MLB Advanced Media, L.P. v Big League Analysis, LLC
2017 NY Slip Op 32617(U)
December 18, 2017
Supreme Court, New York County
Docket Number: 650836/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MLB ADVANCED MEDIA, L.P.,

Plaintiff,

-against-

BIG LEAGUE ANALYSIS, LLC,

Defendant.

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Index No.: 650836/2016
(the 2016 Action)

DECISION & ORDER

BIG LEAGUE ANALYSIS, LLC,

Plaintiff,

-against-

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE UNITED STATES BASEBALL FEDERATION, INC., and NOAH GARDEN,

Defendants.

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Index No.: 152702/2017
(the 2017 Action)

SHIRLEY WERNER KORNREICH, J.:

Motion sequence number 001 in each of the two above captioned actions are consolidated for disposition.[1] These are motions to dismiss fraudulent concealment, negligent omission, and conversion causes of action asserted by Big League Analysis LLC (BLA) as counterclaims against MLB Advanced Media, L.P. (MLBAM) in the 2016 Action and against defendants, the Office of the Commissioner of Baseball, the United States Baseball Federation, Inc., and Noah Garden (collectively with MLBAM, the MLB Parties), in the 2017 Action. The court dismissed BLA's fraudulent concealment and negligent omission claims in both actions during oral

[1] These actions were consolidated by order dated October 17, 2017. *See* 2017 Action, Dkt. 29. Going forward, the parties will be filing documents on NYSCEF in the 2016 Action. References to "Dkt." followed by a number refer to documents filed in the 2016 Action.

argument, and reserved on the balance of the motions. *See* Dkt. 48 (11/14/17 Tr.). For the reasons that follow, BLA's conversion claims are dismissed.

These cases concern a failed business relationship between BLA and the MLB Parties. BLA was to "develop a suite of youth-oriented baseball services" on websites operated by the MLB Parties. *See* Dkt. 32 at 8. The reasons why the parties' relationship deteriorated, while at the heart of these cases, is not at issue on the conversion claims. Rather, dismissal turns on the answer to a discrete, arguably unsettled question of law – whether intangible property (here, confidential business information) allegedly improperly used by defendant may give rise to a cause of action for conversion if, at the same time, plaintiff had complete and unfettered use of its property. The court's recitation of the underlying factual allegations is limited to those pertinent to this question. All other factual allegations and the case's multi-forum procedural history are not discussed. As this is a motion to dismiss, the facts are drawn from BLA's amended answer in the 2016 action (Dkt. 19)[2] and are assumed to be true unless utterly refuted by documentary evidence.[3]

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[2] The facts alleged in BLA's complaint in the 2017 Action are essentially the same as those alleged in its amended answer in the 2016 Action.

[3] On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the

The contract governing the parties' relationship is a Development Agreement dated June 1, 2012, which was most recently amended in December 2013. *See* Dkt. 25 (the Agreement). For the purposes of this motion, suffice it to say that the Agreement governs what the MLB Parties may do with the confidential business information BLA was required to provide to the MLB Parties in order to procure approval of its proposed online content. BLA's sixth counterclaim in the 2016 Action and its sixth cause of action in the 2017 Action are for the MLB Parties' alleged conversion of BLA's confidential business information (principally contained in a binder of documents turned over at a meeting) (*see* Dkt. 19 at 22), which information the MLB Parties are alleged to have used to develop a competing product. The binder was returned; the information in it was allegedly kept and used. This alleged misappropriation of trade secrets and wrongful competition is the subject of other causes of action that the MLB Parties have not moved to dismiss. Nonetheless, BLA asserts seemingly duplicative conversion claims.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50 (internal citations omitted). It is now settled law that intangible property may be converted. *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292 (2007); *see Volodarsky v Moonlight Ambulette Serv., Inc.*, 122 AD3d 619, 620 (2d Dept 2014) ("electronic documents stored on a computer may be the subject of a conversion claim just as printed

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motion will succeed 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 N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

versions of the documents may."). However, there has been some confusion over how the second prong of *Colavito* – "dominion over the property or interference with it" – is to be assessed in connection with the conversion of intangible property. Traditionally, "the plaintiff ... must show that the defendant exercised an unauthorized dominion over the thing in question ... **to the exclusion** of the plaintiff's rights." *Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 (2d Dept 2010) (emphasis added; quotation marks omitted); *see NY Medscan, LLC v JC-Duggan Inc.*, 40 AD3d 536, 537 (1st Dept 2007) ("plaintiff ...must demonstrate that the defendant exercised unauthorized dominion over that property **to the exclusion** of the plaintiff's rights.") (emphasis added).

In Appellate Division cases following *Thyroff*, conversion claims have withstood motions to dismiss where the plaintiff alleged that defendant "wrongfully **withheld**, or otherwise wrongfully **barred access to**, the plaintiff's files and records." *See Alan B. Greenfield, M.D., P.C. v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 889 (1st Dept 2014) (emphasis added); *see also Lemle v Lemle*, 92 AD3d 494, 497 (1st Dept 2012) ("The motion court should not have dismissed the conversion [claim]. Conversion is the unauthorized assumption and exercise of the right of ownership over another's property **to the exclusion** of the owner's rights.") (emphasis added). By contrast, the Appellate Division, citing *Thyroff*, has dismissed conversion claims where "plaintiff **does not allege** that defendants wrongfully exercised dominion over those funds **in derogation** of plaintiff's ownership." *See B & C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 656 (1st Dept 2013). Relying on *Thyroff*'s recitation of the well settled formulation that conversion is "the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another **to the exclusion of the owner's rights**'" [*see Thyroff*, 8 NY3d at 288-89 (emphasis added; citations omitted)], the First Department has

not permitted a conversion claim absent an allegation "that defendants **interfered** with plaintiff's ownership [rights]." *See B & C Realty*, 106 AD3d at 656.

It is clear, therefore, that a conversion claim must be predicated on the plaintiff's loss of its ability to exercise at least some of its ownership rights in the subject property. Here, that essential predicate is not alleged. While BLA claims that the documents it gave the MLB Parties were improperly used by the MLB Parties to wrongfully compete with BLA, BLA does not contend that, at any point, BLA lacked access to its documents or that it could not exploit its trade secrets. Nor does BLA allege that it gave the MLB Parties its only copy of the documents, or that it was prevented from developing its own products due to the MLB Parties' possession of its documents or awareness of its intangible trade secrets. Simply put, BLA has not explained how it was precluded, in any way, from accessing or exploiting the property that was allegedly converted.

Instead, BLA contends that it is not required to make this allegation. It argues that it may prevail even if its ability to utilize the allegedly converted materials was not hindered during the period of the alleged conversion. The court disagrees. As Justice Scarpulla has explained, *Thyroff* did not purport to abrogate the requirement that plaintiff plead interference its rights in the converted property. *See Hyperlync Techs., Inc. v Verizon Sourcing LLC*, 2016 WL 642721, at *5 (Sup Ct, NY County 2015). Rather, *Thyroff* permitted a claim for conversion of intangible property where "Defendants wrongfully possessed and **denied [Plaintiffs] their right** to a tangible piece of property." *Id.* (emphasis added); *see Thyroff v Nationwide Mut. Ins. Co.*, 360 FApp'x 179, 180 (2d Cir 2010) ("Thyroff leased a computer from Nationwide and placed on it personal files, of which Nationwide consequently **took possession**-along with the computer-following termination of the lease.") (emphasis added); *see also Thyroff v Nationwide Mut. Ins.*

Co., 460 F3d 400, 404 (2d Cir 2006) ("The complaint alleges that Nationwide **denied Thyroff access** to the AOA and has **continued to retain possession** of Thyroff's personal information. The complaint also alleges that this is property that Nationwide unlawfully took, **and it cannot be replaced**.") (emphasis added). *Thyroff*, thus, was a case where the plaintiff was *actually deprived* of its property. By contrast, here, as in *Hyperlync*, BLA has "not alleged that [it was] deprived of access to [its] information." *See Hyperlync*, 2016 WL 642721, at *5.

While one New York state trial court has held to the contrary, Justice Bransten, in a case cited favorably in *Hyperlync*, persuasively explained why she declined to follow that holding:

> [Plaintiff] argues that in the digital age, intangible property such as computer files are subject to an action for conversion **regardless of exclusivity**. Relying on [*Thyroff*], [plaintiff] contends that the Court of Appeals has recognized that the tort of conversion can apply to electronic records and cites the recent case of *New York Racing Association v Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 546 (Sup. Ct. Nassau Cnty. 2010). In *New York Racing Association*, the court denied the Defendants' motion to dismiss a conversion claim 'even though [the plaintiff] was not 'excluded' from access to the electronic data." In so finding, the court stated that the Court of Appeals in *Thyroff* suggested that a plaintiff could maintain a cause of action for conversion when its electronically stored data was misappropriated, regardless of whether the plaintiff was excluded from access to that intangible property.
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> The facts of this case, however, are not in accord with *Thyroff*. **In *Thyroff* the plaintiff alleged that he no longer had access to his computer files and could establish the element of deprivation of his property**. Further, in discussing the applicability of the tort of conversion to intangible property, the Court of Appeals specifically pointed to the situation where a thief transfers shares of stock from a person's financial account to the account controlled by the thief and the situation where electronic documents are converted by a third party by pressing the delete button - **thereby depriving the owner of access to its documents**. Plaintiffs do not allege such a deprivation here.
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> This Court therefore concludes that **the element of deprivation of property still applies to the tort of conversion, and that Plaintiffs' ninth cause of action therefore must be dismissed since no deprivation is asserted**.

The Jones Group Inc v Zamarra, 2014 WL 2472102, at *9-10 (Sup Ct, NY County 2014) (emphasis added; citation omitted). This court agrees with Justice Bransten.

This view of the law is reinforced by a pre-*Thyroff* Court of Appeals case cited by BLA, *State v Seventh Regiment Fund, Inc.*, 98 NY2d 249 (2002). There, the Court explained that:

> the wrongful exercise of dominion need not consist of a manual taking, on the defendants' part. ... Thus, while it is not necessary for a defendant to take or destroy goods to constitute a conversion, **it is also not sufficient for a defendant secretly to declare ownership, when that declaration does nothing to inform the owner or any other interested party that an interference with ownership is intended**. Some affirmative act—asportation by the defendant or another person, **denial of access to the rightful owner** or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant—has always been an element of conversion.

Id. at 260 (emphasis added; citations and quotation marks omitted). The Court in *Seventh Regiment* held that while "the act of interference may leave the goods physically undisturbed, yet still impair the owner's rights", there still must be some exclusion of plaintiff from its right to access and exploit its property. *See id.* The Court did not, contrary to what BLA suggests, abrogate the rule that "a defendant who, though having custody of goods, does not 'exclude the owner from the exercise of his rights' is not liable for conversion." *See id.* at 259-60, quoting *Bradley v Roe*, 282 NY 525, 531-31 (1940). To this court's knowledge, no New York appellate court has expressly abrogated this rule.

To be sure, as *Thyroff* indicates, a plaintiff may maintain an action for conversion of trade secrets, such as a confidential client list. *See ARB Upstate Commc'ns LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 932 (3d Dept 2012), citing *Thyroff*, 8 NY3d at 289; *see also Volodarsky*, 122 AD3d at 620 (same). That said, this court holds that the deprivation element of a conversion claim has not been abrogated. Indeed, the Appellate Division continues to require a plaintiff to "show that the defendant exercised an unauthorized dominion over the thing in question **to the**

exclusion of the plaintiff's rights," in order to establish a conversion claim. *Nat'l Ctr. for Crisis Mgmt., Inc. v Lerner*, 91 AD3d 920 (2d Dept 2012) (emphasis added). In *Lerner*, where some of the property converted by defendants was the sort of electronic records at issue in *Thyroff*, the court found a triable issue of fact because "plaintiffs disputed that the materials were ever returned." *See id.* at 921. Hence, while intangible property may be the subject of a conversion claim, dispossession of plaintiff is essential to the claim.

In sum, here, where BLA was not deprived of its ability to use its confidential information, it has not stated a claim for conversion.[4] There is no controlling authority that suggests that a defendant may be held liable for conversion if it wrongfully possesses a copy of documents when the originals are in plaintiff's possession.[5] In such a case, there simply is no derogation of plaintiff's ability to access or exploit its property. Accordingly, it is

ORDERED that the balance of the MLB Parties' motions to dismiss is granted, and BLA's causes of action for conversion are dismissed.

Dated: December 18, 2017 ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[4] The MLB Parties did not argue for dismissal on the ground of the claim being duplicative. The court, therefore, declines to *sua sponte* consider this possible, independent basis for dismissal. The court also declines to extensively address its concern about the possibility of recovering unfair competition damages based on conversion of property that does not qualify as a trade secret, other than to note that if all trade secret claims could be pleaded as a claim for conversion, without the need to actually establish that the converted property qualifies as a trade secret, this would effectively gut the important requirement of proving that business information qualifies for trade secret protection. This could open the floodgates to anticompetitive litigation by effectively permitting stealth trade secrets claims based on the alleged conversion of material that does not actually qualify for trade secret protection.

[5] Indeed, while BLA alleges that "MLBAM ignored Big League's demands for MLBAM to stop using Big League's Confidential Information and took no action to stop or prevent that use," BLA does not allege it demanded that the MLB Parties return the binder of materials that was alleged converted (or that the MLB Parties refused to do so). *See* Dkt. 19 at 35.