MSL Productions, Inc. v IMR Group LLC
2013 NY Slip Op 33746(U)
March 8, 2013
Supreme Court, New York State
Docket Number: 018657-10
Judge: Vito M. Destefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

MSL PRODUCTIONS, INC. and GARY CIOFFI,

Plaintiffs,

-against-

IMR GROUP LLC d/b/a JACK RUSSELL GROUP, IRA WAKS, RICHARD RATHE, GLENN MARK, JONATHAN WAKS, individually and in his capacity as Executor of the Estate of IRA WAKS and BROOKS NELSON,

Defendants.

Decision and Order

MOTION SUBMITTED: November 14, 2013
MOTION SEQUENCE:01, 02
INDEX NO.:018657-10

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
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In an action to recover damages for, *inter alia*, breach of contract, the Defendants move for an order pursuant to CPLR 3211(a)(7) and 3212 dismissing the causes of action numbered one through ten in the complaint. The Plaintiffs cross-move for an order pursuant to CPLR 3124 compelling the Defendants to produce certain documents and to submit to depositions.

For the reasons that follow, the Defendants' motion is granted in part and denied in part

and the Plaintiffs' cross motion is granted.

Factual Background

In 2005, Plaintiff MSL Productions, Inc. ("MSL"), a production company which creates exhibits and signage for trade shows and various companies was formed. By 2007, MSL had incurred debts of approximately $2,000,000 that it was unable to satisfy. In late August of 2007, Plaintiff Gary Cioffi, the Chief Executive Officer of MSL, announced to the staff at MSL that it would be going out of business. Cioffi and Shawn Garrity, MSL's majority shareholders, determined that MSL should be dissolved and its assets sold to satisfy MSL's debts (Ex. "1" to Motion at ¶¶ 1-15).

In September 2007, Cioffi met with Defendants Richard Rathe, Ira Waks ("I. Waks")[1], Jonathan Waks ("J. Waks") and Glenn Mark and all agreed that MSL would sell its assets to a company to be formed by Rathe, I. Waks and Mark. The company to be formed - Defendant IMR Group LLC d/b/a Jack Russell Group ("JRG"), was to pay commissions to MSL; it employed J. Waks and Defendant Brooks Nelson (Ex. "1" to Motion ¶¶ 19-21).

As a precondition to the agreement, Cioffi agreed to allow JRG to purchase a $470,000 debt I. Waks owed to Cioffi at a substantially discounted price of $250,000 (Ex. "1" ¶¶ 25-32) (the "Waks debt").

In October 2007, MSL ceased doing business and terminated its employees. Cioffi allowed I. Waks, J. Waks, Nelson and Mark to continue occupying MSL's offices so that they could transition MSL's accounts and projects to JRG. At about the same time, JRG was formed.

[1] Ira Waks is deceased and now represented by his estate (Ex "1" to Cross Motion ¶ 16).

Cioffi assigned to JRG two of its accounts[2] and referred new client Astra Zenica to JRG, which resulted in sales of approximately $800,000 to $1,000,000 for JRG (Ex "1" ¶¶ 33-35, 43).[3]

In December 2007, Cioffi, I. Waks and Rathe executed a letter agreement in which Cioffi agreed to provide I. Waks with a general release with respect to the Waks debt. In exchange, I. Waks agreed to surrender his shares of MSL and JRG agreed to pay $150,000 to Cioffi at the time of execution and to make an additional payment of $100,000, which was to be paid at a later date (Ex "1" ¶¶ 44-46).[4]

The bulk of MSL's assets had been transferred to JRG by January 2008. Disputes ensued early in 2008. In July 2008, Rathe told Cioffi that JRG would pay no commissions to MSL (Ex "1" at ¶¶ 47-51).

The Plaintiffs thereafter commenced the instant action asserting causes of action for, *inter alia*, breach of contract, fraud and conspiracy. The Defendants answered and asserted counterclaims.

This decision and order shall resolve the parties' motion and cross motion, which respectively seek partial dismissal of the complaint and an order compelling discovery.

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[2] Specifically, the two accounts that were transferred were Scholastic Inc. ("Scholastic") and Arnold Brands Promotions ("Arnold"). By letters dated October 16, 2007, Cioffi wrote to Scholastic and Arnold stating:

> Please be advised that we are transitioning our business operations and assigning the Events and Exhibit Production aspects to IMR Group LLC (dba Jack Russell Group). The key personnel who are already working on your project will continue working on your project at IMR Group LLC. (dba Jack Russell Group)
>
> The existing contract that we have with you is assigned to IMR Group LLC of 555 West 23rd Street, Suite PHG, New York, New York 10011. They will complete the project and you are directed to make payment directly to them. All deposits received by us will be honored by IMR. All invoices for the projects will be sent to you by IMR.
>
> If you need to contact an individual to discuss any aspects of the projects, please feel free to contact Ira Waks at (917) 559-5913 or Ira@jackrussellgroup.net (Ex. "23" to Motion).

[3] According to the complaint, other accounts were transferred as well.

[4] It is undisputed that both payments were made.

The Court's Determination

Defendants' Motion to Dismiss and/or for Summary Judgment

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the pleadings are presumed to be true, and the court must afford the allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943 [2d Dept 2010]).

Breach of Contract (Fifth Cause of Action)

In the fifth cause of action for breach of contract asserted only against JRG, Plaintiffs allege that MSL and JRG entered into an agreement in which MSL would transfer it's assets to JRG and in exchange, for a period of three years, JRG would pay MSL a commission on net sales. JRG did not pay MSL pursuant to the agreement.

The Defendants argue that the oral agreement, "which ostensibly required Defendants' payment of commissions over three years", violates the statute of frauds insofar as the agreement could not be performed within one year.

Pursuant to General Obligations Law § 5–701(a)(10):

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

The agreement at bar violates the statute of frauds as it is an agreement for commissions to be paid for a period of three years. A promise to pay commissions that extends beyond one year that is solely dependent on the acts of a third party and not within a defendant's power to terminate his obligations without thereby breaching the agreement, is within the statute of frauds and must be in writing (*Apostolos v R.D.T. Brokerage Corp.*, 159 AD2d 62 [1st Dept 1990]; *see also AAA Viza, Inc. v Business Payment Systems, LLC*, 38 AD3d 802 [2d Dept 2007]; *Zupan v Blumberg*, 2 NY2d 547 [1957] [since the "terms of the contract are such that the relationship will continue beyond a year, it is within the statute even though the continuing liability to which defendant is subject is merely a contingent one. The endurance of defendant's liability is the deciding factor"]; *Martocci v Greater New York Brewery*, 301 NY 57 [1950]).

Notwithstanding that the oral agreement violates the statute of frauds, it may be enforceable where, as here, viewing the evidence in the light most favorable to the Plaintiffs, there has been "part performance 'unequivocally referable' to the contract by the party seeking to enforce the agreement" (*Barretti v Detore*, 95 AD3d 803 [2d Dept 2012]; *Last Time Beverage Corp. v F&V Distribution Co., LLC.*, 98 AD3d 947 [2d Dept 2012]; *Pinkava v Yurkiw*, 64 AD3d 690 [2d Dept 2009]; *Anostario v Vicinanzo*, 59 NY2d 662 [1983] [it is not sufficient that the oral agreement give significance to plaintiff's actions but, rather, that the actions be 'unintelligible' or 'extraordinary', explainable only with reference to the oral agreement]). Specifically, the part performance which is unequivocally referable to a contract includes the release of the I. Waks debt at a discount and Plaintiffs' transfer of accounts to JRG.

Accordingly, that branch of the Defendants' motion seeking dismissal of the breach of contract claim asserted in the fifth cause of action is denied. To the extent that the Defendants also seek dismissal of the breach of contract claim on CPLR 3212 grounds, that branch of the motion is similarly denied as the Defendants failed to annex a copy of their answer to the motion papers (CPLR 3212[b]).[5]

Unjust Enrichment (Sixth Cause of Action)

The branch of the Defendants' motion seeking summary judgment dismissing the sixth cause of action is denied given Defendants' failure to annex a copy of the answer to their motion papers (CPLR 3212[b]).

Fraud and Civil Conspiracy to Commit Fraud (First and Second Causes of Action)

In the first cause of action, the Plaintiffs allege that the Defendants made false representations with the intent to deceive Plaintiffs and to induce Plaintiffs to act in reliance upon such representations. The first cause of action, only insofar as asserted against JRG, is duplicative of the breach of contract claim and, thus, must be dismissed.[6] A cause of action to recover damages for fraud will not lie when the fraud alleged arises from the breach of a contract

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[5] The Defendants' deficient moving papers were not cured by the cross motion which also did not contain a copy of the Defendants' answer.

[6] Although the breach of contract cause of action is only asserted against JRG, the fraud alleged in the first cause of action is asserted against all of the Defendants. Considering that the individual Defendants were not parties to the agreement between MLS and JRG, they cannot be held liable for breach of that agreement and, thus, the fraud claim insofar as asserted against the individual Defendants is not duplicative of the breach of contract cause of action (*LIUS Group International Endwell, LLC v HFS International, Inc.*, 92 AD3d 918 [2d Dept 2012]; *Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766 [2d Dept 2008]).

(*Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766 [2d Dept 2008]).

In any event, the fraud claim must be dismissed against JRG and the other Defendants. In this regard, the court notes the following: the Plaintiffs allege that the Defendants represented that they would pay a commission to the Plaintiffs on MSL's previous clients and a commission for each new business referral, the "representations made by JRG and the individual Defendants were false at the time they were made, as JRG and the individual Defendants had no intention of JRG paying MSL for the assets transferred to JRG by MSL or new business referrals made by MSL"; at the time of the making of such representations, the Defendants knew such representations were false (Ex. "1" to Motion at ¶¶ 54-57). However, an allegation that a defendant entered into a contract with the 'intent not to perform' is insufficient to sustain a cause of action for fraud (*New York University v Continental Insurance Co.*, 87 NY2d 308, 318 [1995]; *Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766 [2d Dept 2008] [misrepresentation of an intent to perform under the contact is insufficient to sustain a cause of action for fraud]).

With respect to the second cause of action, in order to properly plead a cause of action for civil conspiracy, a plaintiff must allege a "cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). The second cause of action, asserting a civil conspiracy to commit fraud,[7] is dismissed given the dismissal of the fraud cause of action upon which the conspiracy is based (*Dune Deck Owners Corp. v J.J.&P. Associates Corp.*, 85 AD3d 1091, 1096 [2d Dept 2011] [law is well settled that New York does not recognize an independent cause of action based upon a civil conspiracy to commit a tort]; *Scott v Fields*, 85 AD3d 756 [2d Dept 2011] [civil conspiracy to commit a tort stands or falls with the underlying tort]).

Fraud and Civil Conspiracy to Commit Fraud (Third and Fourth Causes of Action)

The fraud allegation in the third cause of action is asserted against I. Waks and Rathe. According to the complaint: I. Waks and Rathe "represented that JRG would only pay MSL for the assets transferred to JRG by MSL and the new business referrals from MSL if Mr. Cioffi accepted $250,000, exclusive of interest, from JRG in full satisfaction of the Waks Debt;" there representations were false when made as neither I. Waks nor Rathe had any "intention of JRG paying MSL for the assets transferred to JRG by MSL or new business referrals made by MSL"; I. Waks and Rathe, knowing the representations to be false at the time they were made, made such representations with the intent to deceive Cioffi and induce him to act in reliance on the

[7] In the second cause of action for civil conspiracy to commit fraud, as against the individual Defendants, the Plaintiffs allege that the individual Defendants, with knowledge that MSL had substantial debts which it could not satisfy, agreed to engage in a scheme or plan to obtain the assets of MSL and MSL's referrals of new business without ever paying MSL for the same.

misrepresentations (Ex. "1" to Motion at ¶¶ 79-83).[8] As noted, however, an allegation that a defendant entered into a contract with the 'intent not to perform' is insufficient to sustain a cause of action for fraud and, thus, the third cause of action must be dismissed.

The civil conspiracy to commit fraud asserted in the fourth cause of action is based upon the fraud allegations asserted against I. Waks and Rathe in the third cause of action. Specifically, the Plaintiffs allege that I. Waks and Rathe agreed to engage in a scheme to make Cioffi release the Waks debt by intentionally making representations that if Cioffi accepted $250,000 in satisfaction of the Waks debt, JRG would pay MSL for transferring its assets and referring new business - although they had no intention of JRG paying MSL (Ex. "1" to Motion at ¶¶ 96-97). Given that there is no cognizable fraud claim in the third cause of action, the fourth cause of action for civil conspiracy to commit fraud is similarly dismissed (*see Perez v Lopez*, 97 AD3d at 560, *supra; Dune Deck Owners Corp. v J.J.&P. Associates Corp.*, 85 AD3d at 1096, *supra*).

Conversion and Civil Conspiracy to Commit Conversion
(Seventh and Eighth Causes of Action)

In the seventh cause of action for conversion, as against all Defendants, the Plaintiffs allege that: the individual Defendants, unlawfully and without MSL's consent, converted and misappropriated the assets of MSL by procuring them without remitting payment to MSL; that they converted MSL's assets for their own benefit and "MSL is entitled to the return of MSL's assets or the equivalent monetary value thereof"; that the Defendants have failed and refused to return MSL's assets that were transferred to JRG; and that the acts of the Defendants were willful, wanton, malicious, and oppressive (Ex. "1" to Motion at ¶¶ 114-18).

In order to maintain a cause of action for conversion, a plaintiff must show that the defendant, intentionally and without authority, assumed or exercised control over the personal property belonging to the plaintiff, interfering with that plaintiff's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *Scott v Fields*, 85 AD3d 756, 757 [2d Dept 2011]).

In the complaint, the Plaintiffs assert that by January 2008, MSL, in accordance with the agreement, had transferred to JRG the bulk of its assets and MSL had complied with its promise

[8] The Plaintiffs argue in their opposition that they believed they were already obligated under the agreement when they executed the I. Waks' release in December 2007 (Memorandum of Law in Opposition at pp 16-18).

to refer new business to JRG (Ex. "1" to Motion at 47).[9] The express language in the complaint that MSL voluntarily transferred its assets to JRG belies the necessary component of conversion that JRG exercised "unauthorized dominion" over MSL's assets. In this regard, if JRG's original possession of MSL's assets was lawful, the cause of action for conversion would have accrued if and when JRG refused to return the assets after MSL made a demand (*In re King*, 305 AD2d 683 [2d Dept 2003] [where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession of the property refuses to retrun it]; *White v City of Mount Vernon*, 221 AD2d 345 [2d Dept 1995]; *Salatino v Salatino*, 64 AD3d 923 [3d Dept 2009]). However, the Plaintiffs have not plead that they made a demand for the return of the assets or that such a demand would have been futile. "Proof of a demand for the return of the subject property 'is an essential ingredient in a conversion action'" (*Cash v Titan Financial Services, Inc.*, 58 AD3d 785 [2d Dept 2009]; 14 NY Practice, Torts § 2:12 ["A demand is a prerequisite to making the conversion claim]).

Insofar as the Plaintiffs' claim for conversion should be dismissed, the claim for civil conspiracy to commit conversion (eighth cause of action) asserted against the individual Defendants must also be dismissed as New York does not recognize civil conspiracy to commit conversion as an independent cause of action (*Dickinson v Igoni*, 76 AD3d 943 [2d Dept 2010]).

Aiding and Abetting Conversion (Ninth Cause of Action)

In the ninth cause of action for aiding and abetting conversion, the Plaintiffs allege that each of the individual Defendants, with actual knowledge of the wrongful conversion, knowingly and actively participated in wrongfully converting MSL's assets for their benefit and the benefit of JRG (Ex. "1" to Motion at ¶¶ 126-28).

In order to maintain a claim for aiding and abetting conversion, a plaintiff must demonstrate: "(1) the existence of a violation committed by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in achievement of the violation" (*Dangerfield v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 2006 WL 335357 [SDNY 2006] [all claims in complaint dismissed except for aiding and abetting conversion]). In view of the fact that Plaintiffs have failed to state a cause of action for conversion, the aiding and abetting conversion claim must also fail (*Dickinson v Igoni*, 76 AD3d at 945, *supra* [where plaintiff failed to plead a valid cause of action sounding in conversion, the cause of action alleging aiding and abetting conversion was dismissed]).

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[9] "MSL's assets consisted solely of current client accounts, client accounts in storage, accounts receivable, work-in-progress projects, and the potential for MSL to refer new business and for its existing clients to do additional business" (Plaintiff's Affidavit in Opposition to Motion to Dismiss at ¶ 13).

Accounting (Tenth Cause of Action)

In the tenth cause of action as against JRG, the Plaintiffs have demanded that JRG account for the funds owed to MSL as a result of revenue generated by the assets that MSL transferred to JRG and the new business referred to JRG by MSL.

Contrary to the Plaintiffs' contention, and in the absence of any fiduciary relationship, the tenth cause of action for an accounting must be dismissed (*Stein v Doukas*, 2012 WL 4094934 [2d Dept Sept 19, 2012] [cause of action for accounting dismissed where defendants established that they were not in a fiduciary relationship with plaintiff]; *LoGerfo v Trustees of Columbia University in City of New York*, 97 AD3d 547 [2d Dept 2012] [right to an accounting is premised upon the existence of a fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest]; *Baer v Complete Office Supply Warehouse Corp.*, 89 AD3d 877 [2d Dept 2011] [accounting cause of action dismissed where complaint failed to plead facts demonstrating the existence of a special, confidential or fiduciary relationship]).

Plaintiffs' Cross Motion to Compel Discovery

On April 11, 2011, the Plaintiffs supplemented there document demand seeking the following:

1. All documents pertaining to all monthly invoices/billing records for JRG and or its subsidiaries and affiliates from September 2007 through November 30, 2010.

2. All documents, pertaining to individual profits and losses for each project worked on by JRG and/or its subsidiaries and affiliates from September 2007 through November 30, 2010.

3. All monthly financial statements for IMR/JRG and/or its subsidiaries and affiliates from September 2007 through November 30, 2010 (Ex. "H" to Ex. "U" to Cross Motion)

(collectively referred to as "financial records").

In a letter written by the court on June 6, 2011 (Warshawsky, J.), the court stated that the above "three requests seem to go to the heart of the issue as to what work was performed on behalf of former MSL clients beginning with the date of the claimed agreement to transfer assets

from MSL" (Ex. "V" to Cross Motion).[10] Considering that summary judgment has been denied with respect to the breach of contract and unjust enrichment causes of action, this court concludes that the financial records are discoverable.

With respect to Plaintiffs' request to compel the Defendants to appear for depositions, there is no opposition to this request as defense counsel has indicated in his motion papers that to the extent any of Plaintiffs' claims survive dismissal and summary judgment, Defendants' depositions shall be scheduled (Affirmation in Opposition at ¶ 9).

Based on the foregoing, it is hereby

Ordered that the branches of the Defendants' motion seeking dismissal of the first, second, third, fourth, seventh, eighth, ninth and tenth causes of action are granted and those causes of action are dismissed; and it is further

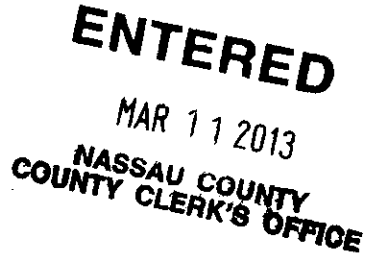
Ordered that the Defendants' motion is, in all other respects, denied; and it is further

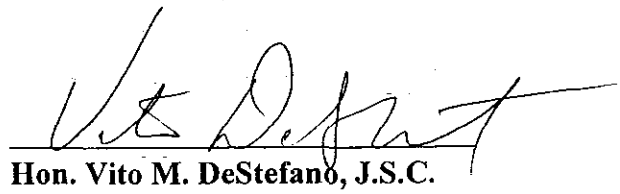
Ordered that Plaintiffs' cross motion is granted and the Defendants are directed to produce to Plaintiffs the financial records sought in Plaintiffs' April 11, 2011 supplemental demand within 30 days of the date hereof; and it is further

Ordered that all counsel are directed to appear on April 11, 2013 at 9:30 a.m. in Part 15 for the purpose of scheduling depositions and other discovery matters.

This constitutes the decision and order of the court.

Dated: March 8, 2013





Hon. Vito M. DeStefano, J.S.C.

[10] In a hearing dated September 15, 2011, Justice Warshawsky indicated that the Defendants were not required to produce information about the revenue generated from the projects at that time but that the Plaintiffs could "follow up" at a later time (Ex. "Z" to Cross Motion at pp 85-91).