Eclipse Jewelry Corp. v Heber
2007 NY Slip Op 34543(U)
January 29, 2007
Supreme Court, New York County
Docket Number: 108600/05
Judge: Barbara R. Kapnick

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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ECLIPSE JEWELRY CORP.,

Plaintiff,

-against-

LEVI HEBER, HAROUTIOU N. MOURADIAN, JEWELRY 2000, INC. d/b/a H. LEVI & CO. and SHMUEL HEBER a/k/a SAM HEBER,

Defendants,

-against-

VATCHE AGHJAYAN,

Additional Defendant on the Counterclaims.

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DECISION/ORDER
Index No. 108600/05
Motion Seq. No. 011

BARBARA R. KAPNICK, J.:

Plaintiff Eclipse Jewelry Corp. ("Eclipse") and counterclaim defendant Vatche Aghjayan, a principal of Eclipse, move for an order pursuant to CPLR § 3211(a)(7) dismissing defendants' counterclaims for failure to state a claim.

In their first counterclaim, defendants seek to recover damages for tortious interference with their business relations, alleging that plaintiff and the counterclaim defendant maliciously and wrongfully advised many of their customers that defendants were selling inferior jewelry, jewelry that was copied or 'knocked off' from Eclipse, and/or jewelry that was stolen from Eclipse and made from models stolen from Eclipse, and that plaintiff and the counterclaim defendant intimidated many of their customers in an attempt to destroy their business.

Plaintiff and the counterclaim defendant argue that the first counterclaim fails to state a claim because it fails to allege that: (a) such statements were made solely to inflict harm on the defendants rather than the plaintiff's own desire to secure the business; and (b) defendants would have actually secured additional business 'but for' the plaintiff's conduct. See, WFB Telecommunications, Inc. v. NYNEX Corp., 188 A.D.2d 257 (1st Dep't 1992), lv. to app. denied, 81 N.Y.2d 709 (1993).

Based on the papers submitted and the oral argument held on the record on November 22, 2006, this branch of the motion is granted to the extent of dismissing the first counterclaim with leave to defendants to replead within 30 days of entry of this order the specific business and customers that defendants claim to have lost as a result of plaintiff and the counterclaim defendant's actions.

In the second counterclaim, defendants seek to recover damages for unfair competition, claiming that plaintiff and the counterclaim defendant willfully and wrongfully disparaged and defamed defendants to many of their customers, and intimidated the customers and other members of the jewelry trade in an attempt to destroy their business.

Plaintiff and the counterclaim defendant argue that defendants have failed to allege any act constituting unfair competition.

"'The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship.' (citations omitted)." Telecom International America, Ltd. v. AT&T Corp., 280 F.3d 175, 197 (2nd Cir. 2001). See also, Zeke N'Zoe Corp. v. Zeke N'Zoe LLC, 2002 WL 72947 (S.D.N.Y.).

Although New York's law of unfair competition has been described as a "broad and flexible doctrine" (Telecom International America, Ltd. v. AT&T Corp., supra at 197), the second counterclaim does not contain any allegation that plaintiff and the counterclaim defendant engaged in the misappropriation of the skill, labor and/or expenditure of the defendants. See, Krinos Foods v. Vintage Food Corp., 30 A.D.3d 332 (1st Dep't 2006); Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dep't 1998).

Therefore, this Court finds that said claim fails to state a cause of action, and that portion of the motion seeking to dismiss the second counterclaim is granted.

In their third counterclaim, defendants seek to recover damages for defamation, claiming that Aghjayan falsely stated that (i) they [the defendants] have "'big problems with the law and he [Levi Heber] has no financial banking background and is going

under'", and (ii) "'[a]t the court hearing the judge was very angry with Levi, he is in trouble for taking the models. The court is going to close him down. It's happening very soon.'"

In their fourth counterclaim, defendants seek a permanent injunction enjoining plaintiff, the counterclaim defendant and all persons acting on their behalf or in concert with them from contacting persons in the jewelry business and disparaging the defendants and/or interfering with their relationship with the customers of Levi Heber and Jewelry 2000, Inc. d/b/a H. Levi & Co.

Plaintiff and the counterclaim defendant argue that the two statements allegedly made by Aghjayan fail to constitute actionable defamation. Rather, they contend that the statements are non-actionable expressions of his opinion (see, e.g., Immuno AG v. J. Moor-Jankowski, 74 N.Y.2d 548 [1989]) and are in any event protected by a qualified privilege because they constituted "communications between parties on matters in which they share a common interest" (Gondal v. New York City Department of Education, 19 A.D.3d 141, 142 [1st Dep't 2005]), since the statements were made to a jewelry buyer and customer of Eclipse who shared a 'common interest' in the quality of jewelry being sold and the authenticity of it. They further argue that defendants have not made any showing to support their allegation of malice.

However, it is well settled that "[a]n opinion that implies a basis in facts that are not disclosed to the listener is actionable (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993])." Arts4All, Ltd. v. Hancock, 5 A.D.3d 106, 109 (1st Dep't 2004).

Moreover, even if the common interest privilege applies, defendants can defeat this qualified privilege by showing that the counterclaim defendant spoke with malice. Arts4All, Ltd. v. Hancock, supra at 109. See also, Liberman v. Gelstein, 80 N.Y.2d 429 (1992). In addition, defendants have no obligation to show evidentiary facts to support their allegations of malice on this motion. See, Arts4All, Ltd. v. Hancock, supra.

Therefore, this Court finds that the third and fourth counterclaims allege viable claims. Those portions of the motion seeking to dismiss said claims are accordingly denied.

Finally, in their fifth counterclaim, defendants seek to recover damages against plaintiff and the counterclaim defendant, alleging that they have been willfully and maliciously disseminating to defendants' customers and others in the jewelry business a false, misleading and improper interpretation of the preliminary injunction granted by this Court on March 31, 2006, and that by reason of this conduct, defendants were precluded from bringing any rings whatsoever to the JCK Show in Las Vegas, Nevada, which took place from June 3 to June 7, 2006.

Although, as plaintiff and the counterclaim defendant argue, the fifth counterclaim does not identify the legal basis on which damages are sought, this Court finds that the fifth counterclaim sufficiently sets forth a claim for tortious interference with defendants' business relations.

Therefore, that portion of the motion seeking to dismiss the fifth counterclaim is denied.

This constitutes the decision and order of this Court.

Date: January 29, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.