SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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TRRIGR LLC,

Plaintiff,

DECISION/ORDER
Index No. 650567/2017

-against-

KERRIZ INC., KERRIANN SCOTT

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Trrigr LLC commenced the instant action seeking to recover damages arising out of the alleged breach of an agreement between the parties. Defendants Kerriz Inc. ("Kerriz") and Kerriann Scott ("Scott") (hereinafter collectively referred to as the "defendants") now move for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint's second, third and fourth causes of action and dismissing the action as against Scott individually. Defendants' motion is granted in part and denied in part.

The relevant facts according to the complaint are as follows. Plaintiff runs a mobile application similar to Uber but in the dry cleaning context (hereinafter referred to as the "app"). Using plaintiff's app, customers can select a local dry cleaner and schedule the pick-up and delivery of their dry cleaning and pay for same through the app. Plaintiff also maintained a physical dry cleaning service called Kae-Lee Cleaners and Custom Tailoring ("Kae-Lee"). In or around January 2016, plaintiff decided to sell Kae-Lee in order to focus on growing the app. On or about February 1, 2016, plaintiff, as seller, entered into an agreement with defendant Kerriz, as purchaser, for the sale of Kae-Lee which included 381 customers who were already doing business with plaintiff through the app (hereinafter referred to as the "Agreement").

Pursuant to Section 27 of the Agreement, entitled Non-Solicitation,

> Buyer agrees that for two (2) years after the date of this Agreement (such period is referred to as the "Restricted Period"), Buyer shall not solicit or attempt to

> solicit the business of any customers or clients of the Seller with respect to services that the Seller performs for such customers or clients. Buyer agrees that it will not directly or indirectly persuade or attempt to persuade any person or entity which is or was a customer or client of Seller to cease doing business with Seller or to reduce the amount of business it does with Seller.

Plaintiff alleges that shortly after the parties entered into the Agreement, defendants began soliciting customers, specifically, the 381 customers who were doing business with plaintiff's app, to cease doing business with plaintiff through the app and place their orders directly through defendants' website. Specifically, plaintiff asserts that on February 28, 2016, defendants sent a mass message to plaintiff's customers stating: "Thanks for being a Kae Lee Cleaners customer. Kae Lee's [] still in business. Try our new website and receive 20% off your 1st order" and included a link in the message which, if clicked on, brings you to defendants' website through which a customer can directly place a laundry and dry cleaning order, circumventing plaintiff's app. Plaintiff alleges that in or around June 2016, defendants sent another mass message to plaintiff's customers stating: "Hi Kae Lee Cleaners Customer! To celebrate our independence, take 10% off your next order. Enter code klju14 during checkout. Ends Jul 2" and included the same link. Plaintiff further alleges that in or around August 2016, defendants sent another mass message to plaintiff's customers stating: "Hi Kae Lee Cleaners customer. We're officially open @ 671 Amsterdam Av, stop by or call (212) 874-3162. Mention this text and get $10 off your order. Exp. 9/30." Plaintiff alleges that in or around October 2016, defendants sent another mass message to plaintiff's customers stating: "Hi Kae Lee Cleaners customer. Due to past due payment of more than $5k we no longer accept orders via TRRIGR. Pls call (212) 874-3162 for pickup/delivery/Thx." Plaintiff also alleges that defendants' website states that it is "Ordering by delivery.com," which is allegedly a direct competitor of the plaintiff.

Based on the above allegations, plaintiff commenced the instant action asserting causes of action for breach of contract, unfair competition, tortious interference with business relations and fraud. Defendants now move to dismiss the complaint's causes of action for unfair competition, tortious interference with business relations and fraud and to dismiss the action as against Scott individually.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

The court first turns to that portion of defendants' motion to dismiss the complaint's third cause of action for tortious interference with business relations on the ground that it fails to state a claim. To state a claim for tortious interference with business relations in New York, a party must allege "1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept 2009).

Here, defendants' motion to dismiss the complaint's third cause of action for tortious interference with business relations is denied as the court finds that plaintiff has sufficiently pled such claim. Specifically, the complaint alleges that defendants intentionally sent the mass messages to plaintiff's customers in order to circumvent plaintiff's app and to collect all the fees associated with the customer orders; that defendants sent such messages "with the intention of harming…[plaintiff's] business relationship with its customers"; and that defendants' conduct "was illegal, wanton, and malicious, and was specifically intended to interfere with [plaintiff's] business relationship with its customers and has succeeded in same." Thus, as such allegations sufficiently state a claim for tortious interference with business relations, the portion of defendants' motion seeking to dismiss such claim is denied.

The court next turns to that portion of defendants' motion to dismiss the complaint's second cause of action for unfair competition on the ground that it is duplicative of plaintiff's first cause of action for breach of contract. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 289 (1987) (internal citations omitted).

In the present case, defendants' motion to dismiss the complaint's second cause of action for unfair competition is granted on the ground that it is duplicative of the breach of contract claim. Plaintiff's unfair competition claim fails to allege that defendants had any duty other than to comply with the terms of the Agreement. Rather, it is based on the same facts as plaintiff's breach of contract claim, namely, that defendants "willfully sent mass messages to [plaintiff's] customers, incentivizing them with a coupon, to directly place their dry cleaning orders on [defendants'] website, thereby circumventing the use of [plaintiff's] mobile application," in contravention of the non-solicitation clause in the Agreement.

Plaintiff claims in opposition that the unfair competition claim is not duplicative of the breach of contract claim as plaintiff has alleged a duty independent of the Agreement, namely that defendants had an independent duty to not direct customers to a direct competitor of plaintiff. Plaintiff bases such statement on the allegation in the opposition papers that "defendants' messages were designed to drive Plaintiff's customers to a third-party, direct competitor, 'Delivery.com.'" However, such assertion is without merit as the complaint fails to allege that defendants' mass messages were sent in order to direct customers to plaintiff's competitor, Delivery.com. The only allegation about Delivery.com in the complaint is that such service is named on defendants' website as the delivery service used by defendants.

The court next turns to that portion of defendants' motion to dismiss the complaint's fourth cause of action for fraud on the ground that it is duplicative of the breach of contract claim. "It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." *Gordon*

v. Dino De Laurentiis Corp., 141 A.D.2d 435, 436 (1st Dept 1988). "A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it." *Id.*

Here, defendants' motion to dismiss the complaint's fourth cause of action for fraud is granted on the ground that it is duplicative of the breach of contract claim. Plaintiff's fraud claim fails to allege any fraud related to conduct outside of the Agreement. Rather, the fraud claim merely restates the breach of contract claim in terms of fraud and misrepresentation. It alleges that defendants misrepresented to plaintiff that it would abide by the terms of the Agreement not to directly or indirectly persuade or attempt to persuade any customer of the plaintiff; that plaintiff justifiably relied on such misrepresentation; and that such fraud is evidenced by the fact that defendants sent the mass messages to plaintiff's customers immediately after entering into the Agreement. Moreover, the allegation in the complaint that defendants never intended to abide by the terms of the Agreement is insufficient to plead a claim for fraud. *See Gordon*, 141 A.D.2d at 436.

Plaintiff's assertion that the fraud claim is not duplicative of the breach of contract claim because plaintiff is seeking special damages relating to defendants' direction of plaintiff's customers to the Delivery.com service and that such damages are different from those it is seeking as a remedy for the breach of contract claim. However, nowhere in the complaint does plaintiff allege that it is seeking special damages based on defendants' direction of plaintiff's customers to Delivery.com.

Finally, the court turns to the portion of defendants' motion to dismiss the complaint as against Scott individually and finds that it must be granted. The only cause of action asserted against Scott individually is the fraud claim which this court has dismissed as duplicative of the breach of contract claim. To the extent plaintiff asserts in opposition to defendants' motion that Scott should remain a defendant in the action based on an alter-ego theory of liability, such assertion is without merit as the complaint fails to allege any facts to support such assertion.

Accordingly, defendants' motion to dismiss is granted solely to the extent that the complaint is dismissed as against Scott individually and the complaint's second cause of action for unfair competition and fourth cause of action for fraud are dismissed. This constitutes the decision and order of the court.

DATE : 5/12/17

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KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.