SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

----------x

Reis, Inc. and Reis Services, LLC

Plaintiff(s) **Index no. 650994/2018**

-against- **DECISION/ORDER**
Motion Sequence No. 1

ATCO Properties & Management, Inc.

Defendant(s)

----------x

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion to dismiss the action based on documentary evidence

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	1
Memorandum of Law in Support	2
Affidavit in Opposition and Exhibits Annexed	3
Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Borrok, J.

Atco Properties & Management, Inc. (**Atco**)'s motion to dismiss pursuant to CPLR § 3211(2), (5) and (7) is denied in its entirety.

The Facts Relevant to the Atco's Motion

Reis, Inc. and Reis Services, LLC (collectively, **Reis**) operate a commercial real estate data base (the **Reis Database**) available on the internet which it offers to paying customers through purchased identification and password credentials. Reis offers a variety of product delivery services including *Reis SE, Reis Reports,* and *Portfolio CRE.* To obtain access, a user must ether pay for a la carte access (i.e.,

pay as you go) or for a subscription and in either case to obtain a license that is subject to a license agreement which incorporates certain terms of service (the **Reis Terms of Service**). Each individual user is issued his or her own login credentials which consist of a unique username and password to access the Reis Database. All users who access the Reis Database agree to be bound by the Reis Terms of Service.[1]

Among other things, the Reis Terms of Service (i) prohibit resale and transfer of use of access to the Reis Database, (ii) require that each person have their own unique password and username which they are prohibited from transferring to anyone else, (iii) provide that Reis may recover its expenses (including attorneys' fees) incurred in prosecuting an action of breach of its terms of service, and, notably, (iv) payment of fees for use of the Reis Database and to refrain from acting in a manner so as to deprive Reis of a "loss of a potential sale of subscription".[2]

Reis alleges that beginning in 2010 and continuing through December 2012, Atco (i.e., identified in October, 2016 through its internet protocol address of 72.43.159.202, and not then a customer of Reis), used login credentials that belonged to Ernst & Young (**EY**), a paying customer of Reis, to access the Reis Database and download at least 359 Reis Reports. According to Reis, 117 of the Reis Reports were downloaded within the six year period prior to filing of the Complaint (the **2012 -2018 Reis Download**) which had a retail value of $49,868 and the other at least 242 of the Reis Reports were downloaded between 2010 and 2012 (the **2010 – 2012 Reis Download**) which Reis Reports had a retail value of $75,510 ($125,378 - $49,868).[3]

On October 12, 2016, Reis contacted Atco regarding the use of the Reis Database using EY login credentials and Atco was "not able to provide any evidence that there was an innocent explanation".[4] Reis therefore brought this action alleging common law fraud, breach of contract, unjust enrichment/quantum meruit and requesting (i) compensatory damages in the amount not less than $125,378, representing the full retail value of the Reis Reports taken by the defendant, plus interest and costs, (ii) punitive damages, (iii) attorneys fees and (iv) such other

---

[1] Complaint, ¶¶ 12-25.
[2] Complaint, ¶ 28.
[3] Defendant Atco Properties & Management, Inc.'s Reply Memorandum of Law in Further Support of its Motion to Dismiss, Pg. 2 *citing* Complaint, ¶¶ 31, 34, 37, and 74; *See Complaint ¶ 95(a).*
[4] Complaint, ¶ 50.

relief as is just and proper. And, Atco moved to dismiss pursuant to CPLR § 3211(a)(2), (5) and (7).

I. CPLR § 3211(a)(2) Lack of Subject Matter Jurisdiction

Atco argues that the Reis cause of action for unjust enrichment/quantum meruit is preempted by federal copyright law and therefore is precluded as a matter of law.[5]

Section 301 of the Copyright Act provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.[6]

More specifically, Atco argues that the 2018 Reis Terms of Service indicate that the Reis reports which Atco allegedly took are protected under the Copyright Act. According to Atco, the 2018 Reis Terms of Service, provide that the service "and content of Reis.com are the property of Reis, its licensors and third parties and are protected by copyright and other intellectual property laws."[7] In addition, Atco argues that Reis has previously claimed that the work on its website is copyrightable in *Reis, Inc. v. Spring 11 LLC,* No. 15-cv-2836, 2016 WL 5390896, at *5-8 (S.D.N.Y Sept. 26 ,2016)*; Reis v. Lennar v. Corp.*, No. 15-cv-7905, 2016 WL 3702736, at *3-4 (S.D.N.Y. Jul. 5, 2016).

In response, relying on *Palatkevich v. Choupak,* 152 F. Supp. 3d 201, 221-22 (S.D.N.Y. 2016)[8], Reis argues that its quasi-contract claim is not preempted by the

---

[5] Affirmation in Support of Motion, Paragraph 20 *citing Noble v. Town Sports Intern, Inc.* 271 A.D.2 367 (1st Dep't 2000) *(affirming motion court's conclusion that plaintiff's unjust enrichment cause of action was preempted by the Federal Copyright Act); see also Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.,* 373 F.3 296, 3060-307 (2d. Cir. 2004) *(holding that unjust enrichment and quantum meruit claims were to be analyzed together as a single quasi-contract claim and were preempted by the Copyright Act).*

[6] 17 U.S.C. § 301(a).

[7] Affirmation in Support of Motion of Scott J, Pashman *Citing* Reis Service downloaded from Reis.com on April 17. 2018 as Ex. E.

[8] To be clear, in Palatkevich, computer programmers created software for the defendants that the defendants used in their business while refusing to pay the promised compensation. The defendants argued that the claims were pre-empted by the Copyright Act. The court however disagreed holding that the claim of unjust enrichment

Copyright Act because this is not a case where Reis made protected data publicly available and then asserted unjust enrichment claims against strangers that used and copied it. This case involves a different right that was allegedly violated – i.e., that Atco wrongfully accessed the Reis Database without permission and authority and absconded with material that was otherwise offered for sale without paying for it. To prove its claim, according to Reis, it must prove an extra element which presents a materially different claim. Put another way, according to Reis, the situation before the court is the same as if a stranger either forged or took an employee's identification card, entered their store and took their 359 items of merchandise otherwise offered for sale, agreed to pay for it, and then subsequently left the store without in fact paying for it.

Reis also claims that the material at issue is not copyrightable and that Atco's reliance on the 2018 Reis Terms of Service as identifying certain material as subject to copyright protection is inappropriate and should be ignored by the court because the 2018 Reis Terms of Service were not the Reis Terms of Service in effect at the time that the alleged appropriation of the Reis Report from the Reis Database took place.

Inasmuch as Reis alleges that (x) there is an extra element that needs to be proved which changes the nature of the action so that it is qualitatively different than a copyright infringement claim and (y) that the material is not copyrightable, the motion to dismiss based on preemption is denied. *See Michael Grecco v. Corbis Sygma and Corbis Corporation*, 284 A.D.2d 234 (1st Dep't 2001); *General Mills, Inc. v. Filmtel International Corporation and Producers Associates of TV, Inc.*, 178 A.D.2d 296 (1st Dep't 1991); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523, 1535 (S.D.N.Y.1985); *Art Shamsky v. Garan, Inc.* 167 Misc.2d 149 (1995).

II. CPLR § 3211(a)(5) Statute of Limitations

It is well settled that the burden of establishing a statute of limitations defense is on the party asserting it. *Gray v. Gray,* 232 A.D.2d 287, 648 N.Y.S.2d 914 (1st Dep't. 1996). The defendants bear the initial burden of showing when the

---

was different than the claim that defendant infringed any copyright by reproducing or distributing. To wit, here, like in Palatkevich, the issue isn't that Atco is alleged to have reproduced or distributed the material. Reis' complaint is that the Atco took material which was offered for purchase without paying for it.

cause of action accrued. *Lebev v. Blavatnik,* 144 A.D.3d 24, 38 N.Y.S.3d 159, 2016 N.Y. Slip Op. 06463 (1st Dep't.). Accrual of a cause of action "occurs when all of the factual elements necessary to maintain the lawsuit and obtain relief come into existence." *Sears, Roebuck and Co. v. Patchogue Associates, LLC,* 87 A.D.3d 629, 928 N.Y.S.2d 476 (2nd Dep't. 2011), *quoting HP Capital, LLC v. Village of Sleepy Hollow,* 68 A.D.3d 928, 929, 891 N.Y.S.2d 443 (2nd Dep't. 2009).

In this case, Atco argues that the claims must be dismissed because (i) the statute of limitations for a copyright infringement claim under the Copyright Act is three years[9], but if the court holds that preemption does not apply, that (ii) the statute of limitations for fraud, breach of contract and quantum meruit is six years[10], and that Reis' claims which stem from the alleged 2010 – 2012 Reis Download must at a bare minimum be dismissed because such alleged 2010 – 2012 Reis Download by Reis' own admission occurred outside of the time period permitted by the statute of limitations.

Reis argues that its claim for breach of contract and quantum meruit relate to the 2012 – 2018 Reis Download (i.e., its claim for $49,868 for the retail value of the Reis Reports downloaded during that time period). This conduct, Reis correctly notes, Atco does not contest occurred within the period required by the statute of limitations.

The balance of Reis' claim (i.e., the claim as it relates to the 2010 – 2012 Reis Download) is based on fraud. The statute of limitations for fraud is the greater of six years from the date the cause of action accrued and two years from the time that plaintiff discovered or could have discovered the fraud with reasonable diligence. *See* CPLR § 213(8).

Reis argues that because Atco was hiding beyond a legitimate Reis user name and password issued to a different company (re: E & Y), Reis had no reason to suspect fraudulent conduct by Atco and that only following forensic investigation did Reis uncover Atco's fraudulent misappropriation of the Reis Reports.[11] Further, Reis argues that while it may have suspected general fraudulent misappropriation of the

---

[9] *See* 17 U.S.C.A. § 507(a).
[10] *See* CPLR § 213.
[11] Reis's Memorandum of Law in Opposition to Defendant Atco Properties & Management Inc.'s Motion to Dismiss, Pg. 16.

Reis Datebase content and disclosed the same in its March 2010 filing with the Securities and Exchange Commission, that does not mean that it knew or should have known of the alleged fraudulent misappropriation *by Atco (emphasis added)*. Moreover, Reis concedes that while Reis will ultimately have the burden of showing that it could not have discovered the fraud until two years before the filing of this action, this is not the standard required at the pleadings stage. The court agrees.

At this stage of the action, Reis has plead sufficiently to invoke the benefit of the two year discovery rule codified in CPLR § 213(8) and Atco's motion to dismiss pursuant to CPLR § 3211(a)(5) is denied.

III. CPLR § 3211(a)(7) Failure to State a Cause of Action

Finally, Atco argues that the complaint must be dismissed because Reis has failed to state a cause of action for breach of contract, quantum meruit or fraud.

It is well settled that in reviewing a motion to dismiss pursuant to CPLR § 3211, the court must determine whether the facts alleged in the complaint fit within any cognizable legal theory. *Demicco Bros V. Consol, Edison Co.*, 8 A.D.3d 99 (1st Dep't. 2004).

A. Breach of Contract

Atco argues that Reis has failed to state a cause of action for breach of contract because the Complaint does not allege facts showing Atco's agreement to the Reis Terms of Service.[12] The court however does not agree.

The elements of a breach of contract claim are (i) the existence of a contract, (ii) performance by the plaintiff, (iii) breach by the defendant and (iv) damages. *JP Morgan Chase v. J.H. Elec. Of N.Y., Inc.*, 69 A.D.3d 802 (1st Dep't 2010). In this case, Reis alleges that all users of the Reis Database agree to be bound by the Reis Terms of Service which require each person to have their own unique username and password and to pay appropriate fees for use of the Reis Database.[13] Accordingly, Reis has made out a cause of action for breach of contract and Atco's motion to dismiss this cause of action is denied.

---

[12] Affirmation in Support of Motion, dated April 24, 2018, by Scott J. Pashman, ¶ 27.

[13] *See Fn. 2, supra; Reis Memorandum of Law in Opposition to Defendant Atco Properties & Management Inc.'s Motion to Dismiss, Pg. 11 citing Compl. ¶ 30.*

B. Quasi-Contract

Relying primarily on *Randall's Island Aquatic Leisure, LLC, et al. v. City of New York, et al.*, 92 A.D.3d 463 (1st Dep't 2012), Atco argues that the quasi-contract claim should be dismissed because the subject matter of the claim is covered by Reis' valid contract with E&Y and that the complaint does not allege a sufficiently close relationship between Reis and Atco.[14] Atco's reliance on *Randall's Island* is however misplaced.

Randall's Island involved the Waterpark Concession Agreement (the **Agreement**) between Randall's Island Aquatic Leisure, LLC and the City of New York (through the Parks Department). Plaintiffs Aquatic Development Corp. (**ADC**) and Recreation Development, Inc. (**RDI**) and defendant Economic Development Corp (**EDC**) were not signatories to the Agreement which Agreement governed the dispute. Accordingly, the court held that ADC and RDI were not proper plaintiffs and the EDC was not a proper defendant in the action and that as non-signatories to the Agreement, there could be no breach of contract claim and there could be no quasi-contract claim as against a third party non-signatory to the Agreement where the Agreement itself covered the subject matter of the dispute.

This action does not involve the alleged breach of a single agreement between E&Y and Reis where that agreement covers the subject matter of this dispute. Rather the premise of this lawsuit is based upon the alleged fraudulent conduct by Atco, its alleged breach of the terms of the Reis Terms of Service and/or its unjust enrichment from obtaining the Reis Reports without paying for them. Put another way, although Reis may have a cause of action against E&Y, the agreement between Reis and E&Y is not the basis for this cause of action. The basis for this cause of action is based on the unpaid for benefit received by Atco for the Reis Reports which Atco allegedly downloaded. *See Freedman V. Pearlman,* 271 A.D.2d 304 (1st Dep't 2000). Accordingly, Atco's motion to dismiss the cause of action for quasi-contract/quantum meruit is denied.

C. Fraud

Fraud requires (i) a misrepresentation or a material omission of fact, (ii) which is known to be false, (iii) made for the purpose of inducing reliance, (iv) justifiable reliance and (v) injury. *Pasternack v. Laboratory Corp. of Am. Holdings,* 27

[14] Affirmation in Support of Motion, dated April 24, 2018, by Scott J. Pashman, ¶ 28; Defendant Atco Properties & Management, Inc's Memorandum of Law in Support of its Motion to Dismiss, Pg. 17.

N.Y.3d 817 (2016). Atco argues that the cause of action for fraud must be dismissed because, relying on *Reis, Inc. v. Spring11 LLC,* 2016 WL5390896 (S.D.N.Y. Sept. 26, 2016), Reis' claim seeks only to recover lost profits which Atco argues are not recoverable damages under New York law in accordance with the "out-of-pocket rule." In *Spring11*, the court commented that Reis' damage claim in that case was based on the value of the reports that the Spring11 employees allegedly downloaded and that such claim is only a loss insofar as it represents a lost profit. Furthermore, the court commented that under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud. In addition, Atco argues that Reis fails to plead its cause of action with specificity.[15]

In its opposition papers, Reis argues that the out-of-pocket rule permits recovery of the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain. That is, the out-of-pocket rule prohibits recovery of speculative profits that the plaintiff might have gained had the defendant's fraudulent representations been genuine. The out-of-pocket rule does not prevent parties for recovering for their actual losses. *See, e.g., Lama Holding Company, et al. v. Smith Barney, Inc., et al.,* 88 N.Y.2d 413 (1996).[16] To wit, Reis argues that it seeks to recover the difference between the value of the fraudulently misappropriated reports and the consideration provided by Atco ($0).[17] In other words, Reis argues it is seeking to be put in the same position it would have been in had the fraud not occurred. This recovery does not violate the out-of-pocket rule.

In addition, Reis argues that the *11Spring* presents a very different case then the one in front of the court. That is, Reis argues that 11 Spring provided real estate consulting, advisory, underwriting and due diligence services to investors and

---

[15] Defendant Atco Properties & Management, Inc.'s Memorandum of Law in Support of Its Motion to Dismiss, Pg. 14.

[16] *Lama* involved a claim that its consent to a merger was fraudulently induced by failing to disclose the merger partner or potential tax consequences to Lama. Lama had acquired its shares to take advantage of the favorable tax treatment available under the General Utilities doctrine whereby double tax on the sale of assets could be avoided in the liquidation of assets. The General Utilities doctrine was repealed by the Tax Reform Act of 1986. Lama claimed that it was not made aware of the tax consequences as a result of the merger and accordingly suffered an over $33 million tax liability. The Court in that case held that the loss did not occur as a result of the misrepresentation but by repeal of the General Utilities doctrine and therefore dismissed the claims for fraud and the court further noted that there was no loss as Lama had like other shareholders received more than twice the FMV for their shares. Finally, the court noted that the out-of-pocket rule prohibits recovery of placing the plaintiff in a better position than he/she would be in had the fraud not occurred.

[17] Reis's Memorandum of Law in Opposition to Defendant Atco Properties & Management Inc's Motion to Dismiss, Pg. 4.

banks and was a service provider of paying customers of Reis who misappropriated information from the Reis Database to Reis customers in the performance of their services. Atco is a company who had no business relationship whatsoever with Reis who is alleged to have misappropriated information from the Reis Datebase for its own use. Moreover, Reis argues, that in *Reis, Inc. v. Lenmar Corp.*, No. 650056/17 (N.Y. Sup. Ct. Aug 16, 2017), Lenmar Corp. like Atco, misappropriated reports for its own use, and Justice Ostrager denied Lenmar Corp.'s motion to dismiss the fraud cause of action when the defendants in that case argued that the fraud claim should be dismissed based on *Spring11*.

Moreover, Reis argues that it has plead fraud with sufficient specificity at this stage of the proceeding. The complaint alleges that each time Atco entered E&Y's credentials, it made a material misrepresentation which it knew to be false for the purpose of inducing reliance by Reis which reliance Reis justifiably relied on (i.e., the username and password credentials were legitimate and had been licensed to E&Y) whereby Reis was injured in the amount of the value of the information taken from it.

Inasmuch as Reis' claim is for pecuniary loss and recovery would not put them in a better position than they would have been had the fraud not occurred and the pleadings make out a cause of action for fraud, the motion to dismiss this cause of action is denied.

D. Punitive Damages

Atco also argues that Reis' claim for punitive damages must be dismissed because Reis alleges in conclusory fashion that Reis is entitled to punitive damages because of Atco's egregious conduct and complete disregard for Reis rights.[18] Atco further argues that the only allegations are that Atco used E&Y credentials to take some 359 Reis Reports over an approximately 10 year period without paying for them and in violation of the Reis Terms of Service.

In its opposition papers, citing *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825-08, 2013 NY Misc. LEXIS 1818, at *44 (N.Y. Sup. Ct. Apr. 29, 2013), Reis argues that at this stage of the pleadings, it need only allege egregious conduct and facts when viewed in the light most favorable to Reis, that would

[18] Defendant Atco Properties & Management, Inc.'s Memorandum of Law In Support of Its Motion to Dismiss, Pg. 18 *citing* Complaint ¶56.

permit a reasonable fact finder to determine that Atco demonstrated a high degree of moral turpitude and wanton dishonesty. Reis argues that the complaint alleges that Atco knew that use of the Reis website was restricted to paying customers and to avoid paying Reis on either an a la carte basis or for a subscription, Atco used E&Y credentials to surreptitiously infiltrate the Reis Database over an eight year period and take some 359 Reis Reports without paying for them. This conduct makes out the necessary egregious conduct necessary to sustain a claim for punitive damages at this stage of the pleadings. The court agrees.

Accordingly, it is hereby ordered that the motion to dismiss pursuant to CPLR § 3211 is denied in its entirety and Atco is ordered to file an answer within 30 days of the date hereof.

Dated: July 25, 2018

Hon. Andrew Borrok
J.S.C.

Hon. Andrew Borrok