

KS Trade LLC v International Gemological Inst., Inc.
2019 NY Slip Op 30728(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 656713/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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<p>KS TRADE LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>INTERNATIONAL GEMOLOGICAL INSTITUTE, INC., ROLAND LORIE, JERRY EHRENWALD, DAVID WEINSTEIN, MARC BRAUNER, KAREN WEINSTEIN, BROWDY/COPELAND, INC., HATTRON (INDIA) LTD., INTERNATIONAL GEMOLOGICAL INSTITUTE DMCC (DUBAI), INTERNATIONAL GEMOLOGICAL INSTITUTE PVT. LTD. (INDIA), VAZON INVESTMENTS S.A., THE ISRAELI DIAMOND EXCHANGE</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>656713/2016</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>002, 004,</u> <u>008, 009, 010</u></p> <p>DECISION AND ORDER</p>
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HON. SALIANN SCARPULLA:

In this action, *inter alia*, to recover damages for breach of contract, defendant The Israeli Diamond Exchange (“IDE”) moves to dismiss the amended complaint insofar as asserted against it (motion sequence no. 002); defendant Roland Lorie (“Lorie”) moves to dismiss the amended complaint insofar as asserted against him and plaintiff KS Trade LLC (“KS”) cross moves for an order permitting an alternative means of service and for an extension of time for service (motion sequence no. 004); defendant Marc Brauner (“Brauner”) moves to dismiss the amended complaint insofar as asserted against him (motion sequence no. 008); defendants International Gemological Institute, Inc. (“IGI NY”), Jerry Ehrenwald (“Ehrenwald”), and David Weinstein (“Weinstein”) move to dismiss the amended complaint insofar as asserted against them (motion sequence no. 009); and defendants Karen Weinstein (“Mrs. Weinstein”) and Browdy/Copeland, Inc.

(“BC”) move to dismiss the amended complaint insofar as asserted against them (motion sequence no. 010).

KS is a New York based jewelry designer and manufacturer. According to the allegations of the amended complaint, IGI NY is a corporation that grades diamonds and precious stones, and appraises jewelry. Lorie and Ehrenwald are the directors of IGI NY. Weinstein is executive director of IGI NY and the manager of its New York laboratories. IGI NY, International Gemological Institute DMCC (Dubai)(“IGI Dubai”), International Gemological Institute Pvt. Ltd. (India)(“IGI India”) are all part of the IGI Group, a corporate group that operates diamond grading and appraisal corporations all over the world.

Defendant Marc Brauner (“Brauner”) is the co-CEO of the IGI Group’s worldwide operations, and an “indirect minority owner” of IGI NY and IGI Dubai. Defendant Vazon Investments S.A. (“Vazon”), owned by Lorie and Brauner, is a 50% shareholder of IGI NY. Ehrenwald is the other 50% shareholder of IGI NY. Defendant Hattron (India) Ltd. (“Hattron”) is a corporation owned by Lorie and Brauner, through which Lorie and Brauner allegedly exercise control over IGI Dubai and IGI India. The Israel Diamond Exchange Ltd. (“IDE”) is a private company with thousands of members engaged in the diamond business in Israel. Mrs. Weinstein is the president of BC, a New York corporation which offers design services to other businesses.

In the amended complaint, KS alleges that the defendants engaged in a scheme to create “illicit profits for itself and its accomplices at the expense of diamond dealers, jewelry manufacturers and the ultimate end-user consumers who purchase the jewelry.”

KS claims that defendants systematically over-graded diamonds at its overseas branches, which then enabled diamond dealers and wholesalers who obtained those diamonds to re-sell them in the United States at artificially inflated prices. The diamonds are then passed off to consumers as higher quality goods with fraudulent appraisals and certificates.

Specifically, KS alleges that throughout 2011-2014, KS purchased diamonds from members of the IDE, which had been graded by IGI branches overseas. KS then sought to sell jewelry made with those diamonds to a jewelry retailer (“Retailer X”) in the United States, which wanted the diamonds also appraised by IGI’s New York branch. According to the allegations of the amended complaint, when KS approached IGI NY to appraise the subject stones, the New York branch would not honor the gradings given by the IGI overseas branches. Rather, it would only give them lower grades.

KS claims that, during phone calls with two of the diamond dealers who had sold KS the subject diamonds with IGI Group certificates, the diamond dealers, each separately, explained the fraudulent scheme to KS’s principal and invited KS to join the scheme. KS complained to Ehrenwald, who then scheduled a phone call between KS and Lorie. During that phone call, Lorie told KS’s principal that Lorie could have IGI NY re-appraise the diamonds if KS would agree to pay a secret fee to IGI NY. KS refused, and was then unable to sell the subject diamonds to Retailer X, who would not accept the diamonds with conflicting appraisals. As a result, KS suffered millions of dollars in losses, and was left with diamonds with fraudulent IGI certifications.

Further, KS maintains that IGI NY laundered the money it obtained from this scheme through vendor payments to BC for its “services.” Allegedly, BC provided fake

invoices for services and then received IGI's illicit profits as "payment" on those invoices. These profits were then returned to Weinstein and the other participants in the scheme.

On these factual assertions, KS pleads causes of action for violations of the Donnelly Act, General Business Law Sections 340 and 349, fraud, aiding and abetting fraud, conspiracy to commit fraud, breach of contract, and tortious interference.

AS stated above, many of the defendants now move to dismiss the complaint on a variety of grounds, and KS seeks to serve Lorie by an alternative means of service.

Discussion

Motion Sequence No. 002

At oral argument on this motion on July 11, 2018, I granted IDE's motion to dismiss the complaint insofar as asserted against for lack of general or specific jurisdiction.

Motion Sequence No. 004

Lorie moves to dismiss the complaint insofar as asserted against him and KS cross moves for an order permitting an alternative means of service and for an extension of time for service upon Lorie. The issue of service upon Lorie has been raised several times previously. At oral argument on July 11, 2018, I granted KS's cross motion to permit an alternate means of service and for an extension of time for service and directed KS's counsel to serve Lorie with the amended complaint within 60 days. Pursuant to an affidavit of service dated October 28, 2018, KS served Lorie on October 8, 2018, which was past the 60-day time limit and in violation of my July 11, 2018 order. KS has not

sought to enlarge the time to effectuate service upon Lorie. Under these circumstances, the claims asserted against Lorie are dismissed without prejudice.

Motion Sequence No. 008

At oral argument on this motion on July 11, 2018, I granted Brauner's motion to dismiss the complaint insofar as asserted against him for lack of any factual basis for an individual claim asserted against him.

Motion Sequence No. 009

IGI NY, Ehrenwald and Weinstein first argue that the cause of action alleging a violation of General Business Law Section 349 must be dismissed because: (1) it does not allege conduct directed at consumers, rather, it alleges conduct directed at jewelry dealers and wholesalers; (2) it does not provide that these defendants participated in allegedly deceptive conduct, rather, the complaint alleges that the deceptive conduct occurred at the foreign IGIs; and (3) it does not adequately allege that a purported injury resulted from any alleged deception on the part of these defendants.

In opposition, KS argues that the scheme is consumer oriented because its goal is to falsify diamond appraisals and certifications that are ultimately given to consumers who purchase the over-graded jewelry. Even though KS is not the consumer harmed here, it can bring this claim because of the alleged harm to the public in general. KS also argues that its injury did result from these defendants' deceptive conduct in that KS was injured by IGI NY's refusal to issue consistent grading reports and appraisals to KS without KS paying a "fee." KS was then left with diamonds with no New York grading certificates, and was unable to make sales to its customers. KS asserts that if it had paid

the “fee,” which other vendors allegedly participating in the scheme have done, then consumers would be misled into purchasing over-graded jewelry at artificially inflated prices.

General Business Law Section 349 provides that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state” are “unlawful.” This statute requires a showing that defendant is engaging in a consumer-oriented act or practice that is deceptive or misleading in a material way, and that plaintiff has been injured by reason thereof. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). In determining whether the act is consumer oriented, the question is “whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor” *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (1995). A “deceptive act or practice” has been defined as a representation or omission “likely to mislead a reasonable consumer acting reasonably under the circumstances.” *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995); *Feinberg v. Federated Dept. Stores, Inc.*, 15 Misc. 3d 299 (Sup. Ct. N.Y. Co., 2007).

Here, this is not just a private commercial dispute between parties. Rather, the crux of this dispute is alleged conduct ultimately aimed at the public. Consumers are not just incidental parties -- parties to whom the fraudulent certificates, appraisals and stones were passed on to – rather, the conduct was ultimately directed at misleading the consumers, in fraudulently grading and selling stones that consumers are buying at

artificially inflated prices. The conduct, as alleged, is sufficiently stated as consumer oriented within the meaning of the statute.

Further, while the original deception is alleged to have occurred at the international level, the moving defendants' conduct is sufficiently alleged as a "deceptive act or practice" resulting in injury. Moving defendants are alleged to have sought a kickback or illicit fee in return for issuing a consistent grading to that of the allegedly fraudulent grading issued by the international IGI entities, in furtherance of the purported scheme. This conduct, as alleged, is sufficiently stated as a "deceptive act or practice" to mislead the public within the meaning of the statute. *Cf. Feinberg v. Federated Dept. Stores, Inc.*, 15 Misc. 3d 299 (Sup. Ct. N.Y. Co., 2007).

As to the injury, KS alleges that when KS refused to pay the illicit fee, it was left with allegedly over-graded stones with no New York certificate, that its customer refused to buy. If others in the industry, as alleged, have been paying the illicit fee to IGI NY, consumers purchasing the end product jewelry have been receiving fraudulently graded stones at artificially inflated prices.

IGI NY, Ehrenwald and Weinstein next argue that the claim premised on the Donnelly Act/General Business Law Section 340 must be dismissed because (1) KS does not sufficiently state a claim for horizontal price fixing; (2) KS does not sufficiently allege a conspiracy; and (3) the complaint does not adequately allege that defendants had power in a relevant market. In opposition, KS argues that it adequately alleged a per se restraint of trade based on horizontal price fixing, and in any event, has alleged an unlawful restraint of trade under the rule of reason analysis.

To state a claim of a violation of the Donnelly Act, a party must identify the relevant market, describe the nature and effects of the purported conspiracy, allege how the economic impact of that conspiracy does or could restrain trade in the market, and set forth a conspiracy or reciprocal relationship between two or more legal or economic entities. *Watts v. Clark Assocs. Funeral Home*, 234 A.D.2d 538, 538 (2nd Dept. 1996).

I find that KS has not adequately alleged an unlawful restraint of trade under the rule of reason analysis. *See Global Reins. Corp.-U.S. Branch v Equitas Ltd.*, 18 N.Y.3d 722 (2012). Further, it has not alleged a per se restraint of trade based on horizontal price fixing. Therefore, the claim based on a violation the Donnelly Act/General Business Law 340 against these defendants is dismissed.

With regard to the claim for fraud, IGI NY, Ehrenwald and Weinstein first argue that the fraud claim is duplicative of breach of contract claim. They further maintain that any alleged misrepresentation is insufficient to support a fraud claim and KS has failed to plead justifiable reliance. In addition, the aiding and abetting fraud claim must also fail because there was no underlying fraud. In opposition, KS maintains that the IGI Group committed fraud when it issued the original certificates for diamonds that it over-graded. IGI NY, Weinstein and Ehrenwald then “intentionally rejected the earlier gradings so that it could solicit illicit fees” from KS.

The IGI Group, on its website, allegedly represented that “IGI is also the only international certification lab wholly owned and controlled by one central governing body. Which ensures consistency in IGI reports across the globe. In adhering to the one internationally accepted system for diamond grading. IGI offers its clients peace of

mind.” In addition to relying on this representation that IGI reports would be consistent across the globe, KS alleges that it also relied on IGI NY’s representation that the stones would be graded fairly. It believed that it would receive a fair and accurate appraisal, without having to pay a bribe, so that it could fulfill its obligation to Retailer X.

Taking the foregoing allegations and other allegations of the complaint as a whole, I find that KS has sufficiently pled a cause of action for fraud. Similarly, sufficient facts have been alleged, at this time, to state a claim for aiding and abetting fraud.

With regard to the claim for conspiracy, “it is well settled that New York does not recognize an independent civil tort of conspiracy. While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action.” *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dept. 2011) (internal citations omitted). As such, the claim for conspiracy is dismissed.

Defendants next argue that the claim for breach of contract must be dismissed because KS does not plead facts establishing the existence of a written or oral contract. KS alleges that it orally contracted with IGI NY to provide gradings of its diamonds and jewelry consistent with the IGI Group’s grading standards across the globe, and it did not get the service it paid for.

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 (1st Dept. 2010). In its cause of action for breach of contract, KS has not adequately pled the existence of a

contract that was breached. As such, the breach of contract cause of action asserted against these defendants is dismissed.

The moving defendants next argue that the claim for tortious interference must be dismissed because the complaint only refers to conduct that the defendants directed at KS, and not to any conduct directed at Retailer X. KS argues that IGI NY knew of KS's purchase order, knew that Retailer X required an appraisal, and knew that by not providing a consistent grade, it would negatively impact KS's relationship with Retailer X.

To state a claim for tortious interference with prospective contract rights or economic advantage, the plaintiff must allege, with specific factual support, direct interference with a third party, and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff. *John Galt Corp. v. Travelers Casualty and Surety Company of America*, 2009 N.Y. Slip. Op. 30969(U) (Sup. Ct. N.Y. Co., April 29, 2009). "Conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192 (2004).

According to the allegations of the complaint, IGI NY had knowledge of KS and Retailer X's business relationship. When providing the grading for the jewelry, IGI NY noted, "not fit for [Retailer X]" on many of the pieces of jewelry. KS further alleged that when it confronted Weinstein about that notation, Weinstein stated "[Retailer X] pays me to make that decision. My fees are paid by [Retailer X]. [Retailer X] is my client." KS,

who was paying for the subject gradings, asked Weinstein for an explanation. He allegedly responded, "it's complicated." Given these allegations, I find that KS has sufficiently pled a claim for tortious interference.

Finally, with regard to the claims asserted against Weinstein and Ehrenwald, KS argues that, as directors of IGI NY, they individually participated in the conduct set forth in the complaint. On a motion to dismiss, where the allegations of the complaint must be accepted as true and construed liberally in the plaintiff's favor, these allegations are sufficient to maintain the surviving claims against these individual defendants. *See Cron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998).

Motion Sequence No. 010

Mrs. Weinstein and BC first argue that the General Business Law Section 349 claim asserted against them must be dismissed. KS contends that this claim can be maintained because Mrs. Weinstein and BC aided in the misleading conduct directed at consumers which caused injury. I find that KS fails to plead sufficient allegations as to how these movants engaged in any deceptive or misleading act directed toward consumers within the meaning of General Business Law Section 349.

With regard to the claim for aiding and abetting fraud asserted against these defendants, it is well settled that the elements of a claim for aiding and abetting fraud are: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dept. 2009).

Substantial assistance, the third element of a cause of action for aiding and abetting a fraud, "exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately cause the harm on which the liability is predicated." *Stanfield*, 64 A.D.3d at 476.

In its complaint, KS pleads that BC assisted in enabling the fraud by laundering the profits from the illicit fees charged by IGI NY. Specifically, KS alleges that BC issued false invoices for design services it never actually rendered to IGI NY, and then received transfers of IGI NY's illicit profits as "payment" on the fraudulent invoices. That "payment" was then transferred to Weinstein and the other participants in the scheme. KS maintains that this laundering was necessary to conceal the profits from the scheme and but for this laundering, the scheme would not have been possible. Based on these allegations, I find that KS has sufficiently set forth a claim for aiding and abetting fraud against BC. However, I also find that KS has not stated a factual basis for a claim asserted against Mrs. Weinstein individually. As such, this claim is dismissed insofar as asserted against Mrs. Weinstein, without prejudice.

Finally, for the reasons stated above in the section for motion sequence 009, the Donnelly Act/General Business Law Section 340 claim and the claim for conspiracy are dismissed as asserted against these defendants as well.

In accordance with the foregoing, it is hereby

ORDERED that defendant The Israeli Diamond Exchange's motion to dismiss the amended complaint insofar as asserted against it is granted (motion sequence no. 002), and the complaint insofar as asserted against it is dismissed; and it is further

ORDERED that after granting plaintiff KS Trade LLC's request to permit an alternative means of service and for an extension of time for service in open court on July 11, 2018, I now grant defendant Roland Lorie's motion to dismiss the complaint insofar as asserted against him for KS Trade LLC's failure to effectuate service as directed on July 11, 2018, and the complaint insofar as asserted against defendant Roland Lorie is dismissed (motion sequence no. 004); and it is further

ORDERED that defendant Marc Brauner's motion to dismiss the amended complaint insofar as asserted against him is granted, and the complaint insofar as asserted against him is dismissed (motion sequence no. 008); and it is further

ORDERED that defendants International Gemological Institute, Inc., Jerry Ehrenwald, and David Weinstein's motion to dismiss the amended complaint insofar as asserted against them is granted to the extent that the claims for breach of contract, conspiracy, and violation of the Donnelly Act are dismissed, and the remaining claims are severed and shall continue (motion sequence no. 009); and it is further

ORDERED that defendants Karen Weinstein and Browdy/Copeland, Inc.'s motion to dismiss the amended complaint insofar as asserted against them is granted only to the extent that all claims asserted against them are dismissed except for the claim for aiding and abetting fraud asserted against Browdy/Copeland, Inc., and that claim is severed and shall continue (motion sequence no. 010); and it is further

ORDERED that the remaining parties are directed to answer the amended complaint within 30 days of the date of this order.

This constitutes the decision and order of the court.

3/18/2019

DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE