

Biz2Credit, Inc. v Izaguirre
2019 NY Slip Op 31427(U)
May 16, 2019
Supreme Court, New York County
Docket Number: 650861/2018
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Biz2Credit, Inc. and Itria Ventures LLC,

Plaintiff,

-against-

Index No. 650861/2018

Julio Izaguirre, Turtle Bay Enterprises LLC,
and Central Diligence Group LLC

Decision and Order
(Mot. Seq. No. 004)

Defendants.

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Hon. James E. d'Auguste, J.S.C.

This action is brought by a former employer, Biz2Credit, Inc. (B2C) and a subsidiary of the former employer, Itria Ventures, LLC (Itria), against a former employee, Julio Izaguirre (Izaguirre) and two companies, Turtle Bay Enterprises LLC (Turtle Bay) and Central Diligence Group LLC (CDG), with which Izaguirre worked or owned during and/or after his employment with B2C. In their amended complaint, plaintiffs assert claims for: (1) breach of contract against Izaguirre in relation to the non-solicitation and confidentiality provisions of his at-will employment agreement with Biz2Credit; (2) breach of the implied covenant of good faith and fair dealing against Izaguirre; (3) breach of the fiduciary duty of loyalty (under the “faithless servant” doctrine) against Izaguirre; (4) aiding and abetting said breach of the fiduciary duty of loyalty against Turtle Bay; (5) common law misappropriation of trade secrets against Izaguirre; (6) aiding and abetting common law misappropriation of trade secrets against Turtle Bay and CDG; (7) misappropriation of trade secrets in violation of 18 USC §1832 against all three defendants; (8) tortious interference with contractual relations related to Izaguirre’s at-will employment agreement against Turtle Bay; and (9) tortious interference with prospective business relations against Turtle Bay and CDG.

Defendant Central Diligence Group (CDG) seeks dismissal of plaintiff's Fourth, Sixth, Seventh, Eighth and Ninth causes of action. For the reasons discussed herein, these causes of action are dismissed as against Turtle Bay.

Aiding and Abetting Breach of Fiduciary Duty

Where a cause of action is based upon some allegation of a breach of trust, such as plaintiffs Fourth cause of action for aiding and abetting a breach of fiduciary duty, the circumstances constituting the wrongdoings must be stated in detail. CPLR 3016(b). A conclusory recitation of the elements of a claim asserted as factual statements is insufficient to survive a motion to dismiss.

To sustain a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must factually allege: (1) that a fiduciary breached his or her fiduciary duty; (2) that the defendant knowingly induced or participated in that breach; and (3) that the plaintiff suffered recoverable damages as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). Even if one were to assume, arguendo, that defendant Izaguirre breached his fiduciary duty of loyalty to plaintiff Biz2Credit during defendant Izaguirre's employment with plaintiff Biz2Credit under the faithless servant doctrine, there is nothing but conclusory statements regarding defendant Turtle Bay's knowing inducement and/or participation in such alleged breach, and no facts alleged that defendant Turtle Bay provided substantial assistance to defendant Izaguirre by affirmatively assisting and/or concealing the alleged tortious acts. See, *Id.*

Misappropriation of Trade Secrets

Plaintiff's Sixth and Seventh causes of action against Turtle Bay for common law and statutory misappropriation of trade secrets, respectively, both fail to articulate any specificity as to the actual trade secret alleged to have been misappropriated. Moreover, even if one were to assume that there was any actual trade secret at issue, there are no facts alleged that demonstrate

any improper actions taken by Turtle Bay in relation to these purported trade secrets, either directly, or indirectly as an aider and abettor to defendant Izaguirre.

As the court finds insufficient if not completely non-existent any factual allegations in the complaint supporting the existence or use of any trade secret, the plaintiffs' sixth and seventh causes of action against defendant Turtle Bay for misappropriation of trade secrets and aiding and abetting the misappropriation of trade secrets are dismissed.

Tortious Interference with Contractual Relations

Plaintiffs contend that Turtle Bay tortiously interfered with the restrictive covenants contained in Izaguirre's at-will employment agreement, as well as with provisions of contractual provisions of B2C's employee handbook. Employee handbooks generally do not form the basis of contractual obligations under New York law and there are no facts alleged to suggest an exception in this case. The court will therefore address the issue the issue of the alleged tortious interference with the non-solicitation provisions of Izaguirre's at-will employment agreement.

Even assuming, *arguendo*, a breach by defendant Izaguirre of his employment agreement with B2C, there are no facts alleged that defendant Turtle Bay either intentionally induced defendant Izaguirre to breach that contract, or that defendant Izaguirre would not have breached that contract but for the conduct of defendant Turtle Bay, both of which are necessary elements to sustain an interference with contract claim under New York law. See, *Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 6 NYS3d 7 (1st Dept 2015). Indeed, it appears from the complaint that plaintiffs allege that defendant Izaguirre had already breached his contract with Biz2Credit before Turtle Bay came into existence and therefore Izaguirre could not have been induced to breach by Turtle Bay, nor can the facts support the contention that defendant Izaguirre would not have breached his purported contract with Biz2Credit but for the existence of defendant Turtle Bay.

Regarding plaintiff Itria, there does not appear to have been any contractual relationship between Izaguirre and Itria with which Turtle Bay could have interfered. Therefore, Itria's claims for tortious interference in relation to Izaguirre's prior employment fail for this reason, in addition to the reasons outlined above with respect to plaintiff Biz2Credit.

To the extent that there are claims by plaintiffs against Turtle Bay for tortiously interfering with some contract between plaintiffs and some customer, no such contract is pled and therefore no tortious interference claim can lie in this regard.

Tortious Interference with Prospective Business Relations

To state a claim for tortious interference with prospective business relations, a plaintiff must plead (1) that plaintiff had a reasonable expectation to enter into a business relationship with a specific third party, (2) that defendant knew about the prospective business relationship, (3) that defendant intentionally interfered with that prospective business relationship, (4) that but for defendant's intentional interference, plaintiff and the third party would have entered into the business relationship, (5) that defendant interfered with the prospective business relationship through the use of wrongful means, and (6) that plaintiff sustained damages as a result of defendant's interference. *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 641 NYS2d 581, 664 NE2d 492 (1996); *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299-300 (1st Dept. 1999).

Plaintiffs fail to allege sufficient facts demonstrating that plaintiff had a reasonable expectation to enter into a business relationship with any specific third party. Indeed, other than plaintiff B2C allegedly sending proposals to President Tuxedo and MWB, there are no further facts that support that plaintiffs had a reasonable expectation of entering into these business relationships. Similarly, there are no facts alleged from which an inference can be made that but

for some tortious conduct of Turtle Bay, plaintiffs would have obtained some specific business from either President Tuxedo or MWB.

Further, Turtle Bay would need to have interfered with these prospective business relationships using wrongful means. In general, the use of wrongful means requires factual allegations of conduct amounting to a crime or an independent tort. *Carvel Corp. v Noonan*, 3 NY3d 182, 785 NYS2d 359, 818 NE2d 1100 (2004). Plaintiffs do not allege any criminal conduct by Turtle Bay and have insufficiently pled any independent tort committed by Turtle Bay. In this regard, plaintiffs appear to assert that the wrongful means by which Turtle Bay diverted prospective business away from plaintiffs was the misappropriation and use of trade secrets and/or other confidential information of plaintiff. However, as there are no factual allegations sufficient to sustain a misappropriation of trade secrets claim, or even the existence of any actual trade secret, the alleged independent tort related to alleged trade secrets cannot form the basis of the tortious interference claim.

Additionally, the allegedly wrongfully used confidential information identified by plaintiffs in their complaint is nothing more non-specific financial and other information of plaintiffs' purported customers or prospective customers, not of plaintiffs themselves. The use of such information does not give rise to tortious conduct by Turtle Bay, especially considering that if these prospective customers ultimately decided to do business with Turtle Bay, these customers would have presumably provided the Turtle Bay with the exact same information that these prospective customers provided plaintiffs. Indeed, there are no facts alleged to suggest otherwise.

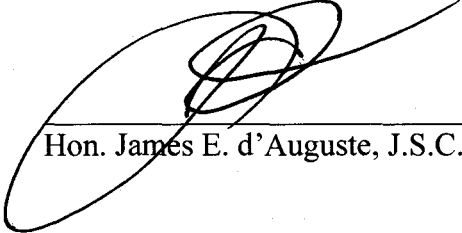
Finally, claims for tortious interference with prospective business relations (as well as claims for breach of fiduciary duty) are subject to a three-year statute of limitations. Plaintiffs filed the instant case on February 22, 2018. Even if this claim had not been deficient for other reasons, the claim is time barred, at least with regard to any activities related to the purportedly

lost President Tuxedo business, all of which occurred, based on the allegations in the amended complaint, prior to February 22, 2015. Further, while the insufficiently alleged diversion of President Tuxedo business appears to have been at least potentially related to Izaguirre's employer, plaintiff Biz2Credit, it appears that even if sufficient facts were alleged regarding the MWB Consulting business, that business related potentially to plaintiff Itria, which was neither Izaguirre's employer to whom Izaguirre might have owed a duty of loyalty, nor a party to the employment agreement containing the restrictive covenant. For these reasons, the Court also finds the facts related to plaintiff Itria to be wholly inadequate with regard to all causes of action and notes that it is not clear from the plaintiffs' complaint how plaintiff Atria, which appears to have never employed defendant Izaguirre, has standing to assert any of the claims asserted therein.

The court uses its discretion to not award costs or disbursements against plaintiff at this time.

This constitutes the decision and order of this Court.

Dated: May 16, 2019



Hon. James E. d'Auguste, J.S.C.