Marshall Broadcasting Group, Inc. v Nexstar Broadcasting, Inc.
2019 NY Slip Op 33240(U)
October 30, 2019
Supreme Court, New York County
Docket Number: 651943/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MARSHALL BROADCASTING GROUP, INC.,

Plaintiff,

-against-

NEXSTAR BROADCASTING, INC.,

Defendants.

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DECISION AND ORDER
Index No.: 651943/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

In this motion sequence 001, defendant Nexstar Broadcasting, Inc. ("Nexstar") seeks to dismiss the complaint against it pursuant to CPLR 3211(a)(7). For the following reasons, the motion will be granted in part only.

I. BACKGROUND

As this is a motion to dismiss, the following facts are taken from the complaint and are assumed to be true. Plaintiff Marshall Broadcasting Group, Inc. ("MBG") owns three television stations: KPEJ-TV in Odessa, Texas ("KPEJ"), KMSS-TV in Shreveport, Louisiana ("KMSS"), and KLJB in Davenport, Iowa ("KLJB") (collectively, the "Stations") (Complaint ¶4). Defendant Nexstar is a subsidiary of a publicly traded company, Nexstar Media Group, Inc., which operates 174 television stations in the United States (*Id.*). In or around March 2014, Nexstar approached MBG Owner Pluria Marshall, Jr. ("Marshall"), a minority business owner, regarding a sale of the Stations (Complaint ¶¶1, 4, 27). Because private lenders and equity firms were previously unwilling to finance Marshall's acquisition of television stations, Nexstar offered to guarantee financing of the purchase for the next five years and to operate the Stations (Complaint ¶¶28–29). The terms of the purchase are set forth in Joint Sales Agreements ("JSA") and Shared Services Agreements ("SSA" and together with the JSA, "Agreements") which provided for Nexstar to sell all of the advertising space on the Stations. In addition, Nexstar would provide back-office services for a fee of $185,000 per month. This agreement was rejected by the "FCC" as the MBG stations would not be sufficiently independent (Complaint ¶41).

To comply with the FCC's requirements, the parties amended the JSAs to limit the amount of commercial advertising Nexstar could sell to fifteen percent and agreed that MBG would acquire

the Stations' programming independently from Nexstar's involvement (Complaint ¶42). Following this change, Nexstar and MBG also agreed to an amendment of the SSAs requiring MBG to pay Nexstar $535,000 a month with a 2.5% increase each year (Complaint ¶44). MBG alleges Nexstar "did not propose any additional services beyond those in the original SSAs" (*Id.*). The FCC approved the amended agreement (Complaint ¶45). Although MBG acquired the Stations' physical assets and FCC licenses, Nexstar retained the Stations' existing capital accounts, accounts receivable, and other streams of revenue (Complaint ¶51). Consequently, MBG was unable to meet immediate financial demands to operate the Stations and, instead, relied on drawing on its existing credit line (*Id.*).

Although the SSA provided that MBG would maintain full control of the Stations, Nexstar communicated to the relevant markets that it retained control of the Stations, enabling Nexstar to preemptively take clients and prevent clients from pursuing advertising through MBG (Complaint ¶55). MBG alleges that: (i) Nexstar misrepresented the Nexstar-MBG transaction to their respective staff, viewers, and clients; (ii) interfered with MBG's programming and sales matters; (iii) inhibited MBG's ability to gain market traction, (iv) refused to pay MBG sales staff advertising sales commissions, (v) moved MBG executives to offices which prevented effective station management, and (vi) failed to include MBG in critical discussions regarding its operations, sales, and finances (*Id.*). MBG further alleges Nexstar failed to meet its SSA obligations, including its failure to create new, minority-oriented programming and syndicating such content (Complaint ¶¶56–59).

MBG alleges that Nexstar withheld retransmission fees owed to MBG from multichannel video programming distributors ("MVPDs") that used the Stations' digital broadcast signals as some MVPDs paid these fees directly to Nexstar (Complaint ¶¶62–65). MBG alleges that despite its requests for the fees, Nexstar has refused to turn them over (Complaint ¶66).

Finally, MBG alleges that Nexstar attempted to force MBG to default on its credit obligations (Complaint ¶¶67–92). MBG's financing for purchase of the Stations was initially provided through a December 1, 2014 Credit Agreement ("December 2014 Credit Agreement") between MBG as borrower, Bank of America as administrative agent and collateral agent, and other lending institutions (Complaint ¶69). To help finance MBG's venture, Nexstar guaranteed MBG's payment of the credit provided to MBG in a December 2014 Guarantee Agreement (the "December 2014 GA") (*Id.*). The December 2014 GA contains a provision which states that the

guarantor's obligations may be extended (Complaint ¶70). MBG alleges that the December 2014 GA was entered into for the benefit of MBG (Complaint ¶71). The December 2014 Credit Agreement's facilities were refinanced on January 17, 2017 ("January 2017 Credit Agreement") (Complaint ¶73) and the December 2014 GA was replaced with a new guarantee agreement (the "January 2017 GA") (Complaint ¶74) which Nexstar states remains in effect today. On July 19, 2017, the January 2017 Credit Agreement was amended to refinance the credit facilities (the "Amended Credit Agreement") and, permitted MBG to request an extension of the maturity date to "no later than December 31, 2019.) (Complaint ¶76). The Amended Credit Agreement did not change the maturity date of the facilities which remained June 28, 2018 (*Id.*). MBG alleges that Nexstar has used the maturity date as leverage against MBG (Complaint ¶77). Further, MBG alleges that it is a third-party beneficiary to the Guarantee Agreements (*Id.*) which Nexstar disputes.

In May 2018, MBG formally requested an extension of its loan maturity date to which some lenders would only agree if Nexstar reaffirmed its guarantee of the credit facilities (Complaint ¶81). Nexstar initially refused but eventually did so, reaffirming its guarantee obligation consistent with its obligation under the December 2014 GA. MBG alleges that Nexstar's initial refusal was part of a scheme to re-acquire the Stations from MBG at a discounted price (Complaint ¶¶89–90).

MBG alleges nine causes of action: (1) breach of contract (SSA), (2) breach of contract (GA), (3) breach of the covenant of good faith and fair dealing (SSA), (4) breach of the covenant of good faith and fair dealing (GA), (5) intentional interference with contractual relations, (6) tortious interference with economic relations, (7) conversion, (8) accounting, and (9) fraudulent misrepresentation. Nexstar seeks dismissal of the complaint in its entirety pursuant to CPLR 33211 (a)(7).

II. LEGAL STANDARD

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part

of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS

A. Defendant's Motion to Dismiss

Nexstar argues that counts one through four should be dismissed for failure to state a claim (Nexstar Br. at 5, NYSCEF Doc. No. 9). It begins with the second count.

1. Count Two: Breach of Contract (GA)

Nexstar asserts the second count for breach of the GA should be dismissed because MBG is not a party, third-party beneficiary, or closely related party to that agreement. Accordingly, it lacks privity and cannot invoke any of its provisions (*Id.*). For a nonparty to recover as a third-party beneficiary, it must establish the specific intent of the parties to benefit the nonparty (Nexstar Br. at 6; citing *Greenwood v Daily News, L.P.*, 8 Misc 3d 1002(A)(1976)). A beneficiary is intended when:

> recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (Defendant's Memo in Support of MTD, at 6, quoting Restatement (Second) of Contracts § 302 (1981).

MBG cannot satisfy these requirements because no such intention is stated in either Guarantee Agreement. The January 2017 GA provides: "[t]his Agreement shall be binding upon each Grantor and its respective successors and assigns and shall inure to the benefit of the Collateral Agent and its successors and assigns...." (January 2017 GA, NYSCEF Doc. No. 8). Nexstar concedes there is no per se rule that a guarantee agreement always has a third-party beneficiary. Instead, it must appear the parties to the agreement intended to recognize the third-party as the primary party in interest and a "privy to the promise" (Nexstar Br. at 7, citing *Worldwide Sugar Co. v Royal Bank of Canada*, 609 F Supp 19, 25 [SDNY 1984]. Nexstar

concludes that because the Guarantee Agreement do not provide for compensation to MBG from any of the parties, MBG is not a third-party beneficiary.

Nexstar also argues that should MBG's allegations suggest the existence of an unreferenced agreement, such evidence is improper parol evidence and should not be considered (*Id.* at 7, citing *Vivir of L I, Inc. v Enrenkranz*, 127 AD3d 962, 964 [2d Dept 2015]). Nexstar further points to the January 2017 GA's integration clause which states it, along "with other loan documents, represent the final agreement between the parties and that it may not be contradicted by . . . [other] agreements of the parties" (*Id.* at 7–8, citing the January 2017 GA). Finally, where as here, plaintiff's bare assertions are contradicted by documentary evidence, the motion to dismiss should be granted (*see In re Loukoumi, Inc.*, 285 AD2d 595, 596 [2d Dept 2001]). Accordingly, the second count for breach of the GA must be dismissed.

2. Counts Three and Four: Breach of the Implied Covenants (SSA & GA)

Counts three and four alleging breach of the implied covenant of good faith and fair dealing should be dismissed as they are duplicative of the breach of contract claims (*Id.* at 9). Under New York law, every contract contains an implicit duty of good faith and faith dealing (*see Simon v Unum Group*, No. 07-cv-11426 (SAS), 2008 WL 2477471, at *2 [SDNY 2008]). When, as here, a claim for breach of the implied duty of good faith and fair dealing accompanies a claim for breach of contract, the former claim is redundant and "cannot survive a motion to dismiss" (*Id.*). The third and fourth counts allege that Nexstar breached the implied covenant of good faith and fair dealing in the SSA and GA respectively wherein MBG's first and second counts are for breach of contract of those same agreements (*Id.*). Notably, the language between counts one and three and counts two and four is similar. There are no new facts alleged separate and apart from the breach of contract claims being alleged (*Id.* at 10; Complaint ¶¶93–118). Because these counts are conclusory and fail to allege any facts that are distinct from those alleged in the first two counts, must be dismissed (*Id.*at 10–11).

3. Count One: Breach of Contract (SSA)

Count one which identifies five actions allegedly taken by Nexstar in breach of the SSAs (Complaint ¶97) should be dismissed because New York law requires a plaintiff alleging breach of contract to attach a copy of the contract or identify the breached provisions (*Id.* at 11 citing *Corp. Serv. Bureau, Inc. v Law Firm of Hall & Hall, LLP,* 36 Misc 3d 1220[A] [Civ Ct Richmond Cty., 2012); *Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118[A] [Sup Ct NY Cty 2007],

aff'd 65 AD3d 448 [1st Dept 2009]). Plaintiff's failure to attach the contract or identify breached provisions also constitutes sufficient basis to dismiss the breach of contract claim (*Id.*). Because MBG merely lists five alleged actions which purportedly result in a breach of the SSA but fails to identify the specific agreements or provisions breached, this count should be dismissed.

4. Count Five: Intentional Interference with Contractual Relations

Regarding the fifth count for intentional interference with contractual relations, the claim should be dismissed because MBG has not identified a specific contractual relationship interfered with (*Id.* at 12). There are four elements necessary to state a claim for intentional interference with contractual relations: (i) the existence of a valid contract between the parties, (ii) the defendant's knowledge of that contract, (iii) the defendant's intentional procurement of a breach of that contract, and (iv) damages (*see Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). MBG has failed to argue the existence of a specific contractual relationship with which Nexstar has interfered through its actions (*Id.* at 12–13). Consequently, these allegations are insufficient and should be dismissed (*Id.* at 13).

5. Count Six: Tortious Interference with Business Relations

Nexstar next argues that MBG's sixth count for tortious interference with business relationships should be dismissed because MBG's allegations do not identify specific third parties (*Id.*). The elements of a claim for tortious interference with a business relationship are: (i) business relations with a third party, (ii) defendant's interference with those relations, (iii) defendant's actions were wrongful or employed unfair, dishonest, or improper means, and (iv) defendant's actions hurt the relationship (*see RFP LLC v SCVNGR, Inc.*, 788 F Supp 2d 191, 195 [SDNY 2011]. Vague allegations that a plaintiff's relationship with clients were injured are insufficient to state a claim (*see Shah v Lumiere*, 2013 WL 6283585, at 3* [SDNY 2013]). The complaint alleges only vaguely that Nexstar tortuously interfered by harming MBG's economic relationships with employees, clients, and potential clients (Nexstar Br. at 14; Complaint ¶133). These allegations are insufficient and should be dismissed (*Id.* at 14).

6. Count Seven: Conversion

As to MBG's seventh count for conversion, it should be dismissed as it is duplicative of the breach of contract claims (*see Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 431 [SDNY 2004]). MBG's conversion claim seeks recovery for retransmission fees Nexstar allegedly received from some MVPDs but failed to remit to MBG (Nexstar Br. at 14; Complaint ¶141). This

allegation is, in fact, a complaint that Nexstar breached the SSAs and consequently is duplicative (*Id.* at 14–15).

7. Count Eight: Accounting

The claim for an accounting has been withdrawn. No further discussion is needed.

8. Count Nine: Fraudulent Misrepresentation

Nexstar counters MBG's assertion that Nexstar promised to transfer $16.3 million in assets to MBG pursuant to the Asset Purchase Agreement, but it never intended to do so (*Id.* at 16; Complaint ¶152). At most, these allegations give rise to a claim for breach of contract and are insufficient for a fraudulent misrepresentation claim. The "mere intent not to perform on a contractual agreement, without more, does not give rise to a fraudulent misrepresentation claim" (*Gelfman Int'l Enters., Inc. v Klioner*, 2006 WL 8439339, at 7* [EDNY 2006]).

A false statement by a party that it intends to perform its contractual obligations give rise to a claim for fraudulent misrepresentation in only three circumstances (i) the defendant owes a legal duty to the plaintiff separate from a contractual duty to perform, (ii) a misrepresentation collateral or extraneous to the contract or (iii) the plaintiff seeks special damages caused by the misrepresentation and unrecoverable as contract damages (*see Zinter Handling, Inc. v Gen. Elec. Co.*, 2005 WL 1843282, at 7* [NDNY 2005]). Nexstar does not owe MBG a duty outside of its contractual duties; the alleged misrepresentation was not collateral or extraneous to the parties' agreement; and MBG does not allege special damages proximately caused by this alleged misrepresentation (Nexstar Br. at 16–17). Consequently, this count should be dismissed (*Id.*).

B. Plaintiff's Memorandum of Law in Opposition

In opposition, Plaintiff MBG defends all of its claims except the eighth cause of action for an accounting (MBG Opp. Br. at 22 n.11, NYSCEF Doc. No. 12).

1. Count Two: Breach of Contract (GA)

MBG maintains that Nexstar's argument regarding breach of the GA contravenes the law and the facts as alleged in of the Complaint (*Id.* at 8). A third-party beneficiary need not be explicitly named. Rather, the court must divine the contract's "true meaning and intention" from the text of the agreement as well as its purpose and effect (*see McClare v Mass. Bonding & Ins. Co.*, 266 NY 371, 376 [NY 1934]). The cases on which Nexstar relies largely involve summary judgment as opposed to motions to dismiss (*Id.* at 8). Further, Nexstar ignores the plaintiff's allegations that allege MBG's status as a third-party beneficiary to the Guarantee Agreements (*Id.*

at 9; Complaint ¶¶69, 74, 77, 100, 101, 114). The Complaint alleges the December 2014 Credit Agreement explicitly states that it is a "condition precedent" for the lenders to extend credit to MBG, effectively stating that the lenders would not have financed MBG without Nexstar's guarantee (*Id.* at 9; Complaint ¶72).

Further, the present matter is distinguishable from *Worldwide Sugar* as there are "ample allegations" here that the GA evidences an intention to benefit MBG (*Id.* at 10). The Complaint made sufficient allegations that the Guarantee Agreements stated they were to benefit MBG (*Id.*; Complaint ¶72). MBG maintains that Nexstar attached the January 2017 GA as opposed to the December 2014 GA in an effort to support its motion by only citing to a single portion of that agreement (*Id.*). The terms of the January 2017 GA do not support Nexstar's position as neither it nor the December 2014 GA explicitly states there are no third-party beneficiaries to the agreements (*Id.*). MBG notes the January 2017 GA discusses "Variable Interest Entities" ("VIE") borrowers including the "Marshall Borrower" to whom the lenders will provide credit facilities (*Id.*). MBG further points out that according to the January 2017 GA, Nexstar agreed to guarantee credit facilities, including the MBG facilities, and stipulated that MBG would "derive substantial direct and indirect benefits from them" (*Id.*). Also, the title of the December 2014 GA, is entitled "Marshall Obligation" and explains that MBG "is a party to [a] certain Credit Agreement" which the lenders have required the guarantors, including Nexstar, execute and deliver (*Id.*). In light of these provisions and language, it is difficult for Nexstar to argue MBG is not a third-party beneficiary.

Nexstar's citation to the integration clause within the January 2017 GA attempts to obfuscate the record by failing to mention that the "other loan documents" mentioned within the clause include Nexstar's Credit Agreement with the lenders which explicitly states that Nexstar and others, including MBG, have "requested the applicable lenders to extend credit to the applicable borrowers under … a credit agreement with … the Marshall Borrower" (*Id.*). Finally, MBG argues that Nexstar has ignored that the Court must look to the purpose and effect of the contract to determine whether MBG is a third-party beneficiary and, here, the GA explicitly states that they are a condition precedent for MBG to receive credit facilities it would not receive but for Nexstar's guarantee (*Id.* at 12–13). Consequently, the Court should reject Nexstar's motion to dismiss as to counts two and four as the Complaint adequately pleads MBG's third-party beneficiary status. Any factual dispute must be resolved in MBG's favor (*Id.* at 13).

2. Counts Two & Four: Breach of Implied Covenant of Good Faith & Fair Dealing

MBG asserts the third and fourth causes of action for breach of the implied covenant of good faith and fair dealing survive as they are alleged in the alternative to the breach of contract claims (*see Citi Mgmt. Grp., Ltd. v Highbridge House Ogden, LLC*, 45 AD3d 487 [1st Dept 2007]). This rule is especially applicable as there are multiple disputes here as to the scope of the contracts in this case (*see Fantozi*, 2008 WL 4866054, at *8 [2d Cir. 1999]). Matters within the scope of these claims include Nexstar's failure to reaffirm its guarantee of MBG's loans (*Id.* at 14). Because of disputes as to the scope of the SSAs and GAs, MBG should be allowed to argue breach of the implied covenant in the alternative to breach of contract.

3. Count One: Breach of Contract (SSA)

Next, MBG argues that the Complaint adequately states a cause of action for breach of the SSAs (*Id.* at 15). A plaintiff who alleges breach of contract is neither "required to attach a copy of the contract or plead its terms verbatim" (*see First Class Concrete Corp. v Rosenblum*, 167 AD3d 989, 990 [2d Dept 2018]). Nexstar's own citation to *Mandarin Trading, Ltd.* includes this language (*Id.* at 15). It is sufficient to simply provide Nexstar with adequate notice of the claim for breach of the SSA (*see 12 Baker Hill Rd., Inc.*, 130 AD3d at 1426). MBG has more than met this standard as it has pled how Nexstar breached and cited to SSA provisions (*Id.* at 16; Complaint ¶¶53, 56, 97).

4. Count Five: Intentional Interference with Contractual Relations

A cause of action for intentional interference with contractual relations may be brought to remedy interference with contractual relations with employees and customers (*see Zimmer-Masiello, Inc. v Simmer, Inc.*, 159 AD2d 363, 366 [1st Dept 1990]). The Complaint's allegations that relevant employment and sales contracts existed that Nexstar was aware of is sufficient to plead this cause of action (*Id.* at 16). Although MBG states that discovery will provide additional insight into the actions taken by Nexstar to interfere with MBG's contractual relations, the Complaint adequately pleads the elements of the cause of action to preserve the claim (*Id.* at 17).

5. Count Six: Tortious Interference with Economic Relations

The Complaint adequately states the elements of a cause of action for tortious interference with economic relations, including that MBG has business relationships with employees and clients that Nexstar was aware of, that Nexstar improperly interfered with those relationships, and that such interference harmed MBG and its relationships (*Id.* at 17; Complaint ¶¶54–55, 58, 128–

134). Again, MBG argues that through discovery a more specific understanding of this interference will emerge but, for now, the Complaint adequately pleads the requisite elements and the motion should be denied as to this count (*Id.* at 17–18).

6. Count Seven: Conversion

The cause of action for conversion is not duplicative of any other cause of action as it deals specifically with retransmission fees improperly withheld by Nexstar. Although Nexstar argues this is duplicative of MBG's breach of contract causes of actions, Nexstar fails cite, quote, or identify which provision of the SSA agreement creates this obligation (*Id.* at 18–19). Even if the conversion of retransmission fees falls within the breach of contract action, MBG is still entitled to plead legal theories in the alternative (*Id.* at 19, citing *Cohn v Lionel Corp.*, 236 NE2d 634, 637 [NY 1968]). Because the Complaint pleads the elements of a conversion cause of action and alternatives are available at this stage of litigation, Nexstar's motion to dismiss the seventh cause of action should be denied (*Id.* at 19).

7. Count Nine: Fraudulent Misrepresentation

As to the fraudulent misrepresentation claim, New York courts have recognized that a defendant may be liable for fraudulent misrepresentation when it misstates the value of property sold to a plaintiff (*see Pete's Corner, Inc. v E-Miljud, Inc.*, 84 AD2d 761 [2d Dept 1981]). MBG argues that Nexstar misstates MBG's argument when it frames the claim as a matter of Nexstar not intending to transfer $16.3 million of assets (MBG Br. at 20). Instead, MBG argues that Nexstar preyed on MBG by fraudulently overcharging for the Stations when it first agreed to sell MBG the Stations for $27 million before amending the agreement to charge an additional $16.3 million (*Id.* at 20; Complaint ¶¶32–33). Nexstar lied when it stated the assets MBG purchased were $16.3 million more valuable than the assets it was to sell to its previous intended buyers (*Id.* at 20; Complaint ¶¶33–35, 151–152). Nexstar seeks to reframe the issue as a matter of breach of contract when, in fact, that is not MBG's argument (*Id.* at 21).

IV. DISCUSSION

A. Count One: Breach of Contract (SSA)

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what

parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*Id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Here, plaintiff successfully pleads a breach of contract claim with regards to the SSA (count one). Plaintiff MBG's Complaint successfully alleges that an SSA existed between the parties, MBG performed its duties by taking on responsibility of running the Stations, Nexstar breached the SSA and MBG suffered damages as a result (Complaint ¶¶44–45, 53–58, 62–66, 93–98). Although Nexstar argues that MBG's failure to attach the contract to its Complaint or identify specific breached provisions precludes this cause of action, MBG accurately cites support that no such verbatim recitation of the contract's terms is necessary merely to preserve this cause of action. This count will not be dismissed.

B. Count Two: Breach of Contract (GA)

A third party may sue as a beneficiary on a contract made for its benefit (*see Dormitory Authority v Samson Construction Co.*, 30 NY3d 704 [2018] [purported beneficiary not named in contract]). However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contract (*Id.*). One who seeks to maintain an action for breach of contract as a third party beneficiary must establish that 1) there is an existing valid and binding contract between the signatories; 2) the contract was intended for the third party's benefit; and 3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost (*see Mandarin Trading Ltd.*, 16 NY3d at 173; *Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783 [2006]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]] *see also Roosevelt Islanders for Responsible Southtown Development v Roosevelt Island Operating Corp.*, 291 AD2d 40 [1st Dept 2001] [applying Restatement 2d of Contracts, § 302[1][a] and [b]]). Additionally, it must be established that no one other than the third party can recover if the promisor breaches the contract or that the language of

the contract otherwise clearly evidences an intent to permit enforcement by the third party (*see Dormitory Authority*, supra; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38 [1985]; *Artwear, Inc. v Hughes,* 202 AD2d 76 [1st Dept 1994]; *Oursler v Women's Interart Center, Inc.,* 170 AD2d 407 [1st Dept 1991]). Courts are generally reluctant to construe an intent to benefit a third party in the absence of clear contractual language evincing such an intent (*see LaSalle Nat. Bank v Ernst & Young LLP,* 285 AD2d 101 [1st Dept 2001]).

In the first cause of action, plaintiff successfully pleads breach of contract with regards to the GA. The Complaint successfully alleges MBG's status as a third-party beneficiary to the Guarantee Agreements by showing that: (i) a valid contract existed between the signatories of the agreement, (ii) the contract was made for MBG's benefit, and (iii) the benefit was immediate (Complaint ¶¶67–76, 99–104). Although Nexstar argues that the Guarantee Agreements were only made to benefit MBG's creditors and Nexstar, MBG has pleaded facts supporting a finding that, without these agreements, MBG's venture with Nexstar would not have been funded (Complaint ¶¶28–29, 67). MBG further successfully pleads the elements of a breach of contract claim, showing that the contract existed, defendant Nexstar breached the contract, and MBG was damaged as a result (Complaint ¶¶67–90). Consequently, this count survives.

C. Counts Three & Four: Breach of the Implied Covenant of Good Faith and Fair Dealing

It is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]). A "claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

Here, counts three and four must be dismissed as they arise from the same conduct as alleged in the breach of contract claims, with counts three and four nearly mirroring counts one and two (*see* Complaint ¶¶105–118; *Simon v Unum Grp.*, WL 4866054, at *7 [SDNY 2008]). Further, as noted above, the covenant is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153). Here, MBG merely reiterates its allegations for breach of contract as opposed to alleging that Nexstar acted in a way that although not expressly forbidden would deprive MBG of enjoying the fruits of the contract. Counts three and four shall be dismissed.

D. Count Five: Intentional Interference with Contractual Relations

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

Count five shall be dismissed as the Complaint does not allege the existence of any specific contractual relationships with which Nexstar interfered (*see CYG-Knit Mills, Inc. v Denton Sleeping Garment Mills, Inc.*, 26 AD2d 800, 801 [1st Dept 1966]). Instead, MBG, only generally alleges that it enjoyed contractual relationships with employees and clients, and that Nexstar's conduct induced the breach and disruption of those relationships (Complaint ¶¶119–126).

E. Count Six: Tortious Interference with Business Relations

"The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant act[ed] with the sole purpose of harming the plaintiff or us[ed] wrongful means; and (d) injury to the business relationship" (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY County 2007] *affd as mod*, 44 AD3d 317 [1st Dept 2007]). "[The] plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). "'Wrongful means' includes

physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required" (*id.* at 300).

This cause of action must be dismissed because the vague allegations that Plaintiff's relationships with clients or employees were damaged are insufficient to state a claim (*see Shah v Lumiere*, 2013 WL 6283585, at *3 [SDNY 2013]). MBG only generally alleges that Nexstar improperly interfered with MBG's economic relationships with employees and clients without naming specific instances (Complaint ¶¶127, 135).

F. Count Seven: Conversion

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*see Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). "[A] claim of conversion cannot be predicated on a mere breach of contract" (*MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD 2d 375, 376 [2d Dept 1997]. However, "[t]he same conduct which constitutes a breach of contractual obligation may also constitute the breach of a duty arising out of the contract relationship which is independent of the contract itself" (*Dime Sav. Bank of N.Y. v Skrelja*, 227 AD 2d 372, 372 [2d Dept 1996] [internal quotation marks omitted]; *see Bender Ins. Agency v Treiber Ins. Agency*, 283 AD 2d 448, 450 [2d Dept 2001]; *Apple Records v Capitol Records*, 137 AD 2d 50, 55 [1st Dept 1988]). Where it does, "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contrat" (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY 2d 171, 179 [1968]; *see Sommer v Federal Signal Corp.*, 79 NY 2d 540, 551 [1992]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY 2d 382, 389 [1987]; *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382, 398 [1882]).

Here, MBG alleges Nexstar has a duty distinct from the SSAs to remit retransmission fees paid by certain MVPDs. The facts alleged are sufficient to state a claim for conversion. As the claim is not duplicative of MBG's breach of contract claim, it survives.

G. Count Nine: Fraudulent Misrepresentation

"The elements of fraudulent misrepresentation are (1) a representation of a material fact, (2) falsity, (3) reasonable reliance and injury (*see Small v Loriblard Tobasco Co., Inc.,* 94 NY 2d 43 [1999]). This claim shall be dismissed for multiple reasons. First, as the complaint merely alleges breach of a promise Nexstar did not intend to keep, no fraudulent misrepresentation claim is stated (*see Yenrab, Inc. v 794 Linden Realty, LLC,* 68 AD3d 755, 757 [2d Dept 2009]). Second, reliance is not justified where MBG could have conducted due diligence in order to protect itself against deception (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B de C.V.,* 76 AD 3d 310 [1st Dept 2010] [Justifiable reliance cannot be made where a sophisticated and well counseled entity fails to include in the transaction documents appropriate provision conditioning the agreement on the truth of the representation made by the defendant]). The allegation that a list of the assets Nexstar intended to transfer "is not publicly available" (Complaint ¶ 34) does not excuse MBG from either making inquiry or obtaining appropriate contractual representations.

It is hereby

ORDERED that the motion to dismiss of defendants Nexstar Broadcasting, Inc. is GRANTED to the extent that the third and fourth (breach of implied covenant of good faith and fair dealing), fifth (intentional interference with contractual relations), sixth (tortious inference with business relations, eight (accounting) and ninth (fraud) causes of action are hereby DISMISSED and otherwise DENIED; and it is further

ORDERED that defendant shall answer the complaint within 20 days of the date of service of this decision and order with notice of entry; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference at Part 49, Courtroom 252, 60 Centre Street, New York, New York 10007 on Tuesday, December 17, 2019 at 10:30 am.

This constitutes the decision and order of the court.

DATED: October 30, 2019

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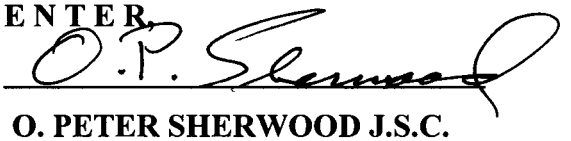

O. PETER SHERWOOD J.S.C.