

<b>Biz2Credit Inc. v Kathuria</b>
2017 NY Slip Op 31950(U)
September 11, 2017
Supreme Court, New York County
Docket Number: 656636/2016
Judge: Kelly A. O'Neill Levy
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY  
*Justice*

PART 19

-----X

BIZ2CREDIT INC.

Plaintiff,

INDEX NO. 656636/2016

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

ARJUN KATHURIA,

Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 19, 20

were read on this application to/for \_\_\_\_\_

Defendant Arjun Kathuria moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint filed against him by plaintiff Biz2Credit Inc. Plaintiff opposes.

**BACKGROUND**

This breach of contract action concerns Defendant's alleged breach of contractual obligations as set forth in his employment and separation agreements with Plaintiff. Defendant was employed by Plaintiff from October 2013 until his termination in March 2015. During his employment, Defendant was involved in matters relating to an agreement between Plaintiff and Kalamata Capital LLC (Kalamata).

On December 8, 2014, prior to Defendant's termination, Kalamata sued Plaintiff and its affiliate and subsidiary, Itria Ventures, LLC (Itria) for, *inter alia*, breach of contract and tortious

interference with business relations (*Kalamata Capital LLC v. Biz2Credit, Inc. et. al.*, Index No. 653749/2014). Thereafter, on December 15, 2015, Kalamata served on Plaintiff and Itria a notice of subpoena for the deposition of Arjun Kathuria, who had been terminated in March of that year. Plaintiff moved for a protective order blocking the deposition. This court denied Plaintiff's motion and allowed Kalamata to proceed with the deposition of Mr. Kathuria.

Plaintiff subsequently commenced this action against Defendant, alleging that Defendant has breached the (1) Nondisclosure and Intellectual Property Assignment Agreement (Nondisclosure Agreement), which included a confidentiality provision (Confidentiality Provision), and which Defendant signed as part of his employment agreement, and (2) Separation and Release Agreement (Separation Agreement), which included a cooperation provision (Cooperation Provision) and a non-disparagement provision (Non-disparagement Provision), and which Defendant signed when he was terminated from the company.

Specifically, Plaintiff alleges that Defendant breached the (1) Confidentiality Provision of the Nondisclosure Agreement by disclosing, in advance of his deposition, Plaintiff's non-public confidential information to Kalamata without consent from Plaintiff and absent any process that would compel him to do so; (2) Cooperation Provision of the Separation and Release Agreement by failing to notify Defendant that Kalamata had attempted to serve a subpoena upon him, for failing to meet with Plaintiff in connection with litigation arising out of aspects of the performance of his job while employed by Plaintiff, and by refusing to comply with Plaintiff's August 2016 request that he appear for a continued deposition; and (3) Non-disparagement Provision of the Separation and Release Agreement by inducing or encouraging Kalamata to engage in conduct injurious to the reputation and interests of Plaintiff and its subsidiary, Itria, as well as making disparaging statements to Kalamata that cast Plaintiff in a negative light. Additionally, Plaintiff seeks attorneys' fees and punitive damages.

Defendant contends that (1) the Cooperation Provision is unenforceable because it imposes a duty of virtually unlimited cooperation; (2) Plaintiff failed to allege any “disparagement” by Defendant; (3) Plaintiff has not alleged any valid damages proximately caused by Defendant’s purported breaches of contract; and (4) Plaintiff’s claim against Defendant is actually a defamation claim barred by absolute judicial privilege.

The relevant contractual provisions include the Confidentiality Provision of the Nondisclosure Agreement and the Cooperation Provision and Non-disparagement Provision of the Separation and Release Agreement.

The Confidentiality Provision of the Nondisclosure Agreement states in relevant part:

You agree that you will not at any time, during your employment with the Company or at any time thereafter in perpetuity, disclose to any person or entity any Confidential Information (as defined) you obtained, observed or learned of during your employment or as a result of your employment with the Company, except (i) in the course of performing your duties as Employee, and only as directed by a senior executive officer of the Company and to the extent reasonably required for such performance; (ii) with the Company’s prior written consent; (iii) to the extent that any such information is in the public domain and generally available to the public without restriction, other than as a result of the direct or indirect breach of any of your obligations to the Company under the Employment Offer Letter or this Schedule A; or (iv) where required to be disclosed by court order, subpoena or other governmental process, but only after giving the Company reasonable prior notice thereof as provided below, and then, if the Company is unable to obtain a protective order, only to the extent ordered to be disclosed. With respect to any proposed disclosure under clause (iv) of the preceding sentence, you shall promptly, but in no event more than twenty-four hours after learning of such subpoena, court order, or other governmental process, so notify the Company in writing. In addition, at the Company’s expense, you shall: (a) take all reasonably necessary and lawful steps requested by the Company to defend against the enforcement of such subpoena, court order or other governmental process, and (b) permit the Company to intervene and participate with counsel of its choice in any proceeding relating to the enforcement thereof.

The Cooperation Provision of the Separation and Release Agreement states:

You agree to cooperate fully with Biz2Credit in connection with any pending or future inquiry or matter (including, but not limited to, any litigation, arbitration, audit, tax proceeding, external or internal investigation, or government proceeding) in which or to the extent the Company, in its sole discretion, deems your cooperation necessary, and including, but not limited to, any pending or future inquiry or matter arising out of any aspect of the performance of your job while employed by the Company.

The Non-disparagement Provision of the Separation and Release Agreement states:

You agree that you have not and will not, and will not induce or encourage others to, engage in any conduct that is injurious to the Company's or the Releasees' reputation or interest, or say, write, or cause to be said or written any statement that may be considered defamatory, derogatory or disparaging the Company or the Company Releasees or any client or customer of the Company to any third party or that may cast any of the foregoing parties in a negative light.

#### STANDARD

It is well established that when determining a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the court must liberally construe the complaint, accept as true the facts alleged in the complaint, and accord the plaintiff the benefit of every possible inference. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002); *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *Leon v Martinez*, 84 N.Y.2d 83, 87 (1994). In considering the motion, the court "is solely directed to the inquiry of whether or not the pleading, considered as a whole, fails to state a cause of action. Looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading." *Foley v D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dep't 1964) (internal citation omitted). Nevertheless, the court must look at the substance of the facts pleaded. *Oringer v. Rotkin*, 162 A.D.2d 113, 114 (1st Dep't 1990); *Foley v. D'Agostino*, 21 A.D.2d at 61 ("On a motion to dismiss, the substance rather than the form is controlling"); *Agin v. Krest Assocs.*, 157 Misc. 2d 994, 997 (Sup. Ct., New York County 1992). Generally, the court "should not *sua sponte* search the record on a CPLR § 3211 motion to dismiss as this motion simply addresses the sufficiency of a pleading whereas the standard of review upon a motion for summary judgment involves searching the record and examining the evidence underlying the pleadings." *Conant v. Alto 53, LLC*, 21 Misc. 3d 1147(A), (Sup. Ct., New York County 2008), 6 (citing *Friedman v. Connecticut Gen. Life Ins. Co.*, 30 A.D.3d 349, 349 [1st Dep't 2006], *aff'd as modified*, 9 N.Y.3d 105 [2007]). The opposing party may defeat the motion by asserting evidentiary facts

which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188 (1st Dep't 1999).

### ANALYSIS

Here, even assuming sufficiency of the factual allegations concerning violations of the Nondisclosure and Separation Agreements, Plaintiff's claims cannot survive the motion to dismiss because Plaintiff's allegations of damages are insufficient to sustain the complaint. *See JFK Hotel Owner, LLC v. Hilton Hotels Corp.*, 42 Misc. 3d 1237(A), 986 N.Y.S.2d 866 (N.Y. Sup., New York County 2014), 7 (citing *Lexington 360 Assocs. v. First Union Nat. Bank of N. Carolina*, 234 A.D.2d 187, 189–90 [1st Dep't 1996]) (dismissing cause of action where "Plaintiff fails to plead what damages were suffered as a result of the breach, and how those damages were caused by the disclosure of confidential information").

Plaintiff argues that its damages arise from the aforementioned *Kalamata* action and further that, at a minimum, Plaintiff has incurred damages in the form of legal expenses as a result of bringing the instant action. Both arguments are unavailing.

The court finds legal expenses and a potential judgment from an action that had been commenced well before Defendant's deposition and in which Defendant's testimony is one of several deponents in a highly contentious action wholly speculative and insufficient to raise a legal theory in breach of contract. *See Lexington 360 Assocs. v. First Union Nat. Bank of N. Carolina*, 234 A.D.2d at 189–90 (1st Dep't 1996) ("Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order"); *JFK Hotel Owner, LLC v. Hilton Hotels Corp.*, 42 Misc. 3d 1237(A), (N.Y. Sup., New York County 2014), 7. As to the second argument, Defendant correctly argues that such a contention is circular and that following such an argument would allow any movant to simply refer to its own breach of contract

action to make out a sufficient pleading for damages. See *Fowler v. Am. Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dep't 2003); *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988) ("mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based").

Furthermore, Plaintiff did not oppose Defendant's motion to dismiss its claim for punitive damages. The court finds that awarding Plaintiff attorney's fees and sustaining its claim for punitive damages is inappropriate. See, e.g., *Int'l Plaza Assocs., L.P. v. Lacher*, 63 A.D.3d 527, 528 (1st Dep't 2009); 36 N.Y. Jur. 2d Damages § 195; see also *Reads Co., LLC v. Katz*, 72 A.D.3d 1054, 1056-57 (2d Dep't 2010) ("Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally") (internal quotation marks omitted).

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that defendant Arjun Kathuria's motion, pursuant to CPLR 3211(a)(7), to dismiss the complaint filed against him by plaintiff Biz2Credit Inc., is granted.

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

9/11/2017

DATE

*Kelly O'Neill Levy*  
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE