Wantickets RDM, LLC v Eventbrite, Inc.
2017 NY Slip Op 31548(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 654277/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WANTICKETS RDM, LLC, Index No.: 654277/2016

Plaintiff, **DECISION & ORDER**

-against-

EVENTBRITE, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Eventbrite, Inc. (Eventbrite) moves, pursuant to CPLR 327 and 3211(a)(3), (4) and (7), to dismiss the complaint. Plaintiff Wantickets RDM, LLC (Wantickets) opposes the motion and cross-moves to amend the caption to reflect its correct corporate name. Eventbrite opposes the cross-motion. The court granted Wantickets' cross-motion during oral argument. *See* Dkt. 77 (4/25/17 Tr. at 23); *see also* Dkt. 33 at 15-19 (explaining Wantickets' conversion from Delaware corporation to Delaware LLC and its authority to do business in New York).[1] For the reasons that follow, Eventbrite's motion to dismiss is denied.[2]

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint (Dkt. 4) and the documentary evidence submitted by the parties.[3]

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The new caption appears at the top of this decision. Appropriate ordering language to effectuate the caption change is set forth below.

[3] The court, however, has not considered the factual averments in the affidavits submitted by defendants. *See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n.4 (1st Dept 2014) ("[A]n affidavit ... may properly serve as the vehicle for the submission of ... documentary evidence. In such situations, **the affidavit itself is not considered evidence; it merely serves as a vehicle to introduce documentary evidence to the court**") (emphasis

The parties are two Delaware entities who are competitors "in the business of selling ticketing services to promoters of events and to entertainment venues." Complaint ¶ 2. "From approximately March to July 2016, Eventbrite [a much larger company than Wantickets] was exploring a potential acquisition of Wantickets." *Id.* "While the deal was under consideration, Wantickets' two most senior executives [non-parties Barak Schurr and Diego Carlin] engaged in a four-month campaign to promote Eventbrite to Wantickets' actual and potential clients, **even though the executives were still employed by Wantickets and even though there was no guarantee the transaction would close.**" *Id.* (emphasis added). During this time, Schurr and Carlin allegedly "engaged in a sustained campaign to divert business from their employer (Wantickets) to their potential corporate acquirer (Eventbrite)." ¶ 13. For instance, allegedly, "they arranged for a series of meetings and calls to introduce Eventbrite to actual or potential clients of Wantickets and to tout the advantages of Eventbrite. This conduct all but guaranteed that the actual and potential clients would lose interest in Wantickets, regardless of whether the Eventbrite transaction closed, while giving Eventbrite the benefit of the contemplated transaction for free." *Id.* Likewise, "Eventbrite was eager to take advantage of the disloyalty of Mr. Schurr and Mr. Carlin", and thus "pitched itself to potential clients via the introductions from Mr. Schurr and/or Mr. Carlin, knowing that Mr. Schurr and Mr. Carlin were still employees of Wantickets and that Mr. Schurr's and Mr. Carlin's diversion of business violated their duties to Wantickets." ¶ 14. "Eventbrite even paid for Mr. Schurr to take a business trip to Ibiza, Spain so that he could develop business for Eventbrite." *Id.*

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added); *see also Liberty Affordable Housing, Inc. v Maple Court Apts.*, 125 AD3d 85, 89 (4th Dept 2015) (discussing "limited purpose" of defendant's affidavit on motion to dismiss), accord *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976).

"The Eventbrite-Wantickets transaction ultimately did not close, and in July 2016, control of Wantickets changed hands in a seperate transaction." ¶ 16. "Upon discovering that Mr. Schurr and Mr. Carlin had been decimating Wantickets' business for several months, Wantickets' new CEO promptly fired Mr. Schurr and Mr. Carlin. **Eventbrite immediately hired them.**" *Id.* (emphasis added). After they started working for Eventbrite, Schurr and Carlin allegedly continued to solicit Wantickets' clients. ¶ 17.

Schurr and Carlin, however, are not defendants in this action. They are currently arbitrating Wantickets' claims against them by virtue of a mandatory arbitration clause in their employment agreements which dictates application of New York law and adjudication in a New York venue. On August 3, 2016, Wantickets filed a petition in this court seeking to enjoin Schurr and Carlin from violating their employment agreements by working for Eventbrite and soliciting Wantickets' clients. *See Wantickets RDM, Inc. v Schurr*, Index No. 654080/2016 (Sup Ct, NY County) (the Related Action). By order dated November 4, 2016, the court granted Wantickets' motion. *See* Related Action, Dkt. 66.

Wantickets commenced the instant action against Eventbrite on August 12, 2016 by filing a summons with notice. *See* Dkt. 1. Subsequently, on October 7, 2016, Eventbrite commenced an action against Wantickets in a California state court for breach of other agreements governing matters not at issue in the instant action, and on November 2, 2016, Eventbrite amended its California complaint to include a declaratory judgment cause of action to encompass the issues before this court. On November 7, 2016, Eventbrite filed a demand for complaint. *See* Dkt. 3. That same day, Wantickets served Eventbrite with its complaint, and filed it on November 21, 2016. *See* Dkt. 4. Wantickets' complaint asserts two causes of action: (1) aiding and abetting

Schurr's and Carlin's breaches of fiduciary duty; and (2) tortious interference with Schurr's and Carlin's employment agreements. *See id.* at 5.

On December 13, 2016, Eventbrite filed the instant motion to dismiss the complaint, and on January 17, 2017, Wantickets opposed and cross-moved to correct the caption to reflect its conversion to an LLC. As noted earlier, the court, at oral argument, granted Wantickets' cross-motion, thereby resolving the portion of Eventbrite's motion concerning Wantickets' capacity to maintain this action.[4] The court reserved on the balance of the motion to dismiss, which seeks dismissal or a stay of this action in favor the California action,[5] and also dismissal for failure to state a claim.

II. The California Action

Eventbrite's contention that Wantickets' claims should be litigated in California is uncompelling. It is well settled that where, as here, a duplicative action in another jurisdiction merely amounts to a counterclaim seeking a declaration that the New York action has no merit, the New York court will not dismiss its case in favor of the other action, regardless of which action was filed first. *Energysolutions, Inc. v Kurion, Inc.*, 2014 WL 1695023, at *4 (Sup Ct, NY County 2014) ("courts generally will not give priority to a first-filed action which merely seeks a declaratory judgment that the threatened lawsuit by the 'true' plaintiff has no merit."), citing *Bridas Int'l S.A. v Repsol, S.A.*, 40 Misc3d 1229(A) (Sup Ct, NY County 2013) (collecting cases); *see San Ysidro Corp. v Robinow*, 1 AD3d 185, 187 (1st Dept 2003), accord *L-3 Commc'ns Corp. v SafeNet, Inc.*, 45 AD3d 1, 8 (1st Dept 2007) (noting that first-in-time rule not

[4] It, nonetheless, bears mentioning that "Eventbrite cites no case that was dismissed because a plaintiff mistakenly sued under the company's name before a conversion from one form to another." *See* Dkt. 33 at 16.

[5] *Eventbrite, Inc. v Wantickets RDM, LLC*, Case No. 16-554711 (Cal Super Ct).

strictly applied; context of competing actions to be considered). That said, this action was the first filed. *See* Dkt. 33 at 11-14 (action filed first; delay in filing complaint due to settlement negotiations).

Moreover, in determining whether to dismiss an action in favor of another pending action, the causes of action and the parties in both actions should be "the same or substantially the same." *White Light Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 93-94 (1st Dept 1997); *see* CPLR 3211(a)(4) ("there is another action pending between the same parties for the same cause of action in a court of any state or the United States; **the court need not dismiss upon this ground** but may make such order as justice requires") (emphasis added). Here, the parties came before the court seeking injunctive relief against the employees; settlement negotiations followed which delayed the commencement of the instant New York action; and then the New York and California complaints were filed in close temporal proximity. This case, and not the California case collaterally challenging its merits, should proceed.

To the extent Eventbrite contends that a *forum non conveniens* dismissal is appropriate [*see Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 135 (2014), accord *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 (1984)], such argument is predicated on its erroneous contention that Wantickets lacks any connection to New York. *See* Dkt. 43 at 3 (noting that "Wantickets' headquarters is located at One Pennsylvanian Plaza, 50th Floor" and that "[a]ll managerial decisions emanate from New York"). Nothing proffered by Eventbrite warrants disturbing Wantickets' choice of forum. *See Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431 (1st Dept 2015) ("Generally, 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'") (citation omitted); *see also id.* at 433 ("defendant did not sustain its burden of

showing that 'although jurisdictionally sound,' this case 'would be better adjudicated elsewhere'), quoting *Pahlavi*, 62 NY2d at 479. Indeed, the judge presiding over the California action is cognizant of these issues, and appears to agree with Wantickets. By order dated January 17, 2017, he stayed Eventbrite's claims in California pending resolution of this action. *See* Dkt. 64 at 2. This case will be litigated in New York.

III. Failure to State a Claim

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v*

Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The parties correctly recognize that Delaware law governs the question of whether Schurr and Carlin breached their fiduciary duties to Wantickets (a Delaware LLC). *Venturetek, L.P. v Rand Pub. Co.*, 39 AD3d 317 (1st Dept 2007); *see Davis v Scottis Re Grp., Ltd.*, 138 AD3d 230, 233 (1st Dept 2016) ("Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation."), citing *Hart v Gen. Motors Corp.*, 129 AD2d 179, 182-83 (1st Dept 1987). However, contrary to the arguments proffered by Eventbrite,[6] it is well settled Delaware law that a "key managerial employee", such as Schurr and Carlin, owes fiduciary duties to the company under "fundamental principles of agency law." *Ironworkers Dist. Council of Philadelphia & Vicinity Ret. & Pension Plan v Andreotti*, 2015 WL 2270673, at *3 n.5 (Del Ch 2015), *aff'd sub nom. Ironworkers Dist. Council of Philadelphia v Andreotti*, 132 A3d 748 (Del 2016), citing *Science Accessories Corp. v Summagraphics Corp.*, 425 A2d 957, 962 (Del 1980) ("an agent can make arrangements or plans to go into competition with his principal before terminating his agency, **provided no unfair acts are committed or injury done his principal**.") (emphasis added); *see Mitchell Lane Publishers, Inc. v Rasemas*, 2014 WL 4925150, at *4 (Del Ch 2014) ("As with corporate fiduciaries, such as officers and directors, key managerial personnel owe fiduciary duties of good faith, loyalty, and fair dealing to their

[6] Eventbrite misguidedly relies on Delaware law regarding, for instance, when a member or manager of an LLC (or an officer or director of a corporation) owes a fiduciary duty to the company, as opposed to when an agent or employee owes such duties. Thus, the case law cited by Eventbrite addressing issues such as whether non-controlling minority members of an LLC owe fiduciary duties to the LLC is inapposite. *Cf. Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.*, 84 AD3d 583, 584 (1st Dept 2011) (addressing Delaware LLC fiduciary duty law).

company."). Further, even if an individual does not qualify as a "key managerial employee", if he "undertake[s] certain duties and obligations as an agent of [the company]," he is imbued with the traditional duties of an agent, which may include fiduciary duties. *See Triton Const. Co. v E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *10 (Del Ch 2009), *aff'd* 988 A2d 938 (Del 2010); *see also id.* at *11 (noting that while "[u]nder Delaware law, the relationship of agent to principal does not of itself give rise to fiduciary duties ... where an agent represents a principal in a matter where the agent is provided with confidential information to be used for the purposes of the principal, a fiduciary relationship may arise. For example, if an employee in the course of his employment acquires secret information relating to his employer's business, he occupies a position of trust and confidence toward it, and must govern his actions accordingly."); *see also Wayman Fire Prot., Inc. v Premium Fire & Sec., LLC*, 2014 WL 897223, at *20 (Del Ch 2014) (same).

Here, regardless of whether Schurr's and Carlin's fiduciary duties arose by virtue of their employment status or as agents, their alleged solicitation of Wantickets' clients for the benefit of a competitor (Eventbrite) while continuing to work for Wantickets may be theft of a corporate opportunity and, therefore, a breach of fiduciary duty. *Science Accessories*, 425 A2d at 963; *see Seibold v Camulos Partners LP*, 2012 WL 4076182, at *21 n.205 (Del Ch 2012), citing Restatement (Third) Of Agency § 8.04 ("Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship."); *see also Triton*, 2009 WL 1387115, at *11 (an employee may not solicit "the employer's customers before cessation of employment ... or usurp[] a business opportunity of

the employer."). To be sure, the question of whether Schurr and Carlin did indeed breach their fiduciary duties to Wantickets will be adjudicated in the arbitration. Nonetheless, the question of whether Eventbrite knowingly and substantially aided and abetted their breach will be adjudicated in this action.

That said, while the internal affairs doctrine mandates that Delaware law govern the fiduciary obligations between Wantickets and Schurr and Carlin, the other aiding and abetting elements are governed by New York law. Since the question of whether a fiduciary duty breach was aided and abetted by another does not implicate the internal affairs of Wantickets, Delaware law does not apply.[7] *See MediaXposure Ltd. (Cayman) v Omnireliant Holdings, Inc.*, 29 Misc3d 1215(A), at *10 n.10 (Sup Ct, NY County 2010) (Fried, J.) ("The Court of Appeals has made clear that New York conducts an interest analysis in tort cases, and has rejected the automatic application of the internal affairs doctrine where another jurisdiction has an overriding interest in the issue to be determined."), citing *Greenspun v Lindley*, 36 NY2d 473 (1975). The same is true of Wantickets' tortious interference with contract claim. *See PMC Aviation 2012-1 LLC v Jet Midwest Group LLC*, 2016 WL 3017763, at *6 n.12 (Sup Ct, NY County 2016) (explaining that non-contractual claims related to a contract, such as tort claims, are not necessarily governed by the law governing the contract). That said, while a choice of law analysis would lead this court to conclude that New York law should be applied because Eventbrite, though based in California, allegedly committed a tort that caused injury to a New York based company (ergo,

[7] The only basis to apply Delaware law is Wantickets' incorporation in Delaware. Where the internal affairs doctrine is not implicated, the parties appear to agree that the choice of law analysis should focus on the location of the parties (i.e., Wantickets in New York and Eventbrite in California).

New York has the greatest interest in the claim),[8] the court may simply apply New York law because the parties do not point to a dispositive difference between New York and California law. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014).

Under New York law, "[a] claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003). As discussed above, Wantickets has properly pleaded the first prong (a determination that required application of Delaware fiduciary duty law); and as discussed below, it has sufficiently pleaded the third. Regarding the second prong, Wantickets properly pleaded the essential element of substantial assistance. *See id.* at ("A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator."). "The complaint alleges that Eventbrite, 'eager to take advantage of the disloyalty' of Wantickets' executives, 'pitched itself to potential clients via the introductions from Mr. Schurr and/or Mr. Carlin, knowing that Mr. Schurr and Mr. Carlin were still employees of Wantickets and that Mr. Schurr's and Mr. Carlin's diversion of business violated their duties to Wantickets.'" Dkt. 33 at 24. "Eventbrite 'even paid for Mr. Schurr to take a business trip to Ibiza, Spain so that he could develop business for Eventbrite.'" *Id.*

The court agrees with Wantickets that, "[a]s a matter of common sense and logic, these pitches and the trip to Ibiza would not be possible without Eventbrite's actively participating in

[8] *See Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 202 (1st Dept 2013) (explaining choice of tort law analysis and noting "the locus of the tort generally defined as the place of the injury" and that the "jurisdiction where the tort occurred ... will almost always have the greatest interest in regulating conduct within its borders.").

the scheme to divert Wantickets' clients." *Id.* Indeed, "[t]he email record confirms that that is exactly what Eventbrite was doing, and its email initially expressing concern over the efforts is evidence that the company knew what it was doing was wrong but chose to plow ahead recklessly." *See id.*, citing Dkt. 38 (emails between Schurr and Carlin with Eventbrite employees, including explicit discussion about the need for Schurr and Carlin to work on behalf of Wantickets, and not Eventbrite, until the deal closes); *see also* Dkt. 37 at 4 (affidavit from Wantickets' CFO, submitted in Related Action, summarizing his review of Schurr's and Carlin's emails, which he found "truly shocking" because "it appears that from late April through their termination in July 2016, Mr. Schurr and Mr. Carlin were effectively functioning as Eventbrite employees while on the Wantickets payroll.").

To the extent Eventbrite seeks dismissal for failure to plead damages with sufficient specificity, it cites no authority for the proposition that a plaintiff, as here, who cites an example of a solicited client[9] and alleges facts permitting a reasonable inference that others were solicited, needs to allege more at the pleading stage. The complaint is sufficiently specific to provide Eventbrite with adequate notice of the alleged wrongdoing. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009).

Likewise, the court rejects Eventbrite's contention that Wantickets has not stated a claim for tortious interference with contract. To properly plead this cause of action, the plaintiff must allege "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, 426 (2007). Wantickets pleaded all four elements: (1) its employment agreements with Schurr and Carlin; (2) Eventbrite's knowledge of

[9] *See* Dkt. 77 (4/25/17 Tr. at 27) (THE COURT: So, you are saying that this casino had a contract at the time of the pitch with Wantickets? MR. MICHAEL: Yes.").

those contracts; (3) Eventbrite's procurement of Schurr's and Carlin's breach of their contracts by hiring them, thereby causing them to breach their restrictive convents; and (4) damages in the form of lost business from the clients Schurr and Carlin solicited. Eventbrite has not submitted any documentary evidence that utterly refutes these allegations. Accordingly, it is

ORDERED that Eventbrite's motion to dismiss the complaint is denied; and it is further

ORDERED that Eventbrite shall file an answer with 20 days of the entry of this order on NYSCEF; and it is further

ORDERED that this action shall now bear the following caption:

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WANTICKETS RDM, LLC, Index No.: 654277/2016

Plaintiff,

-against-

EVENTBRITE, INC.,

Defendant.

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And it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on August 24, 2017, at 11:30 a.m., and the parties' pre-conference joint letter shall be e-filed and faxed to Chambers at least one week beforehand.

Dated: July 21, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

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