimately acquired Strumsoft and Bhalla became the former’s employee. Bhalla testified that he neither received materials/information from Verizon regarding Phone Cloner or any peer-to-peer provisioning technology nor worked on any phone provisioning app while at Synchronoss.

¹ On September 5, 2017, Hyperlync and Synchronoss entered into a Stipulation of Voluntary Discontinuance pursuant to which Synchronoss was dismissed from this action and all claims against it were discontinued.

Hyperlync claims that, in September 2013, Grover told Hyperlync employee Stephen Morrow (“Morrow”) that Verizon gave Hyperlync’s confidential Phone Cloner information to Synchronoss and instructed it to copy the product.² However, Hyperlync’s witnesses were unable to identify the specific information that was allegedly passed to Synchronoss.³

Hyperlync also claims that Grover allegedly informed Hyperlync that Verizon planned to give any peer-to-peer provisioning contract to Synchronoss instead of Hyperlync. In October 2013, Verizon declined Hyperlync’s terms for continued development of Phone Cloner.

Hyperlync contends that after Verizon disclosed Hyperlync’s trade secret information to Synchronoss in breach of the NDA, Synchronoss then released its own phone provisioning app, named MCT, based on the misappropriated Hyperlync information. Hyperlync maintains that Synchronoss’s MCT app had the same functionality, look and feel as Hyperlync’s Phone Cloner.

Verizon moved to dismiss Hyperlync’s claims and in a decision dated February 17, 2016 (the “February 2016 decision”), I granted the motion as to the claims for intentional interference with a contract, civil conspiracy, conversion and fraudulent

² At his deposition, Grover testified that he did not provide any confidential Hyperlync information to Synchronoss.

³ Morrow stated during his deposition that, “I cannot tell you for sure what [information] went to Synchronoss...” Similarly, Harry Fox (“Fox”), Hyperlync CEO, stated, “I do not have direct knowledge of what information, complete information that was given by Verizon over to [Synchronoss].”

concealment. In the February 2016 decision I denied Verizon's motion to dismiss as to Hyperlync's claims for misappropriation of trade secrets, breach of contract, and misappropriation of ideas. Verizon now moves, pursuant to CPLR 3212, for summary judgment on the remaining three claims against it.

Discussion

1. Misappropriation of trade secrets

Verizon argues that Hyperlync's trade secret misappropriation cause of action must be dismissed because, even at the end of discovery, Hyperlync has failed to identify its trade secret. When a plaintiff claims misappropriation of a trade secret, it must prove that: (1) it possessed a trade secret; and (2) defendant used the trade secret "in breach of an agreement, confidence, or duty, or as a result of discovery by improper means."

Integrated Cash Management Services, Inc. v. Digital Transactions, Inc., 920 F.2d 171, 173 (2d Cir. 1990) (citation omitted); *Smartix Intern. Corp. v. Mastercard Intern. LLC*, 2010 N.Y. Slip. Op. 33786 (U) (Sup. Ct. New York County 2010); *aff'd*, 90 A.D.3d 469 (1st Dept. 2011).

To determine whether a plaintiff possesses a trade secret, several factors are considered: "(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. Inc. v. Janien*, 82 N.Y.2d 395, 407 (1993) (quoting Restatement of Torts § 757, comment *b*). Moreover, a plaintiff that claims to have a trade secret must describe the alleged trade secret “with sufficient particularity, both at the time of disclosure and throughout the litigation.” *Big Vision Private Ltd. v. E.I. DuPont De Nemours & Co.*, 1 F.Supp.3d 224, 257 (S.D.N.Y. 2014).

Hyperlync states that its trade secret arises “from the methods that it developed – in secret – for securely transferring many types of data (e.g., contacts, texts, emails, pictures, videos, passwords, etc.) directly from one mobile phone to another, across platforms, and over a Wi-Fi network.” At oral argument, and after being pressed, Hyperlync’s counsel stated that the trade secret is the phone transfer application that Hyperlync created with its bundle of functionality, which no other product on the market contained. And, in addition to the functionality, the trade secret was the ability to make the parts work together “seamlessly” at its fast speed.

Hyperlync’s voluminous papers and exhibits reveal that the trade secret appears generally to be Phone Cloner’s interface, speed, and platform to platform transfer without use of the cloud. But Hyperlync submits no particular information that indicates why or how these facets of its model are unique, proprietary, and secret. Hyperlync’s explanation of its trade secret is nebulous at best, and Hyperlync has failed to describe its trade secret with the requisite particularity. *See Big Vision Private Ltd.*, 1 F.Supp.3d at 257 (holding that documents that allegedly disclose a trade secret lacked any particularity and thus plaintiff’s claim for misappropriation of trade secret failed); *Apogee Handcraft, Inc. v. Verragio, Ltd.*, 155 A.D.3d 494, 496 (2017) (holding that counterclaim for

misappropriation of trade secrets was properly dismissed by the lower court where “defendant failed to proffer sufficient evidence to show that the models were trade secrets.”)

Verizon also argues that the cause of action for misappropriation of trade secret must be dismissed because Hyperlync cannot prove any misappropriation by Verizon in violation of the NDA. Verizon notes that Hyperlync has not submitted any documents or testimony to raise an issue of fact that the “how to” of the Phone Cloner app was passed to Verizon. At his deposition, Morrow testified that he discussed Phone Cloner with Grover extensively but offered scant details. Indeed, Hyperlync admits that Morrow’s recollection during his deposition of what information he gave to Verizon about the Phone Cloner was “vague.” Morrow was clear, however, that Hyperlync did not disseminate any source code associated with Phone Cloner.

In sum, Hyperlync has failed adequately to identify the alleged misappropriated trade secret and has failed to raise an issue that Verizon passed the alleged trade secret to anyone else. Accordingly, I grant Verizon’s motion to dismiss the trade secret misappropriation cause of action.

2. Misappropriation of ideas

To prove a claim for misappropriation of ideas, a plaintiff must establish: (1) a legal relationship between the parties in the form of a fiduciary relationship, an express contract, implied contract, or quasi contract; and (2) that it possessed an idea that was novel and concrete. *See Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 23 (1st Dept. 2015).

Further, an idea cannot be novel if it is in the public domain. *Ferber v. Sterndent Corp.*, 51 N.Y.2d 782, 784 (1980).

Verizon argues that it is entitled to summary judgment on this claim because Hyperlync's idea was not novel and was, at best, a "mixture of known ingredients."

Hyperlync admits that novelty does not usually encompass ideas that are in the public domain or comprise an adaptation of existing knowledge but argues that the standard of novelty is not novelty to the world but rather novelty to the buyer. In support of this standard, Hyperlync cites to a federal court decision, *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000). At least one state court has deemed incorrect *Nadel's* interpretation of novelty. See *Lapine v. Seinfeld*, 918 N.Y.S.2d 313, 321 (Sup. Ct. N.Y. Co. 2011) (stating that in its opinion, *Nadel's* holding is based on a misreading of *Apfel v. Prudential-Bache Secs. Inc.*, 81 N.Y.2d 470 (1993) and dismissing an idea misappropriation claim based on documentary evidence showing that plaintiff's idea was not novel as a matter of law). In the absence of any state court decisions supporting the "novelty to the buyer" standard, I decline to follow *Nadel*.

When applying the standard of "novelty to the world" in this case, Hyperlync's claim for misappropriation of ideas fails. Although Hyperlync argues that the Phone Cloner's bundle of functionality was unlike other products on the market, it has failed to raise an issue of fact as to the app's novelty. In fact, the Morrow and Berger depositions confirmed that the idea for data transfer between two phones via Wi-Fi was already in the public domain at the time of the Phone Cloner app. Verizon's evidence showed that the

following applications for Wi-Fi data transfer pre-dated Phone Cloner: Zappya, Shareable, HTC Transfer Tool, and My Backup Pro.

Idea misappropriation claims cannot stand where, as in this case, the material was in the public domain. *Shroeder v. Pinterest Inc.*, 133 A.D.3d 12, 29 (1st Dept. 2015). I find that even if Hyperlync's app was a creative bundling of known elements, this does not render it "novel." *See Marraccini v. Bertelsmann Music Group Inc.*, 221 A.D.2d 95, 98 (3d Dept. 1996) (affirming dismissal of idea misappropriation claim where the idea was merely a "creative variation" on a preexisting idea already in the public domain).

Hyperlync has failed to raise a fact issue regarding novelty and I therefore dismiss the misappropriation of ideas cause of action. *See Delaney v. Weston*, 66 A.D.3d 519, 520 (1st Dept. 2009) (upholding lower court's grant of summary judgment on misappropriation of ideas claim where idea was neither novel nor original).

3. Breach of contract

A New York plaintiff alleging a breach of contract claim must establish "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

Hyperlync alleges that Verizon breached the NDA when: a) Grover disclosed information about Phone Cloner to Synchronoss; and b) Bhalla, a non-Verizon employee, attended the Walnut Creek Meeting and viewed Grover's Phone Cloner demonstration. I examine these allegations separately.

a. Grover's Alleged Disclosures

Verizon argues that Hyperlync's breach of contract claim based on Grover's conduct should be dismissed because it lacks an evidentiary basis and is supported, at best, by unreliable and inadmissible hearsay.

In support of its allegation that Grover disclosed information about Phone Cloner to Synchronoss, Hyperlync relies on Morrow's general statement that Grover told him, during a phone call, that Verizon was passing confidential information to Synchronoss. As discussed above, however, Morrow testified that he could not recall any specific details about what Grover told him and, importantly, that Grover "did not specify" whether any of the Phone Cloner information was passed along to Synchronoss.

As additional support of its allegation that Grover disclosed confidential Hyperlync information, Hyperlync surmises that because Verizon assigned Grover to work with Synchronoss to develop a competing app, after his work with Hyperlync on Phone Cloner, it can be "inferred" that this conduct breached the NDA. Although the fact that Grover worked with Synchronoss after closely working with Hyperlync is troubling, without more, this allegation is insufficient to support Hyperlync's breach of contract claim. *See Grullon v. City of New York*, 297 A.D.2d 261, 263-264 (1st Dept. 2002) (noting that "conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation") (internal quotation marks and citations omitted).

b. Bhalla's Attendance at the Walnut Creek Meeting

Hyperlync's other breach of contract claim centers on the fact that Bhalla – who was not a Verizon employee - attended the Walnut Creek Meeting presentation, at which a poster showing screen shots of the Phone Cloner app was displayed. Hyperlync then concludes that Bhalla's appearance constituted a breach of the NDA.

Verizon argues that the allegations pertaining to Bhalla are speculative because there is no evidence that Bhalla was exposed to any information covered by the NDA during the presentation at the Walnut Creek Meeting. Verizon also asserts that any information viewed at the Walnut Creek Meeting was not covered by the NDA because it was otherwise disclosed.

Even assuming arguendo that Hyperlync is correct and Bhalla's mere presence at the Walnut Creek Meeting could be considered a potential breach of the NDA, the claim Hyperlync's claim ultimately fails due to a provision of the NDA which rendered the information disclosed non-confidential.⁴ Specifically, section 4 of the NDA states that,

These obligations do not apply to Confidential Information which, as shown by reasonably documented proof:

- c. Now is or later becomes publicly known through no breach of confidential obligation by the receiving party; or
- d. Is disclosed to a third party by the source without a similar nondisclosure restriction...

⁴ In its opposition papers, Hyperlync does not address this contractual provision or respond to Verizon's argument on this point.

Verizon has submitted evidence showing that Hyperlync disclosed information about Phone Cloner with third parties, with whom they did not have nondisclosure agreements, via presentations and YouTube videos. It is undisputed that these presentations and videos shared Phone Cloner screenshots and the steps of its user interface. Verizon submitted a Declaration of Records Custodian for Google Inc. (the “Google Declaration”) which indicated that a number of Hyperlync’s Phone Cloner YouTube videos were public or unlisted from January 24, 2013 through 2016.⁵ Fox corroborated that “[t]here were many customers who [we] had verbal agreements with and no written agreements that did get – receive the links to the video.”

Fox admitted that Hyperlync gave Phone Cloner presentations to groups/individuals without nondisclosure agreements. One such presentation was made to Leonard Tan (“Tan”) and Fox stated that there was not a nondisclosure agreement because Tan’s group was introduced to Fox “by somebody who could vouch for him.” Rick Wyand (“Wyand”), Hyperlync’s VP of Sales, also sent Phone Cloner information to parties without nondisclosure agreements. In an email to Sagar Mathur, dated October 23, 2013, Wyand noted that the parties were not under a nondisclosure agreement yet attached a Phone Cloner power point and provided YouTube links.

Here, the NDA is clear that if information was disclosed to a third party without “a similar nondisclosure restriction,” then such information was no longer confidential

⁵ The Google Declaration stated that Google’s visibility settings for videos are public, unlisted and private. According to the Google Declaration, “public” means that a video was publicly available and searchable and “unlisted” means that a video was available to anyone who had the video’s URL.

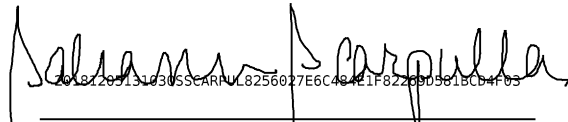
pursuant to the NDA. It is equally clear that Hyperlync’s presentations and YouTube videos disclosed similar information as was presented at the Walnut Creek Meeting to third parties without nondisclosure agreements. Therefore, under section 4 of the NDA, the information presented at the Walnut Creek Meeting was not confidential, and Bhalla’s attendance at the Walnut Creek Meeting does not support a breach of NDA claim. Consequently, I find that Verizon demonstrated its entitlement to summary judgment on the breach of contract cause of action.

In accordance with the foregoing, it is

ORDERED, that Verizon Sourcing LLC’s motion for summary judgment against plaintiffs Hyperlync Technologies, Inc. and Hyperlync Multimedia Israel, Ltd. is granted; and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>12/5/18</u> DATE			 SALIANN SCARPULLA, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT