

Affinity LLP v GfK Mediamark Research & Intelligence, LLC
2013 NY Slip Op 32873(U)
November 7, 2013
Sup Ct, New York County
Docket Number: 651410/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

AFFINITY LLC

INDEX NO. LS1410/2013

-v-

MOTION DATE _____

GFK MEDIA MARK RESEARCH + INTELLIGENCE, LLC

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *by defendant to dismiss the* complaint is DENIED *by: breach of* contract claim and GRANTED *by: claims for misappropriation of trade secrets, unfair competition, fraudulent inducement and tortious interference with economic advantage per the attached* Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: November 7, 2013

Melvin L. Schweitzer
J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

AFFINITY LLP,

Plaintiff,

-against-

GfK MEDIAMARK RESEARCH &
INTELLIGENCE, LLC,

Defendant.

Index No. 651410/2013

DECISION AND ORDER

Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This case arises out of an alleged violation of a non-disclosure agreement entered into in connection with acquisition negotiations. Affinity LLP (Affinity) brings suit alleging various causes of action springing from what it characterizes as unauthorized use of confidential information. GfK Mediamark Research & Intelligence, LLC (“GfK”) moves to dismiss Affinity’s complaint.

Facts

In 2004, Affinity was founded in order to generate the first syndicated magazine advertising effectiveness research service in the United States. In 2005, it launched VISTA Ad Effectiveness Tracking Service (“VISTA”). Subsequently, Affinity experienced fourfold revenue growth from 2005 to 2009.

This success led GfK, a subsidiary of a large market research organization, to express interest in acquiring Affinity. In April 2008, prior to the parties entering into acquisition discussions, GfK and Affinity entered into a non-disclosure agreement (“NDA”). The

“Objectives” paragraph of the NDA states, “[t]he Parties have entered into this Agreement in order to provide for the safeguarding of certain proprietary and confidential information, which may be exchanged between them in connection with the exploration and evaluation of a potential business relationship....” Paragraph 4.1 states that the party receiving confidential information “shall use the Confidential Information only in connection with the furtherance of the Objectives, and shall make no further use, in whole or in part, of any such information.” The NDA defined “Confidential Information” to include, among other things, disclosures exchanged during the due diligence process, including trade secrets, pricing and expenses, and customer lists and contract information.

After the execution of the NDA, Affinity revealed detailed information about VISTA to GfK. On July 14, 2008, the parties discontinued acquisition negotiations. On July 22, 2008, GfK announced the creation of “Starch Syndicated,” a competing syndicated magazine advertising effectiveness research service. On September 16, 2008, GfK disclosed that it had “developed an ‘engagement score’” which it used to measure the effectiveness of 694 print magazine advertisements during the summer of 2008. GfK subsequently disclosed that it had measured over 8,000 advertisements in 2008. GfK formally launched its service in February 2009.

Subsequently, Affinity sued GfK for breach of contract, misappropriation of trade secrets, unfair competition, fraudulent inducement, and tortious interference with prospective economic advantage.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff’s complaint as true, and gives plaintiff the benefit of every

favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether “from the [complaint’s] four corners[,] ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Breach of Contract Claim

Under New York law, the elements of a breach of contract claim “include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept 2010).

In the case at bar, the only element at issue is whether GfK breached the contract. The NDA specified that the parties “shall use the Confidential Information only in connection with the furtherance of the Objectives,” that is to say, “the exploration and evaluation of a potential business relationship.” The complaint alleges that GfK used Affinity’s confidential information for another purpose—to create a competing market research tool. This allegation, if true, would constitute a breach of the contract.

GfK argues that the NDA does not protect information that “is independently developed” by the other party. It goes on to argue that Affinity’s complaint is consistent with the notion that GfK independently developed Starch Syndicated without the help of Affinity’s confidential information. This may be true, but at this stage of the litigation, the court must make all possible inferences in favor of Affinity. GfK announced the creation of Starch Syndicated a mere 8 days after it broke off negotiations with Affinity, and launched it roughly seven months later. Such temporal proximity between these events and the discontinuance of the negotiations with

Affinity gives rise to a plausible inference that GfK used Affinity's confidential information in breach of the contract.

GfK also argues that Affinity has not identified any confidential information that GfK misappropriated. It argues that the information is either "self-evident parts of the Internet-surveying process" "generic features of ad effectiveness," or in the public domain as a result of Affinity's filing with the U.S. Patent and Trademark Office. Indeed, Section 4.3 of the NDA provided that parties had no obligation to protect information that "is or becomes a matter of public knowledge through no wrongdoing or breach of this Agreement."

GfK's argument is unpersuasive. Assuming that the court is even allowed to examine documents other than the complaint at the motion to dismiss stage, Affinity notes that "proprietary research and surveying methodologies, software programming and design, and third-party contractors" remained confidential even after the Trademark Office filing. In any event, "the determination of whether a trade secret exists is often a question of fact," and certainly seems to be so in the case, in which it is unclear to what extent Affinity's methodologies remained secret. *Bear, Stearns Funding Inc. v Interface Group-Nevada, Inc.* 361 F Supp 2d 283, 305 (SDNY 2005). At this stage in the litigation, given the dispute over whether various information was kept secret, the court will accept the plaintiff's allegations and find that it has adequately alleged breach of the NDA.

Tort Claims

Based on the facts described above, Affinity also alleges misappropriation of trade secrets, unfair competition, fraudulent inducement, and tortious interference with prospective economic advantage. Under New York law, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract

itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.” *Clark-Fitzpatrick v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987) (internal citations omitted); *see also Deutsche Bank Sec., Inc. v Rhodes*, 578 F Supp 2d 652, 665 (SDNY 2008) (holding that breach of contract “cannot support liability in tort for misappropriation unless an independent duty has been violated”). In this case, GfK had no legal duties toward Affinity beyond those governed by the NDA. *See Parisi v Metroflag Polo, LLC*, 51 AD3d 424 (1st Dept 2008) (finding that defendants who “negotiated an arm's length commercial contract with plaintiffs” had “no special relationship with” the plaintiffs).

Affinity argues that, in some circumstances, a confidential relationship can arise when a seller and buyer negotiate for a sale, even in the absence of a contract. Affinity merely cites two cases from at least fifty years ago in support of this proposition. *See Heyman v AR. Winarick, Inc.*, 325 F.2d 584, 587 (2d Cir 1963); *Schreyer v Casco Prods. Corp.*, 190 F.2d 921, 923 (2d Cir 1951). These cases sought to impose liability in cases where there was no express agreement between the parties. Subsequent courts have viewed these as equitable cases seeking to avoid unjust enrichment. *Krisel v Duran*, 303 F Supp 573, 578 (SDNY 1969). In the case at bar, where a comprehensive and detailed contract governed the relationship between the parties, finding an independent duty would be inappropriate, since GfK would be liable for breach of contract if it committed any wrongdoing. *See Medinol Ltd. v Boston Scientific Corp.*, 346 F Supp 2d 575, 606 (SDNY 2004) (“The comprehensive coverage of the parties' Supply Agreement appears to be inconsistent with an independent tort theory of misappropriation of trade secrets.”).

Affinity has an additional argument with respect to its fraudulent inducement claim, but this argument is also to no avail. Affinity argues that its fraudulent inducement claim does not duplicate the contract claim because it is based on "GfK's collateral representation that it had not started working on its own syndicated advertising effectiveness research product at the time the parties entered into the NDA." Under New York law, a "cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." *Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607, 607 (1st Dept 1985). In this case, the fraudulent inducement claim, as stated in the complaint, clearly related to the breach of contract claim. The complaint states in relevant part: "GfK MRI thus fraudulently induced Affinity to enter into the NDA and to disclose proprietary and other sensitive business information to GfK MRI"; "Affinity reasonably relied on GfK MRI's statements when it entered into the NDA and disclosed proprietary and other sensitive business information to GfK MRI".

Because Affinity's tort claims are dismissed, the court need not address whether the theft of trade secrets and unfair competition claims are time-barred.

Accordingly, it is

ORDERED that GfK's motion to dismiss the complaint is denied with respect to Affinity's breach of contract claim, and is granted with respect to Affinity's claims for misappropriation of trade secrets, unfair competition, fraudulent inducement, and tortious interference with economic advantage.

Dated: November 7, 2013

ENTER:

J.S.C.