Trrigr, LLC v Kerriz Inc.
2018 NY Slip Op 31281(U)
June 22, 2018
Supreme Court, New York County
Docket Number: 650567/17
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 54

TRRIGR, LLC,

Plaintiff,

against

KERRIZ INC. and KERRIANN SCOTT,

Defendants.

Index No.: 650567/17

DECISION AND ORDER

SCHECTER, JENNIFER, J.:

Pursuant to CPLR 3212, plaintiff Trrigr, LLC (Trrigr) moves for summary judgment on its breach of contract and tortious interference with business relations causes of action and on defendant's counterclaim for malicious prosecution. Defendant Kerriz Inc. (Kerriz) opposes the motion and cross moves to (1) dismiss the complaint based on the pendency of a prior action and (2) amend its answer.[1] The motion is granted to the limited extent that defendant's counterclaim is dismissed and the cross motion is granted to the limited extent that defendant can amend its responses to the allegations in the complaint. Additionally, pursuant to CPLR 3212(b), Kerriz is awarded summary judgment on Trrigr's tortious interference with business relations claim.

[1] By decision and order dated May 12, 2017, this court dismissed the complaint against Kerriann Scott individually and dismissed plaintiff's causes of action for unfair competition and fraud (Affirmation in Support [Aff Sup], Ex K).

Background

Trrigr provided dry cleaning services through a business known as Kae Lee Cleaners (Kae Lee) (Memorandum in Support [Sup] at 6). It decided to change its focus to supplying an integrated platform for customers to place dry-cleaning orders by mobile application (App) and, on February 1, 2016, sold Kae Lee to Kerriz for $67,000. The parties entered into an Asset Purchase Agreement (Agreement) pursuant to which Kerriz purchased Trrigr's dry-cleaning assets, the name "Kae Lee Cleaners" and Kae Lee's customers, at least 381 of which were already doing business with Trrigr through its App (*id*; Memorandum in Opposition [Opp] at 6).

Section 26 of the Agreement ("Non-Solicitation") sets forth:

> "[Kerriz] agrees that for two (2) years after the date of this Agreement (such period is referred to as the 'Restricted Period,') [Kerriz] shall not solicit or attempt to solicit the business of any customers or clients of [Trrigr] with respect to services that [Trrigr] performs for such customers or clients. [Kerriz] 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 [Trrigr] to cease doing business with [Trrigr] or to reduce the amount of business it does with [Trrigr]. The provisions of this Section shall survive the termination of this Agreement. [Kerriz] agrees that any breach of this Section would cause irreparable

> harm to [Trrigr] and that money damages would not provide an adequate remedy"

(Aff Sup, Ex A at § 26).

The Agreement further provides for liquidated damages in the event of a "material breach" of the non-solicitation provision--"$10,000 for each breach and/or customer or client" (*id.* at § 28).

Trrigr alleges that, shortly after execution of the Agreement, Kerriz began soliciting customers--specifically the 381 customers who were doing business on the App--and encouraging them to stop doing business through the App and to instead place orders directly through Kerriz' website, which was powered by Trrigr's competitor delivery.com (Affidavit of Joseph Tillman [Tillman] at ¶¶ 5, 17 and 23).

Trrigr asserts that:

- On "February 28, 2016, defendant began sending mass text messages and/or emails to . . . Trrigr customers . . . [stating] 'Thanks for being Kae Lee Cleaners customer. Kae Lee's []still in business. Try our new website and receive 20% off your 1st order. . . .'" The link provided led to a webpage where customers could directly place their orders circumventing the App. The top of the webpage stated "ordering by delivery.com" (Tillman at ¶¶ 12, 14).

- "In or about June 2016, defendant sent another mass text message to [Trrigr customers] stating 'Hi Kae Lee

> Cleaners Customers! To celebrate our independence, take 10% off your next order. Enter code . . . during checkout . . ..'" The link in the text/email led to a website where customers could directly place laundry and/or dry-cleaning orders. On the top right of the webpage was "ordering by delivery.com" a direct competitor of Trrigr (Tillman at ¶¶ 15, 17).
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> - "In or around August 2016, defendants sent another mass text message to [] Trrigr Customers stating 'Hi Kae Lee Cleaners customer. We're officially open @ 671 Amsterdam Av. Stop by or call . . .. Mention this text and get $10 off your order . . .'" (Tillman at ¶ 18 [emphasis added]).
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> - In or around October 14, 2016, defendant sent out another mass text stating "'Due to past due payment of more than $5K we no longer accept orders via Trrigr . . .'" (Tillman at ¶ 21).

Trrigr commenced this action seeking "no less than $40,000 and up to $3,810,000 pursuant to the liquidated damages clause" (Aff Sup, Ex I at ¶ 36). It now moves for summary judgment on its only remaining causes of action, which are breach of contract and tortious interference with business relations.

Kerriz urges that this action must be dismissed based on a prior pending action that it commenced in Civil Court. It also contends that Trrigr's motion must be denied because discovery has not yet been conducted, because Trrigr waived

compliance with the non-solicitation provision and because there are disputed issues of material fact. Kerriz asserts "upon information and belief" that only one of Trrigr's App customers switched to using a competing delivery service and that "all or at least most of the former Trrigr App users now call the store directly for pickup and delivery service" (Scott Affidavit in Opposition at ¶ 12). In addition, Kerriz cross moves to amend its answer.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (*see William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [emphasis added]). Once the movant has made this showing, the burden then shifts to the opponent to establish,

through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Questions of fact related to the meaning and scope of the non-solicitation provision preclude summary judgment. Significantly, it is unclear what type of solicitations the parties intended to prohibit; consequently, Trrigr has not demonstrated that the breaches it alleges necessarily fall within the scope of the provision. For example, it is unclear that defendant's solicitation inviting customers to "stop by or call" and mention the text to get $10 off an order constitutes a breach of the provision.

Additionally, even if Kerriz may have breached the non-solicitation provision, Trrigr has not demonstrated that the liquidated damages clause is enforceable. Specifically, it has not shown that the amount fixed by the parties is not a penalty "plainly or grossly disproportionate to the probable loss" (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 396 [1999]). The clause contemplates at least a $10,000 award even if none of Trrigr's customers actually ceased or reduced doing business with Trrigr.[2] The court is not convinced, moreover,

[2] Ten thousand dollars, moreover, is almost 15% of the entire price that Kerriz paid to purchase the business.

that damages would be hard to ascertain here when dealing with a limited universe of 381 App customers. The parties could easily figure out which of those 381 customers, if any, placed orders in response to Kerriz' solicitations and Trrigr could be awarded damages in the amount that it would have profited from those orders had they been placed through the App. To the extent that some of the 381 customers may have stopped using the App altogether based on Kerriz' solicitation (a fact that remains unproven), Trrigr's damages could be based on the continuing business those particular customers have done from the date of the alleged breach until the two-year period ended.

Because there are questions of fact as to the meaning and scope of the non-solicitation clause and discovery related to damages is necessary, summary judgment is denied on Trrigr's breach of contract claim.

The record establishes that Kerriz is entitled to summary judgment on Trrigr's tortious interference with business relations claim (*see* CPLR 3212[b]). That Kerriz informed Trrigr customers of an alleged past due amount (Sup at 22) is plainly insufficient to show that it may have acted "solely out of malice or used improper or illegal means that amounted to a crime or independent tort" (*see Wolberg v IAI North*

America, Inc., 161 AD3d 468 [1st Dept 2018]; *Steinberg v Schnapp*, 73 AD3d 171, 177 [1st Dept 2010]). Additionally, the wrongful conduct amounts to no more than the alleged breach of the Agreement; thus, this cause of action is duplicative of that one and must be dismissed.

Trrigr is, however, awarded summary judgment on Kerriz' counterclaim for malicious prosecution. Kerriz did not oppose the motion and, in fact, appears to have abandoned the unsustainable counterclaim as it has not been included in its proposed amended answer (*see* Affirmation in Opposition [Aff Opp], Ex 3).

Kerriz' cross motion to dismiss based on the existence of a prior pending action is denied. Kerriz' Civil Court action, which was based on Trrigr's alleged failure to pay Kerriz for dry-cleaning services that Kerriz provided to Trrigr's App users in breach of a separate agreement between the parties (App Agreement), was dismissed in September 2017 (for Kerriz' failure to appear). That action is no longer pending.

Kerriz also cross moves to amend its answer. Amendments are liberally granted provided that they are not unfairly prejudicial, "palpably insufficient" or "patently devoid of merit" (*Goodwin v Empire City Subway Co., Ltd.*, 124 AD3d 559, 559-560 [1st Dept 2015]; *MBIA Ins. Corp. v Greystone & Co.*,

Inc., 74 AD3d 499, 500 [1st Dept 2010]). Defendant's cross motion is granted to the limited extent that defendant's amended responses to the allegations contained in the complaint--specifically ¶¶ 1-61 of the proposed amended answer--are permitted. In all other respects, amendment is denied.

Defendant's proposed twenty fourth affirmative defense, which is based on the pendency of the Civil Court action, is rejected as palpably insufficient and devoid of merit as that case was dismissed.

Finally, defendant's proposed counterclaim, which alleges breach of the duty of good faith and fair dealing, is also untenable. In its proposed counterclaim, defendant contends that Trrigr "breached its implied duties of good faith and fair dealing by making performance of the Agreement and its restrictive covenants impossible in failing to pay [Kerriz] for services ordered through [Trrigr's] mobile app" and that Kerriz has consequently sustained more than $65,000 in damages (Aff Opp, Ex 3, Proposed Counterclaim at ¶¶ 3-4). Trrigr's alleged breach of the wholly separate independent App Agreement (which was the subject of the Civil Court action that was dismissed) cannot be the basis for breach of the implied covenant of good faith in the contract that is the

subject of this action. In the Agreement there is no mention of the parties' obligations related to payment for orders placed through the App. To add this requirement under the guise of an implied obligation would change the Agreement itself (*see A.N.R. Inv. Co. Ltd. v HSBC Private Bank*, 135 AD3d 632, 634 [1st Dept 2016] [implied covenant cannot be construed so broadly as to create independent contractual rights]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted solely as to defendant's counterclaim, which is dismissed, and in all other respects plaintiff's motion is denied; it is further

ORDERED that summary judgment is awarded to defendant on plaintiff's third cause of action (tortious interference with business relations) pursuant to CPLR 3212(b) and that claim is dismissed; it is further

ORDERED that defendant's cross motion is granted to the limited extent that its answer is deemed amended to include ¶¶ 1-61 of the proposed amended answer attached to the cross moving papers as Exhibit 3 and in all other respects is denied.

Dated: June 22, 2018

HON. JENNIFER G. SCHECTER