

New York Packaging Corp. v Southeastern Paper Group

2015 NY Slip Op 32785(U)

September 9, 2015

Supreme Court, Nassau County

Docket Number: 601704-15

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
NEW YORK PACKAGING CORP.,

Plaintiff,

-against-

SOUTHEASTERN PAPER GROUP,

Defendant.

**TRIAL/IAS PART: 14
NASSAU COUNTY**

**Index No: 601704-15
Motion Seq. No. 1
Submission Date: 7/27/15**

-----X
Papers Read on this Motion:

- Notice of Motion.....X**
- Affirmation in Support and Exhibit.....X**
- Affidavit in Support.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition.....X**
- Affirmation in Opposition and Exhibit.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the court on the motion by Defendant Southeastern Paper Group (“SE Paper” or “Defendant”) filed on June 1, 2015 and submitted on July 27, 2015. For the reasons set forth below, the Court grants Defendant’s motion to dismiss the second, third and fourth causes of action in the Verified Complaint and denies Defendant’s motion to dismiss the first cause of action in the Verified Complaint.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Verified Complaint.

Plaintiff New York Packaging Corp. (“NYP” or “Plaintiff”) opposes the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Fogel Aff. in Supp.) alleges as follows: Plaintiff is a Nassau County-based distributor of plastic bags nationwide. In March of 2006, Plaintiff established a relationship with Food Depot which, in turn, contracted with Fulton Paper. Pursuant to the agreement, Fulton Paper would purchase plastic bags from Plaintiff based on instructions from Food Depot. Fulton Paper interacted with Plaintiff in the context of this arrangement. To meet Food Depot's needs, Plaintiff invested approximately \$100,000 for racking and shipping to all Food Depot stores. In or about January 2008, Defendant assumed the role previously held by Fulton Paper in connection with meeting the distribution needs of Food Depot and Food Depot directed Defendant to interact with Plaintiff regarding Food Depot's needs.

In 2014, Plaintiff and Defendant had an unrelated dispute regarding Defendant's alleged non-payment of product manufactured by Plaintiff for Defendant. Notwithstanding that dispute, Defendant continued to act for and on behalf of Plaintiff in connection with Food Depot's needs. On or about March 11, 2015, Plaintiff received an email from Defendant which advised Plaintiff that Food Depot would be discontinuing its relationship with Plaintiff regarding the manufacture and distribution of plastic bags, and would be returning plastic bag racks already distributed by Plaintiff for Food Depot. In response, Plaintiff contacted Food Depot which advised Plaintiff that Defendant, while still representing Plaintiff's products at Food Depot, "tortiously interfered with the relationship between plaintiff and Food Depot in order to supplant the plaintiff in that role" (Comp. at ¶ 13). When Plaintiff's principal contacted Defendant, Defendant's sales representative advised Plaintiff that it was Ben Miller, Defendant's vice president, who "was directly responsible for orchestrating such tortious conduct" (Comp. at ¶ 14). Plaintiff alleges that Defendant's conduct caused Plaintiff to lose a valuable business relationship and suffer substantial damages.

The Complaint contains four (4) causes of action: 1) tortious interference with contract, 2) breach of fiduciary duty by Defendant in inducing Food Depot to terminate its relationship with Plaintiff which resulted in Defendant assuming Plaintiff's role for itself; 3) unfair business practice and unfair competition by Defendant which allegedly used information provided by Plaintiff to harm Plaintiff, and 4) fraud by Defendant which, in an effort to deceive Plaintiff into believing that Defendant would promote Plaintiff's best interests regarding the Food Depot account, misrepresented to Plaintiff in 2014 that Defendant, notwithstanding the parties' dispute,

would continue to promote Plaintiff's best interests.

In support of the motion, Kenneth Love ("Love"), the Produce Manager for Food Depot for the last eleven (11) years, affirms that Food Depot operates a chain of retail grocery stores in the Southeastern United States. Love affirms that his job duties include ordering supplies, including produce bags ("Produce Bags"), for the Produce Department. Love explains that Produce Bags are made of see-through plastic and come in rolls, with a perforated, tear-away edge between each bag. When a Food Depot store receives the rolls, a Food Depot employee places them on racks ("Racks") located in the store's Produce Department. Shoppers then help themselves to the Produce Bags as needed. The Racks are provided to Food Depot by the manufacturer of the Produce Bags, with the understanding that if Food Depot stops using the manufacturer's bags, the Racks will be returned to the manufacturer. This is a standard and accepted practice in the industry.

Love affirms that in or about 2005, at his direction, Food Depot began using Produce Bags manufactured by Plaintiff, which Food Depot purchased from Fulton Paper. Food Depot did not purchase the Produce Bags directly from NYP. In or about 2009, SE Paper replaced Fulton Paper as Food Depot's distributor of certain products, including but not limited to Produce Bags. Since that time, Food Depot has purchased Produce Bags from SE Paper. Until recently, Food Depot continued to purchase Produce Bags from SE Paper that were manufactured by NYP. At Love's direction, Food Depot recently stopped using NYP's Produce Bags due to NYP's recent conduct.

Love affirms that, approximately one year ago, he received a telephone call from Jeffrey Rabia ("Rabia") who identified himself as NYP's owner. Rabia called to solicit Food Depot's business and offered to have NYP start selling its Produce Bags directly to Food Depot and "cut out" SE Paper as the distributor (Love Aff. at ¶ 8). Rabia told Love that purchasing the bags directly from NYP would save Food Depot money by eliminating SE Paper's mark-up. Rabia also stated that SE Paper was late in paying NYP's bills for the Produce Bags that SE Paper was purchasing from NYP and re-selling to Food Depot. Love advised Rabia that Food Depot was not interested in his offer and intended to continue using SE Paper as its distributor for Produce Bags. Love affirms that he was "very surprised and uncomfortable" to have received Rabia's call (Love Aff. at ¶ 10) and believed it unethical for NYP to contact him directly in an effort to eliminate SE Paper. As a result of Rabia's call, Love decided that Food Depot would stop using NYP's Produce Bags.

Following his conversation with Rabia, Love contacted Jack Campbell (“Campbell”), Food Depot’s account representative at SE Paper, and advised him of his conversation with Rabia. Love also advised Campbell that Food Depot would stop using NYP’s Produce Bags and asked Campbell to obtain Produce Bags for Food Depot from another manufacturer, which he did. As a result of Food Depot’s decision to stop using NYP’s Produce Bags, Food Depot also stopped using the Racks provided by NYP, and had SE Paper remove those Racks from Food Depot’s stores, to be returned to NYP. Love affirms that SE Paper is not the manufacturer of the Produce Bags now being used by Food Depot, and has not replaced NYP or assumed the role of manufacturing Produce Bags for Food Depot. The new manufacturer is a third party that SE Paper secured for Food Depot at Love’s direction. Love submits that Food Depot was “free to decide to stop using NYP’s Produce Bags” (Love Aff. at ¶ 14) and affirms that there was no interference, undermining or inducement by SE Paper, which Love directed to obtain Produce Bags for Food Depot from another manufacturer due to Rabia’s conduct.

In opposition, Rabia disputes Love’s affirmation regarding his conversation with Rabia and denies having any such communication with Love or anyone else at Food Depot. Rabia also questions why, if Love believed that Rabia acted in an improper or unethical manner, Love did not terminate Food Depot’s relationship with NYP sooner.

C. The Parties’ Positions

Defendant submits that 1) dismissal of the tortious interference cause of action is appropriate because Plaintiff does not allege that Food Depot breached the alleged contract; 2) dismissal of the breach of fiduciary claim is warranted because Plaintiff does not adequately allege the existence of a fiduciary relationship and Plaintiff’s conclusory allegations are insufficient to establish the existence of such a relationship; 3) the unfair competition claim is not viable, in part because Plaintiff has failed to provide any factual specificity regarding what information was allegedly imparted and how it was allegedly used, and because the Complaint does not allege that the information was confidential; and 4) the fraud claim is legally insufficient because a) it lacks adequate particularity; b) a statement of future intent cannot form the basis of a fraud claim; c) it is rooted in the breach of fiduciary claim which has not been adequately pleaded; and d) it fails to allege how Plaintiff relied on the alleged misrepresentation, and how Plaintiff was damaged as a result.

Plaintiff opposes the motion submitting that Defendant has misapplied the proper standard of review on a motion to dismiss pursuant to CPLR 3211(a)(7) which is the

determination of whether, from the four corners of the challenged pleading, viable claims have been asserted. Plaintiff submits that 1) Plaintiff has stated a claim for tortious interference by alleging the existence of a contractual relationship between Plaintiff and Food Depot, alleging that Defendant communicated with Food Depot which led to Food Depot terminating its relationship with Plaintiff, and alleging that Defendant acted out of malice stemming from an unrelated dispute between Plaintiff and Defendant; 2) Plaintiff has stated a claim for breach of fiduciary duty by alleging that the parties had a relationship of “high trust” (P’s Memo. of Law in Opp. at p. 9) because Defendant was charged with the responsibility of promoting Plaintiff’s best interests, and alleging that Defendant breached its duty of loyalty to Plaintiff resulting in Plaintiff’s loss of a valued customer to Defendant; 3) Plaintiff has stated a claim for unfair competition by alleging that Defendant obtained information about Plaintiff’s customers and work processes, used that information to replace Plaintiff, and did so with malice stemming from an unrelated dispute; and 4) Plaintiff has stated a claim for fraud by alleging that Defendant represented to Plaintiff that it would continue to perform under the parties’ agreement when Defendant had already formulated a plan to replace Plaintiff.

In reply, Defendant submits *inter alia* that 1) Plaintiff has not adequately alleged the existence of a fiduciary relationship; 2) with respect to the unfair competition claim, Plaintiff has failed to provide adequate specificity regarding what information was allegedly misappropriated and how the information was allegedly used; and 3) Plaintiff has failed to provide adequate specificity regarding the alleged fraud.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

B. Relevant Causes of Action

To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, misconduct that induced the plaintiff to engage in the transaction in

question, and damages directly caused by that misconduct. *Barrett v. Freifeld*, 64 A.D.3d 736, 739 (2d Dept. 2009) citing *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007); *Ozelkan v. Tyree Bros. Envtl. Servs., Inc.*, 29 A.D.3d 877, 879 (2d Dept. 2006). A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people. *Barrett v. Freifeld*, 64 A.D.3d at 739, citing *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 529 (2d Dept. 2001).

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008).

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Dayton Superior Corp. v. Marjam Supply Co., Inc.*, 2011 U.S. Dist. LEXIS 17221, * 46 (E.D.N.Y. 2011), quoting *Telecom International v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001). A claim for unfair competition has been broadly described as encompassing any form of commercial immorality, or simply as endeavoring to reap where one has not sown; it is taking the skill, expenditures and labors of a competitor, and misappropriating for the commercial advantage of one person, a benefit or property right belonging to another. *Dayton Superior Corp. v. Marjam Supply Co., Inc.*, 2011 U.S. Dist. LEXIS 17221 at * 47, quoting *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982) (internal citations, alterations and quotation marks omitted).

The New York Court of Appeals has set forth two long-recognized theories of common-law unfair competition: 1) "palming off", which refers to the sale of the goods of one manufacturer as those of another, and 2) "misappropriation," which encompasses the principle

that one may not misappropriate the results of the skill, expenditures and labors of a competitor. *Dayton Superior Corp.*, 2011 U.S. Dist. LEXIS 17221 at * 47-48, citing *ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476-77 (2007), quoting *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 567-68 (1959). It is well settled that the primary concern in unfair competition is the protection of a business from another's misappropriation of the business' organization or its expenditure of labor, skill and money. *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 127 A.D.3d 48, 56 (1st Dept. 2015), citing *Ruder & Finn v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671 (1981), quoting *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918).

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants' knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

C. Application of these Principles to the Instant Action


The Court 1) dismisses the second cause of action, alleging breach of fiduciary duty, based on the Court's conclusion that Plaintiff has not alleged facts supporting the existence of a fiduciary relationship between Plaintiff and Defendant, sophisticated business people in an arm's-length business transaction; 2) dismisses the third cause of action, alleging unfair business practice and unfair competition by Defendant based on the Court's conclusion that Plaintiff has failed to identify the information that Defendant allegedly used improperly or allege the manner in which that information was used; and 3) dismisses the fourth cause of action, alleging fraud, based on the Court's conclusion that Plaintiff has failed to allege, with adequate specificity, the misrepresentations by Defendant, how Plaintiff relied on those misrepresentations and/or how Plaintiff was damaged as a result of its reliance. The Court denies Defendant's motion to dismiss the first cause of action, alleging tortious interference with contract, based on the Court's conclusion that, according Plaintiff the benefit of every possible favorable inference, Plaintiff has sufficiently pleaded this cause of action by alleging the existence of a contractual relationship between Plaintiff and Food Depot, alleging that Defendant communicated with Food Depot which led to Food Depot terminating its relationship with Plaintiff, and alleging that Defendant acted out of malice stemming from an unrelated dispute between Plaintiff and Defendant.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on October 8, 2015 at 9:30 a.m.

DATED: Mineola, NY
September 9, 2015

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 17 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE