

Carraro v Backstage LLC
2020 NY Slip Op 32368(U)
July 17, 2020
Supreme Court, Kings County
Docket Number: 505133/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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JOSEPH CARRARO,

Plaintiff,

Decision and order

- against -

Index No. 505133/20

BACKSTAGE LLC,

Defendant,

July 17, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant Backstage, LLC, has moved pursuant to CPLR §3211 seeking to dismiss the complaint for the failure to state a cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In 2017, the parties entered into a contract wherein for an ongoing fee, plaintiff would have access to the Backstage website which connects producers of plays with actors. Plaintiff paid defendant about \$600 related to services on the website. On January 6, 2020, defendant contacted plaintiff informing him of cancellation of his account due to complaints received. Plaintiff commenced this action alleging breach of contract, breach of duties of good faith and fair dealings, tortious interference with contractual relations, tortious interference with business relations, misappropriations of trade secrets and conversion. Defendant has filed this motion to dismiss for failure to state a cause of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of breach of contract, the plaintiff must establish "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (143 Bergen St., LLC v. Ruderman, 144 AD3d 1002, 42 NYS3d 252 [2d Dept., 2016]). Defendant argues there are clauses in the contract that grants them full discretion to terminate the contract at will thus there can be no grounds for any breach. Thus, the terms of use which governs the obligations of

the parties states that Backstage "at its sole discretion and without notice to you, may review, censor, delete, move, edit, block access to or prohibit the transmission or receipt of any User Provided Content or other information, in whole or in part, for any reason whatsoever, including but not limited to User Provided Content that Backstage deems obscene, defamatory or libelous in nature, that invades the right of privacy or infringes any right of any person or entity, is unlawful, is offensive or otherwise inappropriate, or that Backstage believes to be in violation of these Terms of Use" (see, Terms of Use, §4 'User Provided Content'). The terms of use further provide that "Backstage reserves the right to terminate, without notice, your subscription and access to the Websites for any conduct that Backstage, in its sole discretion, believes is in violation of these Terms of Use, any applicable law, or is harmful to the interests of another User, service provider, or Backstage" (see, Terms of Use, §9 'User Accounts'). Similar Terms of Use have been held to foreclose any breach of contract claims (see, King v. Facebook Inc., 2019 WL 6493968 [Northern District of California 2019], Talyancich v. Microsoft Corporation, 2012 WL 12941690 [Western District of Washington 2012]). Nor are such terms unenforceable as illusory (Talyancich, supra).

In addition, the terms of use foreclose the possibility of damages. Thus, the terms of use provide that "in no event will

Backstage or any of ITS AFFILIATES be liable for any indirect, special, incidental, or consequential damages, losses or expenses arising out of or relating to the use or inability to use the Websites, including without limitation damages related to any information received from the Websites, removal of content from the Websites, including profile information, any email distributed to any User or any linked web site or use thereof or inability to use by any party, or in connection with any termination of your subscription or ability to access the Websites, failure of performance, error, omission, interruption, defect, delay in operation or transmission, computer virus or line or system failure, even if Backstage, or representatives thereof, are advised of the possibility of such damages, losses or expenses" (see, Terms of Use, §18.1 'Limitation of Liability'). "A contractual provision which limits damages is enforceable unless the special relationship between the parties, a statute, or public policy imposes liability" (Peluso v. Tauscher Cronacher Prof'l Engineers, P.C., 270 AD2d 325, 704 NYS2d 289 [2d Dept., 2000]). Public policy renders a limitation on liability provision unenforceable when, "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith" (Kalisch-Jarcho, Inc. v. City of New York, 58 NY2d 377, 448 NE2d

413 [1983]). The Complaint does not allege any special relationship or public policy mandate that would limit the enforceability of the no damage clause. Therefore, based on the foregoing the motion seeking to dismiss the breach of contract cause of action is granted.

For a valid claim of tortious interference with contractual relations, "plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (White Plains Coat & Apron Co. v. Cintas Corp., 8 NY3d 422, 867 NE2d 381 [2007]). "[T]he interference must be intentional, not merely negligent or incidental to some other, lawful, purpose" (Alvord & Swift v. Stewart M. Muller Const. Co., 46 NY2d 276, 385 NE2d 1238 [1978]), and "that the defendant intentionally procured the breach of contract without justification" (Oxford Health Plans (N.Y.), Inc. v. Biomed Pharm., Inc., 181 AD3d 808, 122 NYS3d 47 [2d Dept., 2020]), and "the evidence must show that the defendant's *objective* was to procure such a breach" (Wellington Shields & Co. LLC v. Breakwater Inv. Mgmt. LLC, 2016 WL 5414979, at *5 [S.D.N.Y. 2016]). The basis for this cause of action is the fact the plaintiff can longer access information contained on the Backstage website and thus Backstage interfered with plaintiff's contractual relations. However, clearly, that reality does not allege any intentional conduct on

the part of Backstage and was a mere incidental result of the termination of access. Therefore, the motion seeking to dismiss this cause of action is granted.

Next, to succeed on a claim of tortious interference with business relations, plaintiff must demonstrate "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (N. State Autobahn, Inc. v. Progressive Ins. Grp. Co., 102 AD3d 5, 953 NYS2d 96 [2d Dept., 2012]). Conduct that is unlawful "must amount to a crime or an independent tort" (Carvel Corp. v. Noonan, 3 NY3d 182, 818 NE2d 1100 [2004]).

In this case, the complaint does not allege any facts in a non conclusory manner how the defendant acted to harm the plaintiff or that they acted with an improper purpose. The conclusory allegations of the complaint are insufficient to establish any of these claims and the motion seeking to dismiss this cause of action is granted.

It is well settled that to establish a claim for conversion the plaintiff must show the legal right to an identifiable item or items and that the defendant has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Thus, "a

conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Petrone v. Davidoff Hutcher & Citron, LLP, 150 AD3d 776, 54 NYS3d 25 [2d Dept., 2017]). As noted, the plaintiff had no possessory right in the information contained within Backstage's website. Consequently, the motion seeking to dismiss the conversion claim is granted.

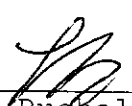
The motion to dismiss the other two causes of action, breach of duty of good faith and fair dealing and misappropriation of trade secrets are granted without opposition.

Thus, the motion seeking to dismiss the entire complaint is granted.

So ordered.

ENTER:

DATED: July 17, 2020
Brooklyn NY



Hon. Leon Ruchelsman
JSC