Caldera Holdings LTD v Apollo Global Mgt., LLC
2019 NY Slip Op 33734(U)
December 19, 2019
Supreme Court, New York County
Docket Number: 652175/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM
Justice

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INDEX NO. 652175/2018

CALDERA HOLDINGS LTD, CALDERA LIFE REINSURANCE COMPANY, CALDERA SHAREHOLDER, L.P.,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 003, 004

- v -

APOLLO GLOBAL MANAGEMENT, LLC, APOLLO MANAGEMENT, L.P., APOLLO ADVISORS VIII, L.P., APOLLO CAPITAL MANAGEMENT VIII, LLC, ATHENE ASSET MANAGEMENT, L.P., ATHENE HOLDING, LTD., LEON BLACK

DECISION + ORDER ON MOTION

Defendants.

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 82, 83, 84, 85, 86, 87, 88, 94, 95, 104, 106
were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 89, 90, 91, 92, 93, 96, 97, 98
were read on this motion to/for DISMISSAL

I. Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, accepted as true. Defendant Apollo, consisting of defendants Apollo Global Management, LLC, Apollo Management, L.P., Apollo Advisors VIII, L.P., Apollo Capital Management VIII, LLC, Athene Asset Management, L.P., and Leon Black (Apollo), manages approximately $248 billion in assets. (NYSCEF Doc. No. [NYSCEF] 54 at ¶ 22.) Apollo invests in defendant Athene Holding, Ltd. (Athene), a publicly traded holding company engaged in the business of owning operating subsidiaries that issue, reinsure and acquire retirement savings products. (*Id.* at ¶¶ 23, 24.) Athene employed nonparties Stephen Cernich and Imran Siddiqui, who ultimately left the

company. (*Id.* at ¶¶ 35, 37, 39.) Siddiqui informed Apollo that he was leaving to start a business, plaintiff Caldera Holdings Ltd. (Caldera). (*Id.* at ¶¶ 40, 41.) Apollo subsequently commenced an arbitration proceeding with JAMS against Siddiqui and his business on January 9, 2018. (*Id.* at ¶ 48.) Apollo alleged that Siddiqui was using Apollo and Athene's confidential and proprietary information to compete with Apollo and Athene in violation of Siddiqui's restrictive covenants. (*Id.* at ¶ 49.) The parties settled their dispute on February 21, 2018 and memorialized their terms in an agreement (Release). (*Id.* at ¶ 54.) As of the date of the Release, Apollo agreed that "any provisions in the Restrictive Covenants prohibiting ... Siddiqui from competing with Apollo or soliciting or interfering with investors shall no longer be in effect." (*Id.* at ¶ 55[b].)

Subsequently, "[d]efendants contacted both a law firm and a public accounting firm with whom Caldera had sought an engagement, advising both firms that they would lose all business from Apollo and Athene in the event they worked with Caldera." (*Id.* at ¶ 59.) Apollo and Athene knew that "one of the insurance assets being vetted by Caldera was a publicly traded company that Apollo and Athene had, years earlier, discussed as a potential acquisition" (Company A). (*Id.* at ¶ 60.) Nevertheless, "[d]efendants pressed market participants for information regarding the identity of Caldera's investors in connection with this potential transaction, which was confidential by contract." (*Id.* at ¶ 62.) Upon receipt of this information, Leon Black, Apollo's Chief Executive Officer, "telephoned those investors with whom he was personally familiar, including at least two investors who had previously expressed willingness to invest in a transaction to acquire Company A." (*Id.* at ¶ 63.) During these telephone conversations, which started on May 2, 2018, Black stated that he was "disappointed" in Siddiqui, whose conduct he called "unlawful." (*Id.* at ¶ 63.) Black also "falsely stated in those conversations that Caldera's efforts to acquire Company A were prohibited because its principal ...[,] Siddiqui, was 'violating his ongoing non-compete.'" (*Id.* at ¶ 64.) Black "further stated during these calls that Apollo and Athene intended to sue Caldera, and that anyone working with Caldera could expect to be tied up for a considerable time period in a litigation process ... ." (*Id.* at ¶ 65.) "[O]ther senior Apollo representatives also contacted Caldera investors parroting ... Black's false claim that Caldera was acting unlawfully in connection with its pursuit of Company A." (*Id.* at ¶ 66.) "These Apollo agents told Caldera's bankers that they must terminate their relationship with Caldera, and if they refused, Apollo and Athene would take their considerable business elsewhere." (*Id.* at ¶ 69.) "Defendants undertook these communications in

furtherance of their conspiracy to interfere with Caldera's investor ... with the objective of eliminating Caldera as a competitor in connection with Athene's efforts to acquire Company A." (*Id.* at ¶ 70.) Athene also "approached Company A's representatives with a sham offer ... designed for the purpose of interrupting the momentum that had been achieve by Caldera with Company A." (*Id.* at ¶ 71.)

Apollo and Athene pursued "sham lawsuits", including a second JAMS arbitration against Siddiqui, in which Apollo alleged that Siddiqui and Caldera were using "confidential and proprietary information" to acquire Company A. (*Id.* at ¶ 74.) Athene also filed a "Specifically Indorsed Writ of Summons" against Caldera, Siddiqui, and Cernich in the Supreme Court of Bermuda (Bermuda Action). (*Id.* at ¶ 81.) In the Bermuda Action, Athene claims that Caldera, Siddiqui, Cernich, and an individual by the name of "Messrs" possessed confidential information of Athene's that they were improperly using to acquire Company A. (*Id.* at ¶ 86.)

As a result of the defendants' conduct, "at least one specific investor who had previously confirmed its willingness to make a substantial investment in a potential transaction by Caldera to acquire Company A, discontinued all such discussion." (*Id.* at ¶ 102.) Caldera began "efforts to locate a potential substitute investor or investors." (*Id.* at ¶ 103.) "Caldera's other investors, though presently committed to Caldera, have indicated their uneasiness with moving forward with Caldera without material progress in the Second JAMS Arbitration and the Bermuda Action." (*Id.* at ¶ 104.) Allegedly, "Caldera will be forced to withdraw its bid for Company A if it does not replace the one investor it already lost, or if any other investor withdraws its commitment to Caldera." (*Id.* at ¶ 105.)

Caldera[1] commenced this action against defendants alleging defamation, disparagement, injurious falsehood, unfair competition, tortious interference with prospective business relations and economic advantage, and conspiracy to interfere with prospective business relations and economic advantage. Caldera claims that defendants caused "potential damages to be incurred in the future in the event that [d]efendants are successful in their efforts to prevent Caldera from competing fairly to acquire Company A." (*Id.* at ¶ 122.) Caldera seeks "an award ... of damages in an amount to be determined at trial, but no less than $1.5 billion." (*Id.* at ¶ 23.)

[1] Although the caption in the amended complaint names three plaintiffs, it appears that the causes of action are interposed only on behalf of Caldera Holdings Ltd., an entity referenced in the complaint as "Caldera." (NYSCEF 54 at ¶ 1.)

II. Motion Sequence Number 004[2]

In motion sequence number 004, Apollo[3] moves to dismiss the complaint pursuant to CPLR 3211 (a) (7). Caldera opposes. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

A. Defamation, Disparagement & Injurious Falsehood

Here, Caldera fails to state a claim for defamation, disparagement, and injurious falsehood. "[A]lthough defamation and disparagement in the commercial context are allied in that the gravamen of both are falsehoods published to third parties, there is a distinction." (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981].)

1. Defamation

"Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation." (*Martin v Daily News L.P.*, 121 AD3d 90, 99 [1st Dept 2014][internal quotation marks and citation omitted].) "The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014][internal quotation marks and citation omitted].) "CPLR 3016 (a) requires that in a defamation action, 'the particular words complained of ... be set forth in the complaint.' The complaint must also allege the time, place and manner of the false statement and specify to whom it was made." (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999][citation omitted].)

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[2] The motions are considered out of order for the sake of brevity.

[3] The court notes a discrepancy between the defendants listed in the Amended Complaint's caption, and the defendants listed in the Notice of Motion caption. Whereas the Amended Complaint names "Apollo Capital Management VIII, LLC", defendants' Notice of Motion to Dismiss names "Apollo Capital Management, L.P." (*Compare* NYSCEF 54 and 69.)

Here, Caldera alleges that on or about May 2, 2018, Black telephoned "investors" and stated that he was "disappointed" in Siddiqui, who was "violating his ongoing non-compete." (NYSCEF 54 at ¶ 63.) Black allegedly stated that "Caldera's efforts to acquire Company A were prohibited because its principal ... Siddiqui, was 'violating his ongoing non-compete.'" (*Id.* at ¶ 64.) Caldera claims that it suffered damage for "the additional expenses incurred ... as a result of the lost investor" and "potential damages to be incurred in the future" should Caldera be prevented from acquiring Company A. (*Id.* at ¶ 122.) This defamation claim is inadequately pleaded because Caldera fails to allege the time and place of the false statements. (*Dillon*, 261 AD2d at 38.) The claim is also inadequately pleaded because Caldera does not specify "the persons to whom the publication was made." (*Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 455 [1st Dept 2012][citation omitted].) Alleging that Leon Black telephoned "investors" is insufficient. (*CSI Group, LLP v Harper*, 153 AD3d 1314, 1320 [2d Dept 2017] [finding that "certain clients" was insufficient for purposes of specifying the persons to whom the defamatory statements were made].) The defamation claim is dismissed.

2. Disparagement & Injurious Falsehood

Whereas defamation arises from a statement that "impugns the basic integrity or creditworthiness of a business", disparagement arises from a statement "confined to denigrating the quality of the business' goods or services." (*Ruder & Finn*, 52 NY2d at 670-671.) A claim for disparagement requires an allegation of special damages. (*Christopher Lisa Matthew Policano, Inc. v North Am. Precis Syndicate*, 129 AD2d 488 [1st Dept 1987].) Disparagement "can be seen as a subcategory of the tort of injurious falsehood." (Victor A. Kovner and Lance Koonce, New York Practice Series – Commercial Litigation in York State Courts § 110:8 [4th ed 2019].) The tort of "injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment." (*Banco Popular N. Am . v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010][citation omitted].) The facts must cause special damages, in the form of actual lost dealings. (*Id.*) These special damages, along with the alleged falsehood uttered, must be specified with particularity. (*BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [1st Dept 2009].) For instance, "general allegations of lost sales from unidentified lost customers" are insufficient to plead special damages. (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002].) "[L]ost future income, conjectural in identity and speculative in amount" is also insufficient. (*Id.*) Damages in "round

figures with no attempt at itemization, must be deemed to be a representation of general damages" and not of special damages. (*Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 441 [1960][citation omitted].)

Here, Caldera seeks an award "of damages in an amount to be determined at trial, but no less than $1.5 billion." (NYSCEF 54 at ¶ 23.) This round figure with no attempt at itemization is deemed to be a representation of general damages and not a representation of special damages. (*Drug Research Corp.*, 7 NY2d at 441.) Accordingly, Caldera's pleading of special damages is inadequate. Additionally, Caldera's allegation that defendants caused "potential damages to be incurred in the future in the event that [d]efendants are successful in their efforts to prevent Caldera from competing fairly to acquire Company A" (NYSCEF 54 at ¶ 122) is "conjectural in identity and speculative in amount." (*Vigoda*, 293 AD2d at 266.) Because these allegations are also insufficient to state special damages, Caldera's pleading is inadequate. Lastly, Caldera's allegations that it incurred "additional expenses ... as a result of the lost investor" are as conclusory as "a general allegation of lost sales from unidentified lost customers." (*Id.*) Absent special damages specified with particularity, the disparagement and injurious falsehood claims are dismissed.

C. Unfair Competition

Caldera fails to state a claim for unfair competition. "We have long recognized two theories of common-law unfair competition; palming off and misappropriation. 'Palming off' – that is, the sale of the goods of one manufacturer as those of another – was the theory of unfair competition endorsed by New York courts, and 'has been extended ... to situations where the parties are not even in competition.'" (*ITC v Punchgini, Inc.*, 9 NY3d 467, 476 [2007] [internal quotation marks and citations omitted].)

> "Under the 'misappropriation theory' of unfair competition, a party is liable if they unfairly exploit 'the skill, expenditures and labors' of a competitor. The essence of the misappropriation theory is not just that the defendant has 'reap[ed] where it has not sown,' but that it has done so in an unethical way and thereby unfairly neutralized a commercial advantage that the plaintiff achieved through 'honest labor.'"

(*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 449 [2018] [internal quotation marks and citations omitted].) "Under New York law, "[a]n unfair competition claim involving misappropriation

usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." (*ITC v Punchgini, Inc.*, 9 NY3d at 479.) "Allegations of a 'bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information' can give rise to a cause of action for unfair competition." (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 56 [1st Dept 2015][citation omitted].) For instance, misappropriation of confidential information concerning customer lists arises when a party steals the list, or misuses a list that is considered to be a trade secret. (*2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 698 [1st Dept 2011] ["the fourth cause of action, for misappropriation of confidential information, fails to allege that DHL stole the information or that plaintiffs took steps to maintain the secrecy of the information"]; *Eastern Bus. Sys. v Specialty Bus. Solutions*, 292 AD2d 336, 338 [2d Dept 2002].)

There is a greater likelihood that a customer list will be considered a trade secret "[i]n cases where plaintiff secures a customer's patronage through years of effort and advertising." (*Metal & Salvage Assn. v Siegel*, 121 AD2d 200, 201 [1st Dept 1986].) However, the plaintiff must allege that it "took sufficient precautionary measures to insure that the information remained secret." (*Edelman v Starwood Capital Group., LLC*, 70 AD3d 246, 249 [1st Dept 2009][citation omitted].) Indeed, trade secret protection will not attach unless the customers cannot be ascertained outside the plaintiff's business, are not known in the trade and are discoverable only by extraordinary efforts. (*See Metal & Salvage Assn.*, 121 AD2d at 201.)

Here, Caldera alleges that defendants sought and acquired "Caldera confidential information (including the identity of Caldera's actual and potential investors)." (NYSCEF 54 at ¶ 125.) Caldera does not, however, allege that defendants stole this confidential information including the identities of Caldera's actual and potential investors. (*2470 Cadillac Resources*, Inc., 84 AD3d at 698.) Caldera also does not allege that it "took sufficient precautionary measures to insure that the information remained secret." (*Edelman*, 70 AD3d at 249.) Significantly, Caldera does not even allege that this information is a trade secret. Caldera patently fails to allege what this confidential information is, other than a list of investors, and it fails to articulate how defendants use of this information exploits Caldera's skill, expenditures and labor. Nothing in the complaint indicates that Caldera secured these investors' patronage through years of effort and advertising. (*Metal*, 121 AD2d at 201.) Moreover, Caldera does not allege that these investors' identities cannot

be ascertained outside of Caldera's business, that these investors are not known in the trade, or that their identities are discoverable only by extraordinary efforts. The unfair competition claim is dismissed.

C. Tortious Interference with Prospective Business Relations and Economic Advantage

Caldera fails to state a claim for tortious interference with prospective business relations and economic advantage. "A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or the sole purpose of malice; and (4) resulting injury to the business relationship." (*534 E. 11th St. House. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011].) "Wrongful means include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." (*Arnon Ltd (IOM) v Beierwaltes*, 125 AD3d 453, 454-455 [1st Dept 2015][internal quotation marks and citations omitted].) Stated otherwise, in a cause of action for tortious interference with prospective business relationships and economic advantage, the plaintiff "must set forth that the claimed interference constituted a crime or an independent tort." (*Mitzvah Inc. v Power*, 106 AD3d 485, 487 [1st Dept 2013].) "Where the interfering conduct is a civil suit, it must be shown that the suit was 'frivolous'." (*Arnon Ltd (IOM)*, 125 AD3d at 453-454.) Civil suits, even those sufficiently alleged to be frivolous, must be "directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." (*Id.* [citation omitted].)

Here, Caldera's alleges that the defendants "disparaged and defamed it" after "actively soliciting contractually protected confidential information." (NYSCEF 54 at ¶¶ 109-110.) As previously discussed, Caldera does not sufficiently state a claim for defamation, disparagement, injurious falsehood, or unfair competition. Therefore, Caldera fails to allege that the claimed interference constitutes "an independent tort." (*Mitzvah Inc.*, 106 AD3d at 487.) Without this allegation of an independent tort, Caldera fails to state "wrongful means" sufficient to satisfy the third element of a tortious interference claim. (*534 E. 11th St. House. Dev. Fund Corp.*, 90 AD3d at 542.) The claim, to the extent premised on these allegations, is dismissed.

Caldera further premises the tortious interference claim on allegations that defendants "threatened Caldera's investors with legal process in connection with claims that [d]efendants know

are ... without merit." These allegations are insufficient to state a claim because they are conclusory and unsupported by specific facts especially concerning Caldera's unspecified investors. (*Steiner Sports Mktg., Inc. v Weinreb*, 88 AD3d 482 [1st Dept 2011] [allegations that "Steiner Sports representatives" had threatened "other potential employers" with litigation was conclusory and unsupported by specific facts].) Accordingly, the claim is dismissed to the extent premised on these allegations.

Caldera premises the tortious interference claim on allegations that defendants have filed "sham lawsuits ... in New York and Bermuda" against Siddiqui, Cernich, and Messrs. (NYSCEF 54 at ¶¶ 74, 81, 85, 112.) These allegations are insufficient to state a claim, because even if they are frivolous, Caldera fails to allege that Siddiqui, Cernich, and Messrs are the parties with which Caldera "seeks to have a relationship." (*Arnon Ltd (IOM)*, 125 AD3d at 454.) Insofar as the claim is premised on these allegations, it is dismissed.

Caldera lastly premises the tortious interference claim on allegations that defendants "threatened to cease working with bankers and lawyers that have worked with or had hoped to work with Caldera." (NYSCEF 54 at ¶ 112.) These allegations are insufficient to state a claim because they "do not amount to the sort of extreme and unfair 'economic pressure' that might be 'wrongful.'" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004].) Indeed, "persuasion alone is not enough to constitute wrongful means." (*Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012][citations omitted].) The claim is dismissed insofar as it is premised on these allegations.

Because the claim for tortious interference with business relations and economic advantage is dismissed in its entirety against Apollo, any claim for conspiracy to interfere with prospective business relations and economic advantage is dismissed as well. (*Capin & Assoc., Inc., v 599 W. 188th St. Inc.*, 139 AD3d 634, 635 [1st Dept 2016] ["New York does not recognize an independent cause of action for conspiracy to commit a civil tort".) The court has considered Caldera's remaining arguments, and to the extent properly before the court, they are without merit.

III. Motion Sequence Number 003

In motion sequence number 003, defendant Athene moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7), and (8). Athene argues that Caldera fails to state a claim largely for the same reasons argued by the other defendants. Athene also argues that this court lacks jurisdiction over it. Caldera opposes. Even if this court has jurisdiction over Athene, Caldera fails to

state a claim for defamation, disparagement, injurious falsehood, unfair competition, and tortious interference for the reasons it failed to state these claims against Apollo. Accordingly, the complaint is dismissed against Athene.

It is

ORDERED that motion sequence numbers 003 and 004 to dismiss the complaint herein are granted, and the complaint is dismissed in its entirety as against the defendants, with costs and disbursements to the defendants as taxed by the County Clerk, and the Clerk is directed to enter judgment accordingly in favor of the defendants.

Motion Seq. No. 003

12/19/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

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

Motion Seq. No. 004

12/19/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION		
	X	GRANTED	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER		
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