SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM
Justice

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INDEX NO. 152069/2017

SCOPIA CAPITAL MANAGEMENT LP, HOMECARE MANAGEMENT CORPORATION, and COMMUNITY BASED CARE, LLC,

MOTION SEQ. NO. 003

Plaintiffs,

- v -

DECISION AND ORDER

LEWIS QUINN and AYM TECHNOLOGIES, LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action by Scopia Capital Management LP ("SCM"), Homecare Management Corporation ("HMC"), and Community Based Care, LLC ("CBC") (collectively "plaintiffs") seeking injunctive relief and damages for breach of contract against Lewis Quinn ("Quinn") and AYM Technologies ("AYM") (collectively "defendants"), plaintiffs move, pursuant to CPLR 3025, to amend the complaint. Defendants oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

In their complaint filed March 2, 2017, plaintiffs alleged that they were entitled to damages because defendants breached certain July 25, 2015 confidentiality and non-disclosure agreements ("the agreements") between the parties while defendants were considering investment opportunities relating to the acquisition of certain North Carolina service providers

which cared for developmentally challenged individuals. Plaintiffs also alleged that, pursuant to the agreements, they were entitled to injunctive relief prohibiting defendants from further use or disclosure of confidential information to which they became privy in connection with their execution of the agreements.

In or about June, 2015, SCM entered into a non-disclosure agreement with AYM, by its principal Quinn. Doc. 56. That agreement provided that it "will be construed and enforced in accordance with the laws of the State of New York, USA applicable to agreements made and to be performed entirely in such State." Doc. 56.

Pursuant to an addendum to that agreement, Quinn assumed, among other things, confidentiality and non-use obligations in favor of HMC. Doc. 57. Paragraph 11 of the addendum provided as follows:

> 11. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law principles that require the application of the laws of any other jurisdiction. In the event of any suit, action or proceeding arising out of or based upon this Agreement, each party hereto submits to the exclusive jurisdiction of the courts of the State of New York and of the United States of America located in New York County, New York, and also submits to the in personam jurisdiction of such courts and waives any defense of *forum non conveniens* with respect to any action in any such court.

Doc. 57.

In or about June, 2015, SCM also entered into a non-disclosure agreement with Douglas Kahn, a co-investor of Quinn's. Doc. 58; Doc. 66 at par. 2. That agreement, too, provided that it would "be construed and enforced in accordance with the laws of the State of New York, USA applicable to agreements made and to be performed entirely in such State."

Pursuant to an addendum to that agreement, Kahn undertook certain confidentiality obligations in favor of HMC. Doc. 59. Paragraph 11 of the addendum was identical to paragraph 11 of Quinn's addendum set forth above. Doc. 59.

Prior to the commencement of this action, AYM and Quinn had filed suit against SCM, a Delaware limited partnership with its principal place of business in New York, HMC, a North Carolina corporation with its principal place of business in that state, and CBC, a limited liability company with its principal place of business in North Carolina, in the North Carolina General Court of Justice, Superior Court Division (case number 16-CVS-21788) ("the North Carolina action"). In the North Carolina action, AYM and Quinn alleged misappropriation of trade secrets, breach of contract, conversion of confidential business information, unfair competition and tortious interference with business opportunities.

Plaintiffs claim that, during depositions in the North Carolina action, they discovered that defendants engaged in "copycat financing", a deceptive business practice, in that state. Based on this new information, they now move, pursuant to CPLR 3025, to amend the complaint to add additional facts to their breach of contract and injunctive relief claims. They also seek to add a claim that defendants violated N.C. Gen. Stat. §75 ("the North Carolina statutory claim"), a North Carolina statute governing "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. §75-1.1 (a).

In support of the motion, plaintiffs argue that leave to amend a pleading should be freely granted. They further assert that, pursuant to the principles of "depecage", portions of claims or defenses in an action can be governed by the law of one state, while another state's law may apply to other issues. Thus, they assert that, although the agreements involved herein require that New York law apply to any disputes arising from the same, depecage allows plaintiffs to

assert the North Carolina statutory claim. Plaintiffs also maintain that, since choice of law determinations are fact intensive and are routinely made after discovery is conducted, this Court should not make a final ruling at this juncture regarding whether the North Carolina statutory claim should survive.

In opposition, defendants claim that the motion must be denied because "the choice of law and forum selection clauses that plaintiffs rely on for their claim of jurisdiction in New York specifically prohibit the application of any law other than New York's." Doc. 61 at 2.[1] Defendants further maintain that the North Carolina statutory claim lacks merit and that plaintiffs are asserting the said claim solely "to avoid being subjected to the law of the State of New York, where they are contractually agreed to be bound." Doc. 61 at 3. Even if the North Carolina statutory claim can be brought in New York, assert the defendants, plaintiffs failed to plead it with sufficient specificity as required by CPLR 3016 (b). Further, defendants argue that the motion must be denied because plaintiffs failed to furnish this Court with a copy of the proposed amended complaint highlighting the proposed changes to the pleading.

In reply, plaintiffs argue that, even if they inadvertently failed to highlight the proposed amendments to the complaint, the motion adequately described what they sought to add to the complaint.[2] In an attempt to rectify this deficiency, plaintiffs annex to their reply papers the the proposed amended complaint with the amendments highlighted. Plaintiffs further maintain that it is premature for this Court to make a determination regarding the choice of law issue since discovery is needed to determine the viability of the North Carolina statutory claim.

[1] This Court notes, however, that, at a discovery conference on June 12, 2019, defendants' counsel acknowledged that no statutory claim for copycat financing exists in New York.
[2] Indeed, plaintiffs annexed a proposed amended complaint to their motion papers. Doc. 55.

LEGAL CONCLUSIONS:

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40th Street, LLC*, 43 AD3d 82 (1st Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1st Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010); *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007).

"Under the doctrine of depecage, which is often applied by New York courts (*Holzsager v. Valley Hospital*, 482 F. Supp. 629, 634 n.4 [S.D.N.Y. 1979]), 'the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate the other issues.'" *Hutner v Greene*, 734 F2d 896, 901 (2d Cir 1984) (citation omitted). As with choice of law in general, New York courts applying depecage determine what law to apply to a specific issue by resort to the paramount interest test. *See, e.g., Babcock v. Jackson*, 12 N.Y.2d 473 (1963).

Pursuant to the conflict of law provisions in the nondisclosure agreements, the parties specifically agreed that New York law would apply to the interpretation and/or enforcement of the said agreements. Docs. 56, 58. Since the claim regarding copycat financing is based on a North Carolina statute, and is not contractual in nature, the choice of law provisions in the non-disclosure agreements do not apply to the proposed amended claim.

Similarly, the addenda to the non-disclosure agreements specifically provide that those agreements would be "governed by and construed in accordance with the laws of the State of

New York, without regard to any conflicts of law principles that require the application of the laws of any other jurisdiction" and that, "[i]n the event of any suit, action or proceeding arising out of or based upon [the non-disclosure agreements], each party hereto submits to the exclusive jurisdiction of the courts of the State of New York. Docs. 57, 59.

It is evident that the choice of law provisions only require that New York law be applied in connection with the operation and/or interpretation of the agreements, and do not prevent plaintiff from asserting the North Carolina statutory claim against defendants in this Court pursuant to the doctrine of depecage. *See USA-India Export-Import, Inc. v Coca-Cola Refreshments USA*, Inc. 46 Misc3d 1215(A) (Sup Ct Westchester County, Scheinkman, J., 2015) (where choice of law clause did not state that Georgia law was to be applied to "any and all claims arising out of the relationship between the parties", a Georgia court could conclude that the choice of Georgia law in the parties' agreement did not preclude plaintiff from pursuing a claim pursuant to General Business Law § 349 arising from deceptive business practices occurring in New York); *see also Gregor v Rossi*, 2014 NY Slip Op 30015(U) (motion to dismiss North Carolina statutory claims alleged in New York action denied where facts alleged were sufficient to establish that defendants acted in furtherance of scheme in North Carolina).

This result is consistent with the paramount interest test set forth in *Babcock, supra*. Given the language of N. C. Gen. Stat. §75, it is reasonably apparent that the North Carolina legislature believes that substantial public policy interests are served by prohibiting individuals involved in commerce within that state from engaging in deceptive acts and practices. New York, on the other hand, has no apparent interest in regulating the conduct of those involved in North Carolina commerce. Thus, New York should defer to the regulatory interest expressed in

N. C. Gen. Stat. §75 and apply that statute to the issue of whether defendants engaged in the deceptive acts and practices alleged.

This Court rejects defendants' contention that the choice of forum clauses, pursuant to which the parties agreed to submit to the jurisdiction of New York State courts, prevent plaintiff from bringing the North Carolina statutory claim in this Court. Where, as here, plaintiff has alleged contractual claims, then related non-contractual claims, such as the North Carolina statutory claim, are also subject to the forum selection clause. *See Erie Ins. Co. of N.Y. v AE Design, Inc.*, 104 AD3d 1319, 1320 (4th Dept 2013). Thus, plaintiffs are constrained by the forum selection clauses to proceed with the North Carolina statutory claim in New York.

This Court deems without merit defendants' argument that the North Carolina statutory claim is patently devoid of merit and insufficiently pleaded. Even a cursory review of the proposed amended complaint (Docs. 55, 66) reflects that plaintiffs have set forth in detail the deceptive acts and practices allegedly committed by defendants.

Finally, it is important to note that although GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York State]," the acts allegedly committed by defendants occurred in North Carolina and thus the GBL is inapplicable to the same. *See Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 324 (2002). Given the reasons above, and since plaintiffs would be prevented from asserting that defendants committed deceptive practices if they were not permitted to amend the complaint to add the North Carolina statutory claim, this Court determines, in its discretion, that the motion be granted.

The remaining claims are either without merit or need not be addressed in light of the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc. 55) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further,

ORDERED that plaintiff shall e-file on NYSCEF the proposed amended complaint as a separate document labeled "amended complaint"; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days from the date of service of the amended complaint; and it is further

ORDERED that the parties are to appear for a previously scheduled preliminary conference on September 5, 2019 at 80 Centre Street, Room 280, New York, New York; and it is further

ORDERED that this constitutes the decision and order of the court.

6/20/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE