DNA Model Mgt., LLC v Next Mgt. LLC
2016 NY Slip Op 31536(U)
August 10, 2016
Supreme Court, New York County
Docket Number: 652387/15
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMM. DIV. PART 39

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DNA MODEL MANAGEMENT, LLC,

Plaintiff,

- against -

NEXT MANAGEMENT LLC, ANAIS MALI, and KYLE HAGLER,

Defendants.

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Index No. 652387/15
DECISION & ORDER
(Motion Seq. 001)

SALIANN SCARPULLA, J.:

Defendants Next Management LLC and Kyle Hagler move for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint as against them for failure to state a cause of action.

Plaintiff DNA Model Management, LLC (plaintiff) and defendant Next Management LLC (Next) are both modeling agencies located in New York City. Defendant Anais Mali (Mali) is a model who signed a management contract with plaintiff DNA on or about February 14, 2013, pursuant to which Mali appointed DNA as her exclusive personal manager in the territory of New York (Cmplt., ¶ 9; *see also* Jaroslawicz aff, Ex. C).

The initial term of the management agreement was for two years, and it renewed automatically on February 14, 2015 for an additional one-year period (Cmplt., ¶ 10). On June 15, 2015, Mali sent plaintiff an email in which she stated that she had not been very happy lately and wanted a fresh start with a new team (Cmplt., ¶¶ 18, 72; *see also*

Jaroslawicz aff, Ex. B). Prior to this email, all communications with Mali had been enthusiastic, encouraging and positive (Cmplt., ¶¶ 18, 70, 73), although plaintiff alleges that Mali took a three-month leave of absence for personal reasons during 2013-2014 and could only be reached through Facebook (*id.*, ¶¶ 51-52). Although the management agreement contains a provision requiring the parties to mediate any dispute, Mali allegedly never requested a mediation to resolve any dispute she might have with plaintiff's management services (*id.*, ¶¶ 16-17).

Prior to the June 5th email, plaintiff allegedly expended significant time and effort on furthering Mali's modeling career, and contends that, while under plaintiff's management, Mali's popularity and income expanded tremendously and her billings increased by 50%, with her billings in 2014 grossing seven figures (Cmplt., ¶¶ 49-50, 6). Plaintiff further contends that its efforts took her "from being virtually unknown to her current status as a top model" (*id.*, ¶ 55), and that Mali got "dream" modeling assignments through plaintiff, such as becoming the face of Dolce Gabbana cosmetics, shooting for the David Yurman campaign, and being featured in Vogue, Italian Vogue, Paris Vogue, German Vogue, W Magazine and Allure (*id.*, ¶ 56-57). In addition, Mali was working in the United States by virtue of the fact that plaintiff sponsored her work visa, in accordance with federal immigration law (*id.*, ¶ 36).

After receiving Mali's June 5th email, plaintiff advised her that she was still under contract until February 13, 2016 and could not unilaterally terminate the relationship without cause and without adhering to the terms of the management agreement (Cmplt., ¶ 19). Mali was also advised that she had bookings or options that they expected her to

fulfill (*id.*, ¶ 20), but Mali did not respond (*id.*, ¶ 21). Allegedly, around this time, Next posted on its website and made announcements via or through social media, that it was now representing and managing Mali (Bonnouvrier aff, ¶ 12). According to an email exchange between David Bonnouvrier of plaintiff and Joel Wilkenfeld of Next, as early as June 18, 2015, Next was featuring Mali on its website (*id.*, Ex. A).

Bonnouvrier avers that he immediately demanded that Mali be removed from Next's website, but Wilkenfeld refused (*id.*, ¶ 13). In an email dated June 18th, Bonnouvrier stated that he had no choice but "to file" (*id.*, Ex. A). In response, Wilkenfeld offered to meet and try to resolve the situation without involving their lawyers (*id.*). At some point, Wilkenfeld allegedly suggested a shared commission agreement, but DNA rejected that offer (*id.*, ¶ 13).

On June 22, 2015, plaintiff received a communication from an attorney indicating that she represented Next and was "reserving Ms. Mali's rights in law and equity" (Cmplt., ¶ 30). The letter allegedly stated that Mali had "terminated her relationship with plaintiff and was now represented by Next," and accused plaintiff of interfering with Mali's business relationships (*id.*, ¶¶ 31-32).

Prior to signing with plaintiff, it is alleged that Mali had "bounced around without much direction, changing management agencies on numerous occasions with limited success," working with Wilhelmina Models Inc. from April 2009 until August 2010, and Ford Modeling Agency (Ford) from August 2010 through January 2013 (Cmplt., ¶¶ 37, 54). Plaintiff alleges that "Mali's modus operandi seems to be to change agencies on a whim, rarely if ever fulfilling her contracts, and rarely staying at an agency for an

extended period of time" (*id.*, ¶ 38). Plaintiff alleges that it negotiated in good faith with Ford for the release of Mali's obligations to Ford in early 2013, incurring significant expenses from legal fees and the payment of commissions to Ford (*id.*, ¶¶ 39-40). Plaintiff further alleges that the exclusive and binding nature of contracts between agency and talent is an essential cornerstone of the modeling industry, because the agencies invest substantial time, money and effort in the development and advancement of the model's career (*id.*, ¶ 43).

Next is accused of not playing by these rules and wrongfully coercing and inducing Mali to breach her exclusive management agreement with plaintiff, knowing at the time that she was still under contract with plaintiff (Cmplt., ¶¶ 14, 45). Plaintiff alleged that Next allegedly has engaged in a pattern of poaching models from other agencies over the last few years (*id.*, ¶¶ 46-47). Plaintiff claims that Mali's departure from plaintiff was "initiated and/or assisted by representatives of Next," as evidenced by the fact that the timing of her departure coincided with Next's announcement that it was representing Mali (*id.*, ¶ 62).

In the complaint plaintiff states that, during the last few years, Next has been experiencing a significant loss of agents and other key personnel, and thus has lost a large number of models (Cmplt., ¶ 63). In order to stop "hemorrhaging," Next hired defendant Kyle Hagler (Hagler), a well-known figure in the modeling industry, who allegedly promised to deliver millions of dollars in billings (*id.*, ¶¶ 64-65). When Hagler allegedly failed to deliver on this promise, he "begun ramping up his efforts to coerce or otherwise convince models (even those with under [sic] contract with other agencies) to leave their

agencies for Next," including Mali (*id.*, ¶¶ 66, 68, 69). Next is accused of poisoning Mali with false promises and helping her manufacture a false pretext to breach her agreement with plaintiff (*id.*, ¶¶ 71, 81).

Based upon the foregoing allegation, plaintiff advances the following four theories of liability against the defendants: (1) tortious interference with contract by Next and Hagler; (2) unfair competition against Next; (3) breach of contract against Mali; and (4) unjust enrichment against Next. Defendants move to dismiss all but the breach of contract claim against Mali.

On a motion to dismiss pursuant to CPLR 3211 (a), the court must accept the facts alleged in the complaint as true and accord the plaintiff every favorable inference, determining only whether the facts as alleged state a valid legal claim (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Cabrera v Collazo*, 115 AD3d 147, 150-151 [1st Dept 2014]).

There are four elements of a tortious interference claim under New York law: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993], citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]; *see also Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 592 [1st Dept 2011]; *Click Model Mgt. v Williams*, 167 AD2d 279, 280 [1st Dept 1990]). To prove the third element, plaintiff must prove that Mali would not have breached her exclusive management agreement with plaintiff but for the activities of Next and/or Hagler (*see Michele*

Pommier Models, Inc. v Men Women N.Y. Model Mgt., Inc., 173 F3d 845, *1 [2d Cir 1999]; *Sharma v Skaarup Ship Mgt. Corp.*, 916 F2d 820, 828 [2d Cir 1990]; *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002]).

In the complaint plaintiff alleges facts that support each of the four elements of a claim for tortious interference with contract against Next and Hagler. While the complaint itself alleges that Mali's "modus operandi" was to "change agencies on a whim" (Cmplt., ¶¶ 38), the allegations of the timing of her departure from plaintiff and signing with Next together with her status as a foreign national, employed in the United States only by virtue of an agency-sponsored work visa, is sufficient to raise a question of fact as to whether these defendants induced her to breach her contract with plaintiff.

Contrary to defendants' argument, nothing in *Wilhelmina Models v Abdulmajid* (67 AD2d 853 [1st Dept 1979]) limits plaintiff's remedies to a breach of contract claim against Mali. *Michele Pommier Models, Inc. v Men Women N.Y. Model Mgt., Inc.* (173 F3d 845), also does not, as defendants contend, stand for the principal that there is no basis for a lawsuit against the subsequent management agency that represents the model. While the claim for tortious interference was dismissed in that case, it was on summary judgment where the evidence showed that the model intended to breach her contract with the plaintiff modeling agency several months before negotiating with the defendant modeling agency.

Further, there is also no basis to dismiss the tortious interference claim against Hagler at this juncture. A corporate official who personally participates in the commission of a tort may be held independently liable regardless of whether he/she was

acting in the course of official duties or was motivated by personal gain (*Espinosa v Rand*, 24 AD3d 102, 102-103 [1st Dept 2005]; *American Express Travel Related Servs. Co. v North Atl. Resources*, 261 AD2d 310, 311 [1st Dept 1999]; *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]). Accordingly, I deny that part of defendants' motion in which they seek to dismiss the tortious interference with contract cause of action.

"[T]he gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets" (*Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998]). There are no allegations that Next had access to or exploited any of plaintiff's trade secrets or proprietary information in inducing Mali to terminate her relationship with plaintiff seven months early. Likewise, there are no allegations that Next misappropriated a commercial advantage belonging exclusively to plaintiff by trademark or trade name infringement or dilution. I therefore dismiss the unfair competition claim in its entirety.

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]). "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional

contract or tort claim (*id.; see also Benham v eCommission Solutions, LLC*, 118 AD3d 605, 607 [1st Dept 2014]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski,* 14 AD3d 644, 645 [2d Dept 2005]). The unjust enrichment claim is wholly duplicative of the tortious interference claim; thus I dismiss it in its entirety.

For the foregoing reasons, it is hereby

ORDERED that the motion (seq. no. 001) to dismiss the complaint is granted only to the extent of dismissing the second and fourth causes of action, and the motion is denied in all other respects; and it is further

ORDERED that defendants Next Management LLC and Kyle Hagler are directed to serve and file answers to the complaint within twenty (20) days of the date of this decision and order.

This constitutes the decision and order of the court.

Dated: August 10, 2016

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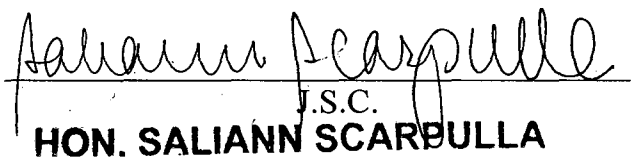

J.S.C.

HON. SALIANN SCARPULLA