

<b>MAC Presents, LLC v C Lewis Group, LLC</b>
2019 NY Slip Op 32807(U)
September 18, 2019
Supreme Court, New York County
Docket Number: 652788/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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MAC PRESENTS, LLC, MARCIE ALLEN
Plaintiff,

- v -

C LEWIS GROUP, LLC, CARA LEWIS,
Defendant.

INDEX NO. 652788/2019
MOTION DATE 09/18/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

C Lewis Group, LLC and Cara Lewis (CLG) move to dismiss the complaint filed in this action by MAC Presents, LLC and Marcie Allen (MAC) pursuant to CPLR § 3211 (a) (1), (4), and (7). For the reasons set forth below, the motion is denied.

FACTS RELEVANT TO THE MOTION

Marcie Allen is the President and founder of MAC, an entertainment agency with offices in New York City (Complaint, ¶ 2). Cara Lewis is a talent agent for performing artists in the entertainment industry (id., ¶ 4). In 2015, Ms. Allen agreed to sublease some of her office space to assist Ms. Lewis in starting her own talent agency, CLG (id., ¶ 20). The parties agreed orally that Ms. Lewis would pay \$5,000 per month in rent for use of approximately half of MAC's office space, plus the costs of supplies, utilities, and maintenance (id., ¶ 21). MAC's rent at that time was \$21,500 per month and escalated to \$25,000 per month in late 2018 (id.). Pursuant to the oral agreement, CLG agreed to abide by MAC's office policies and procedures and MAC

provided CLG with a copy of its employee handbook (*id.*, ¶ 22). MAC alleges that, in early 2018, Ms. Allen received an offer to sell MAC to another management company, and that the parties executed a one-page Rental Agreement to protect CLG from being evicted in the event that the deal went forward, and that it was understood that it otherwise would not take effect (*id.*, ¶¶ 38-39). Ultimately, the deal fell through and MAC was not sold.

MAC alleges that Ms. Lewis began to take advantage of MAC and engaged in erratic and aggressive behavior in the workplace and made a mess in the office, to the point that most of MAC's employees refused to come into the office and opted instead to work from home (*id.*, ¶¶ 41-48). MAC further alleges that CLG refused to accept any increases in rent and began to take over more and more office space (*id.*, ¶¶ 36-44). Finally, MAC alleges that, in February 2019, after an episode in which Ms. Lewis is alleged to have entered Ms. Allen's office yelling and screaming, Ms. Allen terminated CLG's tenancy and CLG agreed to move out by the end of the month (*id.*, ¶ 45). Nevertheless, MAC alleges that CLG has refused to move out of the office space and remains there today, continuing to breach its lease and using MAC's confidential business information to usurp business opportunities and solicit MAC's clients (*id.*, ¶ 46).

MAC commenced this action by filing a summons and complaint seeking to recover possession of the office space and asserting causes of action for breach of contract, private nuisance, unjust enrichment, *quantum meruit*, unfair competition, and breach of fiduciary duty. CLG's motion to dismiss is now before the court.

## DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Pursuant to CPLR § 3211 (a) (4), a party may move to dismiss on the ground that "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." Dismissal on this ground is not mandatory, but the court may do so as justice requires (*id.*).

### **The Motion to Dismiss Based on the Prior Pending Action**

The "first-in-time" rule provides that "the court which has first taken jurisdiction is the one in which the matter should be determined" (*Fouad v Mohamed Emat Ezzat Mahmoud Magdy*, 147

Ad3d 436, 437 [1st Dept 2017], quoting *Syncora Guar. Inc. v J. P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013] [internal citations and quotation marks omitted]). MAC commenced this action by filing a summons and complaint dated May 9, 2019 (NYSCEF Doc. Nos. 1, 2). CLG commenced a separate action in this court based on the same underlying facts by serving a summons with notice dated April 25, 2019 (the **CLG Action**), but did not file the complaint in the CLG Action until June 4, 2019 (NYSCEF Doc. No. 9). The problem with the motion to dismiss on this ground is that the filing of a summons with notice without service of a complaint does not constitute commencement of an action for purposes of CPLR § 3211 (a) (4) (*San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st dept 2003]). Accordingly, the motion to dismiss based on the prior pending action is denied.

#### **First Cause of Action: Declaratory Relief and Ejectment**

To prevail on a cause of action to recover possession of real property, “a plaintiff must: (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession” (*Jannace v Nelson, L.P.*, 256 AD2d 385, 385-86 [2d Dept 2009]). The complaint alleges that MAC is the owner of an estate in fee for a term of years in the office space in question by virtue of its lease of the office space, of which it has a present and immediate right to possession, and alleges that MAC has been unlawfully ousted or disseised as a result of the defendants’ conduct and refusal to vacate despite due notice of termination of the sublease (Complaint, ¶¶ 19-22, 49-57). The complaint therefore sufficiently pleads a cause of action for ejectment. Accordingly, the motion to dismiss the first cause of action is denied.

**Second Cause of Action: Breach of Lease and Ejectment**

To state a claim for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). The complaint alleges that the parties entered into an oral agreement pursuant to which MAC agreed to sublease a portion of MAC's office space to Ms. Lewis for \$5,000 per month so that Ms. Lewis could start her company, CLG (Complaint, ¶ 21). The complaint further alleges that CLG agreed to abide by MAC's office policies and procedures as a condition of the sublease and MAC provided CLG with a copy of MAC's Employee Handbook, which set forth the policies and procedures (*id.*, ¶ 22, 59). The complaint alleges performance by MAC by sharing office space with CLG as agreed (*id.*, ¶ 30, 36). The complaint sufficiently pleads that CLG breached the agreement by failing to comply with MAC's policies and procedures and engaging in threatening and disruptive behavior (*id.*, ¶ 41-45, 60-64). The complaint also alleges that, as a result of CLG's breach, MAC has incurred damages of not less than \$500,000 (*id.*, ¶ 65). Accordingly, the motion to dismiss the second cause of action is denied.

**Third Cause of Action: Breach of Oral Agreement**

As set forth above, to state a cause of action for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Second Source Funding, LLC*, 144 AD3d at 446). In the case of a purported oral agreement, the complaint must specifically allege that the plaintiff is relying on an oral agreement and set forth all of the salient terms (*Bomser v Moyle*, 89 A.D.2d 202, 205 [1st Dept 1982]). As set forth above, the complaint sufficiently pleads the existence of the purported oral

agreement and the terms thereof, the plaintiffs' performance, the defendants' breach and damages. The complaint alleges that oral agreement set forth specific terms pursuant to which Ms. Allen agreed to assist Ms. Lewis in starting and developing her business, CLG, the obligation of CLG to incur the costs of furniture purchased for CLG's use, and the costs that the CLG would pay associated with the use of MAC staff and personnel in service of CLG's business (Complaint, ¶¶ 23-29, 66-78).

To the extent that CLG argues that the complaint fails to allege that MAC fully performed its obligations, this argument is unpersuasive. The complaint alleges, and CLG does not dispute, that MAC in fact provided office space to CLG as agreed. Moreover, the written Rental Agreement does not utterly refute the cause of action for breach of the oral agreement or conclusively establish a defense as a matter of law. The complaint asserts that the oral agreement is the operative agreement, and there was no mutual assent to the Rental Agreement taking effect. It further alleges that the oral agreement encompassed the entirety of the terms governing the parties' relationship, including a broad range of terms not contemplated within the Rental Agreement, *i.e.*, that that written Rental Agreement modified certain terms of the oral agreement but did not supersede it. Taking the allegations in the complaint as true and affording them every favorable inference, the complaint sufficiently pleads breach of the oral agreement. Accordingly, the motion to dismiss the third cause of action is denied.

#### **Fourth Cause of Action: Private Nuisance**

The elements of a cause of action for private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right

to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). Here, the complaint alleges that Ms. Lewis intentionally engaged in aggressive and abusive behavior and intentionally interfered with MAC's right to peaceful and undisturbed use and enjoyment of its office space (Complaint, ¶¶ 79-83). The complaint further alleges that Ms. Lewis's threatening conduct and erratic behavior caused MAC's employees to stop coming into work and that CLG has taken over the majority of MAC's office space while refusing to accept any increases in rent (*id.*, ¶¶ 42-44).

While the defendants argue that the private nuisance cause of action is merely duplicative of the cause of action alleging breach of contract, this argument is unavailing. A breach of contract does not give rise to a tort unless an independent legal duty has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1st Dept 1987]). The plaintiffs allege that the private nuisance claim arises from the duty of the defendants not to interfere with the plaintiffs' rights of quiet use and enjoyment of the office space. This is a duty that is independent of the contractual duty, arising from either the oral agreement or the Rental Agreement, to, among other things, abide by MAC's policies and procedures as set forth in the employee handbook. Therefore, the private nuisance action is not duplicative of the breach of contract action and the motion to dismiss the fourth cause of action is denied.

#### **Fifth Cause of Action: Unjust Enrichment**

The elements of a cause of action for unjust enrichment are "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d

511, 516 [2012]). Here, the complaint alleges that MAC purchased furniture and office supplies for use by CLG and made its staff and personnel available to work for CLG (Complaint, ¶¶ 85, 87). The complaint also alleges that CLG used the furniture and office supplies and demanded and accepted work from MAC's staff and personnel (*id.*, ¶¶ 86, 88). The complaint alleges that CLG paid "grossly under-market rate" for the office space while refusing to pay any increased rent and benefited from the support provided by MAC, and that it would be against equity and good conscience to permit CLG to retain these benefits (*id.*, ¶¶ 90-92). The complaint states that the parties understood that under the terms of their agreement, the assistance that MAC provided to CLG was to be temporary and was expected to be eventually repaid (*id.*, ¶ 25). The complaint states a cause of action for unjust enrichment, and the motion to dismiss the fifth cause of action is therefore denied.

**Sixth Cause of Action: *Quantum Meruit***

To prevail on a cause of action for *quantum meruit*, the proponent must establish: (i) the performance of services in good faith by the plaintiff, (ii) acceptance of those services by the defendant, (iii) with an expectation of compensation for the services, and (iv) the reasonable value of the services (*Freedman v Pearlman*, 271 AD2d 301, 304 [1st Dept 2000]). The complaint alleges that MAC performed services for CLG in good faith by, among other things, subletting and furnishing office space, acquiring office supplies, helping Ms. Lewis get CLG off the ground, including by helping her form an LLC and secure the appropriate insurance policies, making MAC staff available to assist CLG, and offering Ms. Allen's expertise and guidance (Complaint, ¶¶ 23-29). The complaint further alleges that these services were accepted by CLG (*id.*, ¶¶ 70, 72, 76, 88, 91). And the Complaint also alleges that MAC had a reasonable

expectation that CLG would repay MAC for the value of the assistance provided (*id.*, ¶ 25). The complaint states a cause of action for *quantum meruit* (*see id.*, ¶ 94). To the extent that the defendants argue that the *quantum meruit* cause of action must be dismissed because a contract governs the dispute, this argument is unavailing. At this stage of the proceedings, the plaintiffs are permitted to plead contract and quasi contract claims in the alternative (*Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011]). Accordingly, the motion to dismiss the sixth cause of action is denied.

### **Seventh Cause of Action: Unfair Competition**

Under New York common law, a cause of action for unfair competition requires a showing that the defendant acted in bad faith in misappropriating a property right or commercial advantage belonging to the plaintiff (*Redf Organic Recovery, LLC v Rainbow Disposal Co., Inc.*, 116 AD3d 621, 622 [1st Dept 2014]). Here, the unfair competition alleged in the complaint relates to misappropriation. “Under New York law, ‘[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff’s property to compete against the plaintiff’s own use of the same property’” (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 478 [2007], quoting *Roy Export Co. v Columbia Broadcasting Sys.*, 672 F2d 1095, 1105 [2d Cir 1982]). The complaint alleges that CLG obtained confidential information regarding MAC’s business and used that information to usurp MAC’s business opportunities by deliberately soliciting MAC’s clients, causing damages to MAC (Complaint, ¶¶ 48, 96-100). The usurpation of commercial advantage constitutes the taking and use of property for the purposes of an unfair competition claim under a misappropriation theory (*ITC Ltd.*, 9 NY3d at 478, citing *Flexitized, Inc. v National Flexitized Corp.*, 335 F2d 774, 781-82 [2d Cir 1964]). Therefore, the complaint

sufficiently pleads a cause of action for unfair competition under a misappropriation theory and the motion to dismiss the seventh cause of action is denied.

### **Eighth Cause of Action: In the Alternative, Breach of Fiduciary Duty to Co-Venturer**

The elements of a cause of action for breach of fiduciary duty are (i) the defendant owed a fiduciary duty to the plaintiff, (ii) the defendant committed misconduct, and (iii) the defendant's misconduct resulted in damages to the plaintiff (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]). The complaint alleges that, to the extent that CLG claims to be in a joint venture with MAC, CLG owes a fiduciary duty to MAC as a co-venturer, which duty requires CLG to act with good faith and loyalty and to act prudently in the affairs of the business so as not to harm MAC's interests (Complaint, ¶¶ 102-103). The complaint further alleges that CLG breached its duty by disparaging Ms. Allen to MAC employees and third parties, misappropriating confidential business information and soliciting MAC's clients, failing to repay MAC for its services, interfering with MAC's quiet enjoyment of its office space, and attempting to harm MAC's business, resulting in damages to MAC (*id.*, ¶¶ 104-105). The complaint states a cause of action for breach of fiduciary duty, and the motion to dismiss the eighth cause of action is therefore denied.

### **Consolidation**

Pursuant to CPLR § 602, when actions pending before the same court involve a common question of law or fact, the court may order the actions consolidated (CPLR § 602 [a]). Here, the instant action and the CLG Action involve the same facts and parties and should be consolidated

in the interest of judicial economy. The defendants are directed to file an answer in this action within twenty days of the date of the order herein.

Accordingly, it is

ORDERED that the motion to dismiss is denied in its entirety without prejudice; and it is further

ORDERED that the above-captioned action is consolidated in this Court with *C Lewis Group v MAC Presents, LLC and Marcie Allen*, Index No. 652439/2019, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 652788/2019 and the consolidated action shall bear the following caption:

MAC Presents, LLC and Marcie Allen,

Plaintiffs,

-against-

C Lewis Group, LLC and Cara Lewis,

Defendants.

And it is further

ORDERED that C Lewis Group, LLC and Cara Lewis are directed to file an answer in the consolidated action within twenty days of the date of the order herein; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

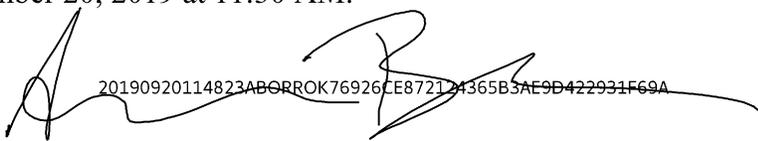
ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119),

who is hereby directed to reflect the consolidation by appropriately marking the court's records;  
and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in  
accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 238, 60  
Centre Street, New York, New York, on November 20, 2019 at 11:30 AM.



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9/18/2019  
DATE

ANDREW BORROK, 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