

Hyperlync Tech., Inc. v Verizon Sourcing LLC

2016 NY Slip Op 30288(U)

February 17, 2016

Supreme Court, New York County

Docket Number: 650151/2015

Judge: Saliann Scarpulla

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

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

Plaintiffs,

DECISION and ORDER

- against -

Index No. 650151/2015
Motion Seq. Nos. 003 and
004

VERIZON SOURCING LLC, and
SYNCHRONOSS TECHNOLOGIES, INC.,

Defendants.

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SCARPULLA, J.:

In this action to recover damages for, inter alia, breach of contract, defendant Synchronoss Technologies, Inc. (“Synchronoss”) moves (in motion sequence number 003) to dismiss the complaint for failure to state a cause of action, to stay discovery, and for a protective order if the action is not dismissed. Synchronoss also seeks sanctions. Defendant Verizon Sourcing LLC (“Verizon”) moves (in motion sequence number 004) to dismiss the complaint, to stay discovery, and for a protective order. Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiffs Hyperlync Technologies, Inc. and Hyperlync Multimedia Israel, Ltd. (collectively “Hyperlync” or “Plaintiffs”), companies specializing in information technology, have provided software products to Verizon since 2010. On or about October 12, 2012, Hyperlync and Verizon entered into a Nondisclosure Agreement (the “NDA”). Among other things, the NDA provides that “[a]ll 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.” It further stipulated that Hyperlync and Verizon were prohibited from disclosing any confidential information except 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 dubbed Phone Cloner (“Phone Cloner”). Plaintiffs allege that Phone Cloner was an improvement over other apps at the time because other apps required hard-wire connections or cloud services to perform data transfers between devices. In contrast to the other apps, Phone Cloner lets users copy content from one mobile device to another via a Wi-Fi network. Hyperlync presented the concept of the Phone Cloner to a Verizon employee, Joseph Berger, in March of 2013. Subsequently, Berger told Hyperlync that Verizon was interested in Phone Cloner and requested a PowerPoint presentation with details of the

product's capabilities. Hyperlync made the requested presentation to Verizon and had additional meetings with Verizon regarding Phone Cloner in which they gave functioning versions of the app as well as technical information to Verizon for testing. Plaintiffs allege that they disclosed their trade secret phone-to-phone transfer process to Verizon pursuant to the NDA.

Plaintiffs assert that in September 2013, a Verizon employee told Hyperlync that Verizon gave Hyperlync's confidential Phone Cloner information to Synchronoss, a competitor of Hyperlync, and instructed it to copy the product. This employee also 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.

According to Plaintiffs, after Verizon disclosed Hyperlync's trade secret information to Synchronoss, Synchronoss released its own phone provisioning app based on the misappropriated information in June 2014. Plaintiffs state that the Synchronoss app had the same functionality, look and feel as Hyperlync's Phone Cloner. Synchronoss released a press release in January 2015 announcing that it had contracted with other mobile carriers to provide its phone provisioning app.

In its amended complaint, Plaintiffs claim that Verizon's disclosure of Plaintiffs' Phone Cloner app to Synchronoss was in breach of the NDA. Plaintiffs also contend that Defendants "willfully misappropriated" Plaintiffs' trade secrets and ideas when Verizon gave Hyperlync's Phone Cloner app and related materials and information to

Synchronoss and Synchronoss used it to create a rival phone provisioning app. Further, the amended complaint states that Defendants' conduct constitutes tortious interference with the NDA because: 1) Verizon knew that it could not share the Phone Cloner information with a third party; and 2) Synchronoss knew that the information it received from Verizon was confidential because all of the Phone Cloner materials contained a legend indicating that the material was subject to the NDA. Lastly, Plaintiffs' complaint includes allegations of civil conspiracy, conversion, and fraudulent concealment.

Synchronoss and Verizon now move to dismiss the Plaintiffs' claims.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts as true the complaint's factual claims and accords the plaintiff the benefit of all favorable inferences in order to determine "whether the plaintiff can succeed upon any reasonable view of the facts as stated." *Schneider v. Hand*, 296 A.D.2d 454 (2002).

Motions to dismiss based on CPLR 3211(a)(1) are granted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Indeed, such a motion will only be granted if the "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

1. Misappropriation of Trade Secrets Claim

A plaintiff claiming misappropriation of a trade secret must allege that (1) plaintiff possesses a trade secret; and (2) defendant is using the trade secret “in breach of an agreement, confidence, or duty, or as a result of discovery by improper means.” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 117 (2d Cir. 2009). Synchronoss contends that Hyperlync’s misappropriation of trade secrets claims should be dismissed because: 1) Plaintiffs do not give sufficient details as to what constitutes their trade secret; and 2) Plaintiffs fail to provide facts showing that Synchronoss obtained Hyperlync’s trade secret by wrongful means or otherwise. Verizon argues that the claim should be dismissed because: 1) Hyperlync’s complaint fails to identify a trade secret with particularity; 2) any information that it received regarding Plaintiffs’ Phone Cloner app would have been readily apparent once the finished product was marketed; and 3) Plaintiffs’ idea was not novel.

Section 757 of the Restatement of Torts provides that a trade secret is “any formula, pattern, device or compilation of information which is used in one’s business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Restatement of Torts § 757 cmt. b at 5 (1939). Additionally, “a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”

Integrated Cash Mgmt. Serv., Inc. v. Digital Transactions, Inc., 920 F.2d 171, 174 (2d Cir. 1990).

In determining whether a trade secret exists, New York courts consider the following factors: “(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).

In its amended complaint, Plaintiffs state that they provided Verizon with “functioning versions, technical details, and functionality specifications of Phone Cloner.” On oral argument, Plaintiffs argued that it possessed a trade secret relating to the “how to” underlying its wireless phone-to-phone data transfer method. In addition, they contend that they conveyed the “how to” to Verizon, who, in turn, conveyed it to Synchronoss. Therefore, for the purposes of this pre-answer motion to dismiss, plaintiffs have alleged sufficient information to plead that they possessed a trade secret. *See, e.g., Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. 1990); *Applied Information Management, Inc. v. Icart*, 976 F.Supp. 149, 156 (E.D.N.Y. 1997).

Moreover, not only do Plaintiffs allege that Verizon passed along the “how to” of the Phone Cloner to Synchronoss, but they also allege that the trade secret was being used in breach of the NDA. Thus, both elements of misappropriation of a trade secret are satisfied with respect to Verizon.

Because Plaintiffs did not have a contract with Synchronoss, they must establish that their trade secret was used by the latter “as a result of discovery by improper means” to prevail on their misappropriation of trade secret claim against them. “Improper means” are usually “means which fall below the generally accepted standards of commercial morality and reasonable conduct.” Restatement of Torts § 757 cmt. f (1939). Plaintiffs’ complaint alleges that Synchronoss obtained the Phone Cloner information in documents marked with “confidential pursuant to NDA,” through improper means and then used this information to make its own product. This is sufficient to state a claim for misappropriation of trade secrets against Synchronoss. *See, e.g., Balance Point Divorce Funding, LLC v. Scrantom et al*, 978 F.Supp 2d 341, 353-354 (S.D.N.Y. 2013).

2. Breach of Contract Claim

In New York, to state a claim for breach of contract, a plaintiff must allege facts showing (1) the existence of a contract; (2) the plaintiff’s performance under that contract; (3) the defendant’s breach of its contractual obligations; and (4) damages resulting from the breach. *See Elisa Dreier Reporting Corp., v. Global Naps Networks, Inc.*, 84 A.D.3d 122, 127 (2d Dept. 2011).

Plaintiffs' complaint sufficiently alleges each of the aforementioned elements of a breach of contract claim. In relevant part, Plaintiffs allege: (1) there was an October 12, 2012 Nondisclosure Agreement between Hyperlync and Verizon; (2) Hyperlync made both the initial presentation of its Phone Cloner product and the subsequent deliveries of materials and information pertaining to Phone Cloner pursuant to the NDA; (3) Verizon disclosed information about Phone Cloner, in contravention of the terms of the NDA, to Synchronoss; and (4) because of Verizon's breach, Hyperlync suffered damages in that it cannot market its Phone Cloner product. Hence, Verizon's motion to dismiss the breach of contract claim is denied.

3. Misappropriation of Ideas claim

A plaintiff must plead and prove two elements for a misappropriation of ideas claim: (1) a legal relationship between the parties in the form of a fiduciary relationship, an express contract, implied contract, or quasi contract; and (2) an idea that is novel and concrete. *See Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 23 (1st Dept. 2015); *Dhou v. Huffington*, 2011 WL 11415371 at *4 (N.Y. Sup. Oct. 7, 2011).

Here, Plaintiffs do not allege the existence of any legal relationship between them and Synchronoss. Therefore, Plaintiffs have failed to establish a viable cause of action for misappropriation of ideas as against Synchronoss and this claim against it is dismissed.

Plaintiffs have alleged the existence of a legal relationship between them and Verizon. Verizon does not dispute this relationship but instead seeks dismissal of

Plaintiffs' misappropriation of ideas claim on the grounds that documentary evidence proves that Plaintiffs Phone Cloner product idea was not novel. Plaintiffs allege that the ideas upon which Phone Cloner are based were "specific, unique, and commercially unavailable at the time of their disclosure." Because a determination concerning novelty is generally a question of fact, "where a plaintiff sufficiently alleges that its ideas were novel and concrete, dismissal at the pleading stage is generally inappropriate." *See Dhou* 2011 WL 11415371 at *5.

Defendants cite one case, *Lapine v. Seinfeld*, where a court dismissed an idea misappropriation claim at the pleading stage. 31 Misc.3d 736 (N.Y. Sup. 2011). In that case, the court held that documentary evidence, which consisted of "numerous publications" about "sneaky cookery" conclusively showed that plaintiff's idea of camouflaging vegetables in children's food was not novel as a matter of law. 31 Misc.3d at 746.

In *Dhou v. Huffington*, a commercial litigation case, the defendants submitted some printouts of news and opinion websites as proof that the plaintiff's website idea was not novel. *Dhou*, 2011 WL 11415371 at *7. The court in that case held that a few printouts were not the same as the "numerous publications" proffered by defendants in *Lapine*. *Id.* The *Dhou* court, noting that *Lapine* was "one of the few cases" where a court dismissed a misappropriation of ideas claim at the pleading stage, held that the printouts "do not conclusively establish the lack of novelty of plaintiffs' specific idea but rather, raise questions that must be resolved by the fact-finder." *Id.*

This case is similar to *Dhou* and thus distinguishable from *Lapine*. The exhibits offered by Verizon fall far short of the “numerous publications” in *Lapine* and fail to conclusively establish that Hyperlync’s idea was not novel. Verizon’s motion to dismiss Hyperlync’s misappropriation of ideas claim is therefore denied.

4. Intentional Interference with Contract claim

To establish a claim for tortious interference with a contract, a plaintiff must allege that “a valid contract existed which a third party knew about, the third party intentionally and improperly procured the breach of the contract and the breach resulted in damage to the plaintiff.” *Bradbury v. Cope-Schwarz*, 20 A.D.3d 657, 659 (3d Dept. 2005). Further, it must be shown that the defendant “induce[d] or intentionally procure[d] a third-party’s breach of its contract with the plaintiff” and not simply have knowledge of its existence. *Beecher v. Feldstein*, 8 A.D.3d 597, 598 (3d Dept. 2004). Here, Plaintiffs have not alleged that Synchronoss either induced or intentionally procured Verizon’s breach of its NDA with Plaintiffs. Consequently, Plaintiffs’ claim for tortious interference with a contract is dismissed.

5. Civil Conspiracy Claim

New York does not recognize civil conspiracy to commit a tort as an independent cause of action but rather such a claim stands or falls with the underlying tort. *Dickinson v. Igoni*, 76 A.D.3d 943, 945 (2d Dept. 2010). Hyperlync’s civil conspiracy claim is therefore dismissed.

6. Conversion Claim

To establish a cause of action for conversion, “the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question... to the exclusion of the plaintiff’s right.” *Clark Street Wine and Spirits v. Emporos Sys. Corp.*, 754 F.Supp.2d 474, 484 (E.D.N.Y. 2010) (citation omitted).

A conversion claim may be brought where “the conduct the plaintiff seeks to recover for amounts to the destruction or taking of the property” but such a claim “will not normally lie [] when it involves intangible property.” *Sporn v. MCA Records*, 58 N.Y.2d 482, 489 (1983). Although the Court of Appeals of New York found that the “the protections of the law [of conversion] should apply equally to both forms [of property] – physical and virtual,” it limited its holding to the facts of its case. *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292-293 (2007). In that case, the court held that the type of data that the defendant took possession of, namely electronic records stored on a computer which were not distinguishable from printed documents, may be subject to a conversion claim. *Id.* at 293.

Here, unlike in *Sporn*, Hyperlync does not allege that Defendants wrongfully possessed and denied them their right to a tangible piece of property. Rather, Plaintiffs allege that Defendants converted Hyperlync’s “intellectual property.” Even if the kind of data alleged to have been converted here, the Phone Cloner app materials, may be subject to a conversion claim, Plaintiffs have not alleged that they were deprived of access to

their information. Thus, Plaintiffs conversion claim must be dismissed. *See The Jones Group Inc. v. Zamara*, 2014 WL 2472102 at *9 (N.Y.Sup. Apr. 9, 2014) (Trial Order).

7. Fraudulent Concealment Claim

To establish a claim for fraudulent concealment, “[i]n addition to the traditional elements of misrepresentation, scienter, reliance, and damages, a plaintiff ... must allege a duty to disclose material information.” *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373 (1st Dept. 2003). Furthermore, a breach of contract is not a tort unless there is a violation of a legal duty that is independent of the parties’ contract. *See Non-Linear Trading Co. v. Braddis Assoc.*, 243 A.D.2d 107, 116 (1st Dept. 1998). “Merely charging breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.” *Id.*

Hyperlync alleges that, pursuant to the NDA, they provided “updated versions of the app and related materials and information” to Verizon. They further allege that they received information in September 2013 that Verizon gave their Phone Cloner information to Synchronoss. The complaint does not allege that additional information was furnished after this discovery. Thus, if Plaintiff’s allegations are proven true, Verizon’s sharing of Phone Cloner information with Synchronoss would constitute a breach of the NDA. Plaintiffs have not established that this act by Verizon stems from a violation of a different legal duty that is separate from the contract. Consequently, the

Plaintiffs' cause of action based on fraudulent concealment fails to state a cause of action and this claim is dismissed.

8. Synchronoss's Request for Sanctions

Pursuant to 22 NYCRR §130-1.1, the court has the discretion to impose financial sanctions against any party in a civil action or proceeding who engages in frivolous conduct. *See also McCrae v. City of New York*, 62 A.D.3d 539, 608 (1st Dept. 2009) citing *Llantín v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are reserved for serious transgressions. Here, there is absolutely no showing that Plaintiffs pursued this action in bad faith. Accordingly, Synchronoss's motion for sanctions is denied.

9. Discovery Stay and Protective Order

At oral argument, on October 28, 2015, discovery was stayed pending the resolution of this motion. Now that the motions have been decided, I lift the discovery stay. Also, subsequent to the submission of this motion, Hyperlync, Verizon, and Synchronoss entered into a confidentiality stipulation which I so ordered on October 22, 2015. In light of the existing confidentiality stipulation, Defendants' requests for protective orders are redundant and denied as moot.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Verizon to dismiss the amended complaint by plaintiff Hyperlync is granted as to plaintiffs' claims for intentional interference with a contract, civil conspiracy, conversion and fraudulent concealment and

denied as to plaintiffs' claims for misappropriation of trade secrets, breach of contract, and misappropriation of ideas; and it is further

ORDERED that the motion by defendant Synchronoss to dismiss the amended complaint by plaintiff Hyperlync is granted as to plaintiffs' claims for misappropriation of ideas, intentional interference with a contract, civil conspiracy, and conversion and denied as to plaintiffs' claim for misappropriation of trade secrets; and it is further

ORDERED that Synchronoss's motion for sanctions against Hyperlync is denied; and it is further;

ORDERED that the discovery stay is lifted; and it is further

ORDERED that both Verizon's and Synchronoss's requests for a protective order are denied as moot; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on March 16, 2016 at 2:15pm.

This constitutes the decision and order of the Court.

DATE : 2/17/16


SALIANN SCARPULLA,
JSC