T.A. Tax & Ins. Brokerage Inc. v Agag Multi Serv. Corp.
2016 NY Slip Op 32441(U)
November 10, 2016
Supreme Court, Queens County
Docket Number: 700774/15
Judge: Martin E. Ritholtz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
SHORT-FORM ORDER
COMMERCIAL DIVISION PART D
Present: MARTIN E. RITHOLTZ, Justice

T.A. TAX & INSURANCE BROKERAGE INC. and SHEILA AGAG as ADMINISTRATOR for the ESTATE OF TAREK AGAG,

Plaintiff(s),

-against-

AGAG MULTI SERVICE CORP., ABDELMONOEM AGAG, Individually, and KHALED AGAG, Individually,

Defendant(s).

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Mot. Seq. No.: 3

The following papers read on this motion by Defendants for an Order, pursuant to CPLR 306-B, CPLR 3016(a), CPLR 3211(a)(7), and CPLR 3211(a)(8), dismissing the Complaint, or alternatively, dismissing the first cause of action and dismissing claims asserted on behalf of Plaintiff SHEILA AGAG, as Administrator of the ESTATE OF TAREK AGAG; and on the cross-motion by Plaintiffs for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Plaintiffs.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	EF8-14
Notice of Cross-Motion-Affidavits-Exhibits	EF18-26
Replying Affidavits	EF27-31

MARTIN E. RITHOLTZ, J.:

As an initial matter, an interim decision in this action, on this motion, under Motion Sequence Number 3, was issued by the late Justice Duane A. Hart, on February 29, 2016, and entered on march 8, 2016. That order held the motion in abeyance during settlement talks. With such talks not resulting in resolution, this decision now follows.

In this action, Plaintiffs, upon the foregoing papers, allege that Defendants ABDELMONEM AGAG and KHALED AGAG (hereinafter "ABDELMONEM and KHALED"), former employees T.A. TAX & INSURANCE BROKERAGE INC. ("T.A. TAX"), conspired to establish an identical accounting business as AGAG MULTI SERVICE

CORP upon learning that their brother, TAREK AGAG, was hospitalized and terminally ill. Plaintiffs allege Defendants ABDELMONEM and KHALED contacted customers of T.A. TAX in an allege attempt to lure them to AGAG MULTI SERVICE CORP. Plaintiffs also allege that Defendants ABDELMONEM and KHALED diverted funds from T.A. TAX to themselves.

Plaintiffs, in their complaint, plead as their first cause of action that Defendants ABDELMONEM and KHALED engaged in a "harassment campaign" by sending letters and making telephone calls to T.A. TAX customers and making "false derogatory statements" about T.A. TAX. In the first cause of action, plaintiff seeks $500,000 for the alleged campaign of defamation waged by the defendants. Plaintiffs further contend that, by contacting these customers, the Defendants tortiously interfered with Plaintiff's business causing damages. In their second cause of action, Plaintiffs allege that Defendants ABDELMONEM and KHALED misappropriated payments amounting to approximately $300,000.00 intended for the benefit of T.A. TAX.

Defendants move to dismiss the complaint. Defendants claim that Plaintiffs failed to serve all defendants with a copy of the summons and complaint pursuant to CPLR 306-b and CPLR 3211(a)(8). The parties herein have already appeared before the Honorable Justice Duane A. Hart at a prior court-ordered conferences, on February 10, 2016, with respect to the herein motion, and the Defendants have served their Answer with affirmative defenses and counterclaims. That branch of Defendants' motion to dismiss the complaint on the ground that Plaintiffs failed to serve all defendants pursuant to CPLR 306-b is denied where Defendants suffer no prejudice as Defendants' Answer demonstrate that they had actual notice of the above action. *See, Dhuler v. Elrac, Inc.*, 118 A.D.3d 937 (2d Dep't 2014).

The defendants next move to dismiss the first cause of action for tortious interference. The Court must give the complaint a liberal reading especially where the defendants have almost exclusive knowledge of the falsehoods they allegedly uttered to existing and prospective clients of the plaintiff corporation, T.A. TAX. *See, Heeran v. Long Island Power Auth.*, 141 A.D.3d 561 (2nd Dept. 2016) ("[T]he court must read the complaint liberally and assume the plaintiffs' allegations are true. If the allegations, as supplemented by any affidavits, fit within any cognizable legal theory, the court must deny the motion to dismiss."). On this basis alone, the Appellate Division has denied defense motions, pursuant to CPLR 3211(a)(7), to dismiss a complaint. *See*, *Hooker v. Magill*, 140 A.D.3d 589 (1st Dept. 2016) (reversing dismissal of complaint, court stated: "[P]laintiff should be permitted discovery of the relevant information in NYU's sole possession, as such discovery could lead to relevant evidence."); *Bonilla v. Bangert's Flowers*, 132 A.D.3d 618, 619 (2nd Dept. 2015) ("[T]he plaintiff demonstrated that facts essential to justify opposition to that portion of the

motion were exclusively within the [defendants'] knowledge and control."); *Wesolowski v. St. Francis Hosp.*, 108 A.D.3d 525, 526-527 (2nd Dept. 2013) ("Since the plaintiffs had no personal knowledge of the relevant facts, they should be afforded the opportunity to conduct discovery, including depositions of the defendant's employees and other witnesses that were present during the incident complained of .").

"[O]n a motion to dismiss, pursuant to CPLR 3211(a)(7), the facts alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts, as alleged, fit within any cognizable legal theory." *Sabre Real Estate Grp., LLC v. Ghazvini*, 140 A.D.3d 724 (2nd Dept. 2016) (reversing complaint's dismissal); *accord*, *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409 (2001) (reversing dismissal of complaint seeking specific performance against builder); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977) ("[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners, factual allegations are discerned, which taken together, manifest any cause of action cognizable at law a motion for dismissal will fail."); *Hooker v. Magill*, 140 A.D.3d 589 (1st Dept. 2016) ("Plaintiff's pleadings and sworn statements in opposition to the motion, when viewed in the light most favorable to her and all reasonable inferences drawn in her favor, state a legally sufficient claim."); *Hutchison v. Kings Cty. Hosp. Ctr.*, 139 A.D.3d 673 (2nd Dept. 2016); *Fough v. Aug. Aichhorn Ctr. for Adolescent Residential Care, Inc.*, 139 A.D.3d 665 (2nd Dept. 2016); *Soldatenko v. Village of Scarsdale Zoning Bd. of Appeals*, 138 A.D.3d 1002 (2nd Dept. 2016); *Fedele v. Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 A.D.3d 965 (2nd Dept. 2016); *Butler v. Magnet Sports & Entertainment Lounge, Inc.*, 135 A.D.3d 680, 680-681 (2nd Dept.), *lv. to appeal dismissed*, 27 N.Y.3d 1032 (2016); *E & D Grp., LLC v. Vialet*, 134 A.D.3d 981, 982 (2nd Dept. 2015) ("[T]he criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate."); *Sokol v. Leader*, 74 A.D.3d 1180, 1180-1181 (2nd Dept. 2010) ("Whether a plaintiff can ultimately establish its allegations is not part of the calculus."); *Cooper v. 620 Props. Assocs.*, 242 A.D.2d 359, 360 (2nd Dept. 1997) ("If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail.").

The Second Department, in *Rosenfeld v. Sayers*, 51 A.D.3d 998, 999 (2008), in reversing the dismissal of a cause of action for tortious interference stated:

> In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should "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" (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88). Applying these principles, the Supreme Court erred in dismissing the plaintiff's first cause of action, which sufficiently pleaded a cause of action to recover damages for tortious interference with contract

The branch of the motion seeking the dismissal of the first cause of action based upon tortious interference is, accordingly, denied.

The Court, furthermore, upon reviewing the papers, believes that the complaint does not state any cause of action in favor of the Estate of Tarek Agag. A reading of the complaint shows that the damages sought for the alleged tortious interference and misappropriation of $300,000 is to the corporate plaintiff T.A. TAX. The basis for relief is not a harm to the Estate of Tarek Agag, but to the corporate entity. Accordingly, to the extent of any confusion, the complaint is dismissed as against the Estate of Tarek Agag, but survives as properly pled by the corporate plaintiff. *See, Jordan v. City of New York*, 23 A.D.3d 436 (2nd Dep't 2005).

Plaintiffs' cross-motion for summary judgment is denied as premature as a result of the discovery that remains outstanding.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: November 10, 2016

J.S.C.

Appearances of Counsel:

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