

Netologic, Inc. v Goldman Sachs Group, Inc.

2013 NY Slip Op 31357(U)

June 21, 2013

Supreme Court, New York County

Docket Number: 600394/2009

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK
J.S.C.

PART 39

Index Number : 600394/2009

NETOLOGIC

vs
GOLDMAN SACHS GROUP

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 6/21/13


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x
NETOLOGIC, INC.,

Plaintiff,

-against-

THE GOLDMAN SACHS GROUP, INC., WALL
STREET ON DEMAND, INC and BEVERLY
WESTLE,

Defendants.
-----x

DECISION/ORDER

Index No. 600394/09

Motion Seq. No. 003

BARBARA R. KAPNICK, J.:

The facts of this case were discussed in detail in a prior Decision of this Court, on motion seq. nos. 001 and 002, dated March 31, 2011. As such, the facts will be presented herein only to the extent necessary to address the issues in this motion.

Defendants The Goldman Sachs Group, Inc. ("Goldman") and Wall Street on Demand ("WSOD") are moving for an order pursuant to CPLR 3211(a)(1), (5) and (7) dismissing the claims asserted against them in the Amended Complaint, dated May 4, 2011.

This Court, in its Decision of March 31, 2011, dismissed all claims against WSOD with prejudice and dismissed all claims against Goldman, with the exception of that portion of the second cause of action which sought relief for breach of the covenant of good faith and fair dealing. In addition, plaintiff was granted leave to

replead its (a) first cause of action for fraud against Goldman; (b) third cause of action for conspiracy against Goldman and co-defendant Beverly Westle ("Westle") and (c) ninth cause of action for breach of the confidentiality agreement and breach of loyalty against Westle with more specificity.

In its Amended Complaint, plaintiff alleges the following causes of action:

- (1) fraud in the inducement against Goldman;
- (2) breach of contract against Goldman;
- (3) breach of covenant of good faith and fair dealing against Goldman;
- (4) breach of confidentiality agreement against Goldman;
- (5) unjust enrichment against WSOD; and
- (6) breach of confidentiality agreement and breach of loyalty against Westle.

Breach of Contract, Breach of Confidentiality Agreement and Unjust Enrichment

Defendants argue that these causes of action simply reiterate - virtually verbatim - the claims asserted by plaintiff in the original Complaint, which were already dismissed by this Court in the prior Decision and thus must be dismissed in accordance with that Decision.

In opposition, plaintiff essentially asks this Court to revisit or reconsider its previous Decision, which is improper and will not be considered. Accordingly, the second, fourth and fifth causes of action in the Amended Complaint are dismissed in accordance with this Court's March 31, 2011 Decision, which dismissed those causes of action without leave to replead.

Fraud in the Inducement

The original Complaint asserted a cause of action for fraud against Goldman, based on the contention that plaintiff was fraudulently induced to enter into the License and Distribution Agreement (the "LDA"), and related agreements. According to defendants, the Amended Complaint continues to fail to provide any factual specifics to support its general assertions of fraud. Moreover, defendants argue that the fraud claim fails for the additional reason that it merely restates the failed breach of contract claims as a fraud claim.

In opposition, plaintiff points to paragraph 68 of the Amended Complaint to support its argument that it repled its fraud claim with sufficient particularity. Paragraph 68 states as follows:

68. To induce the plaintiff to enter into the LDA and the related agreements and, on the course of the negotiations, Goldman made the following false and fraudulent representations to plaintiff:

a. That the pre-LDA Agreement access granted by Goldman to WSOD, which allowed access to plaintiff's Spectrum website, was in connection with due diligence by Goldman of plaintiff's product offerings.

b. That WSOD, Goldman's subsidiary, was not in any way competitive to plaintiff and specifically not in the customized systems market. Goldman represented to plaintiff that WSOD was in the business of designing, developing and hosting websites for the financial service industry.

c. That the on-line access Goldman granted to the plaintiff's systems and data was in furtherance of the proposal LDA's goals.

d. That Wellington Capital, a client of Goldman, would be introduced to plaintiff because GS saw it as a perfect fit for Investars® Insight product offering.

The Amended Complaint goes on to allege that the above representations were false when made and that plaintiff relied upon them. Plaintiff argues that because the negotiations among the parties took place over a two-year period, it is difficult to pinpoint when the misrepresentations were made.

The Court's March 31, 2011 Decision specifically granted plaintiff leave to "replead its fraud cause of action with more specificity as to the details of the alleged fraudulent misrepresentations." However, upon comparing the allegations in the original Complaint to those in the Amended Complaint, it is clear that no new allegations or detail have been added. (*Compare*

Compl. ¶¶ 70-74 with Am. Compl. ¶¶ 67-71.)

Even assuming that plaintiff had followed the Court's instructions to replead with greater specificity, viewing the Amended Complaint independent from the original Complaint, it fails to state a claim for fraud. "To make out a cause of action for fraud, . . . a party must allege representation of a material existing fact, falsity, scienter, deception and injury." *Megarix Furs v. Gimbel Bros.*, 172 AD2d 209, 209 (1st Dep't 1991) (citation and internal quotation marks omitted). Moreover, "each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that the circumstances constituting the wrong shall be stated in detail." *Id.* at 209-10. Here, plaintiff fails to state when these allegations were made and by whom. Furthermore, scienter is not specifically pled and there is virtually no factual support for the conclusion that these alleged misrepresentations were false when made.

Therefore, for all the reasons stated above, the first cause of action for fraud in the inducement is dismissed.

Breach of the Implied Covenant of Good Faith & Fair Dealing

This Court previously denied Goldman's motion to dismiss this

cause of action. Defendant Goldman now argues that the allegations in the Amended Complaint clarify that this cause of action should be dismissed.

The Amended Complaint alleges that “[b]y establishing a subsidiary in direct competition with plaintiff, and steering business to that subsidiary WSOD, and in the other ways hereinbefore alleged, Goldman acted in a manner to deprive plaintiff of the fruits of its Agreement with Goldman.” (Am. Compl. ¶ 78.)

Specifically, defendant Goldman argues that since this Court has already held that there is nothing in the LDA that would prevent this conduct, plaintiff cannot employ the covenant of good faith and fair dealing to imply an obligation that this Court has already found does not exist in the LDA.

Plaintiff argues that here the implied covenant of good faith and fair dealing is not being invoked to create a new obligation, but rather to measure compliance with an explicit contractual obligation.

Moreover, this Court has already evaluated defendant’s arguments that this cause of action must be dismissed along with the insufficient breach of contract claim and found that it

survived the original motion to dismiss. Therefore, this Court, in adhering to its original finding, will deny the instant motion to dismiss the third cause of action for breach of the implied covenant of good faith and fair dealing.

Conclusion

In accordance with the foregoing, the only remaining causes of action in the remaining causes of action in the Amended Complaint are the third and sixth causes of action¹.

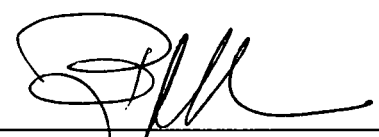
Defendants shall have twenty (20) days from the date of this Decision/Order to answer the remaining causes of action in the Amended Complaint. The parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Rm. 208 on August 14,

¹ Plaintiff was granted leave to replead its cause of action for breach of confidentiality agreement and breach of loyalty against Westle, and did replead it in its Amended Complaint (now the sixth cause of action). It appears that Westle's attorney did file an unsigned Notice of Motion (NYSCEF Doc. No. 30), which was filed under document type "Affidavit." The purported Notice of Motion indicates that Westle would move for an order dismissing the remaining cause of action pled against her. However, the Court is not in receipt of any other papers supporting the motion, either in hard copy or via the electronic filing system. It also appears that a motion sequence number was never assigned to this Motion to Dismiss. Westle's attorney did appear at oral argument on the Goldman/WSOD Motion to Dismiss and stated on the record that he would rely on the co-defendants' counsel's "able argument." (Tr. 11:8-9, Feb. 29, 2012.) However, the Court cannot consider a motion that has not formally been made and for which it has no papers. Thus, the sixth cause of action will not be dismissed.

2013 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: *June 21, 2013*



BARBARA R. KAPNICK
J.S.C.

