

Advanced Copy Technologies, Inc. v. Christopher Wiegman et al.

Superior Court at Middletown
No. MMX-CV-15-6013794-S
Memorandum Filed October 19, 2016

Contracts – Noncompete Agreements – Misc. Cases – Allegations that the Defendant Induced a Competitor's Former Sales Employee to Breach a Noncompete Agreement with the Former Employer Do Not Satisfy the "Dishonest Purpose" Element of a Tortious Interference with Contract Claim.

Master and Servant – Noncompete Agreements – Misc. Cases – Allegations that the Defendant Induced a Competitor's Former Sales Employee to Breach a Noncompete Agreement with the Former Employer Do Not Satisfy the "Dishonest Purpose" Element of a Tortious Interference with Contract Claim.

Torts – Interference with Business Relationships – Elements – Allegations that the Defendant Induced a Competitor's Former Sales Employee to Breach a Noncompete Agreement with the Former Employer Do Not Satisfy the "Dishonest Purpose" Element of a Tortious Interference with Contract Claim. Allegations that the defendant hired a competitor's sales employee and induced the salesperson to solicit customers of the former employee with knowledge that such conduct would breach the employee's contract with the former employer are insufficient to state a claim for the tort of interference with a contract, because such facts do not satisfy the element that the alleged interference have been motivated by a fraudulent or malicious purpose. The opinion reasons that **the self-serving hiring of a competitor's employee and taking advantage of the employee's knowledge, with knowledge that the employee would be breaking an agreement with the former employee, is neither fraudulent nor malicious.** Rather, a complaint for interference with contract requires some additional evidence that the interference was tortious.

VITALE, ELPEDIO N., J. Pursuant to Practice Book §10-39, the defendant Ross Machinery Sales, Inc. (Ross), has **moved to strike counts eleven (breach of covenant of good faith and fair dealing), twelve (tortious interference with contract), and thirteen (violation of Connecticut Unfair Trade Practices Act [CUTPA], General Statutes §42-110a et seq.)** of the amended complaint filed by the plaintiff, Advanced Copy Technologies, Inc. Ross argues that count eleven is legally insufficient because the plaintiff has failed to allege bad faith and failed to allege sufficient facts to support its conclusion that it suffered damages. Ross argues that count twelve is legally insufficient because the plaintiff has failed to allege the existence of any contractual or beneficial relationships that could have been interfered with, failed to allege sufficient facts to indicate that the alleged interference was tortious, and failed to adequately allege damages. As to count thirteen, Ross argues that the plaintiff has not alleged sufficient facts to support its conclusion that it suffered an "ascertainable loss" under

General Statutes §42-110g(a)⁽¹⁾ and failed to allege sufficient facts to indicate that the alleged misconduct was unscrupulous, unfair, or deceptive.

NATURE OF THE PROCEEDINGS

The plaintiff commenced the present action by service of process on the defendant Christopher Wiegman (Wiegman) and Ross on June 26 and June 29, 2015, respectively. The thirteen-count amended complaint, filed on May 11, 2016, arises out of the alleged breach by Wiegman, the plaintiff's former employee, of the noncompetition and nondisclosure provisions of Wiegman's employment contract. The plaintiff alleges generally that Wiegman violated this agreement by misappropriating the plaintiff's confidential business information and pursuing the plaintiff's customers and by then resigning from the plaintiff's employ in order to begin working for Ross, one of the plaintiff's competitors. Counts eleven through thirteen of the amended complaint—the only counts relevant for the purpose of the present motion—are directed against Ross.

In count eleven, the plaintiff alleges that it and Ross had entered into a partnership agreement to refer potential customers to each other and that Ross breached the covenant of good faith and fair dealing implied into that agreement by making an offer of employment to Wiegman and by failing to share sales leads. In count twelve, the plaintiff alleges that Ross knowingly and intentionally disrupted the relationship between the plaintiff and Wiegman by offering Wiegman employment with Ross and by teaming with Wiegman to contact and solicit the plaintiff's customers and to contact the plaintiff's vendor while Wiegman was still employed by the plaintiff. Finally, in count thirteen, the plaintiff alleges that Ross engaged in unfair trade practices in violation of CUTPA by soliciting Wiegman to work for Ross and compete with the plaintiff in violation of the noncompetition and nondisclosure agreement and by teaming with Wiegman to contact and solicit the plaintiff's customers and to contact the plaintiff's vendor while Wiegman was still employed by the plaintiff.

On May 26, 2016, Ross filed the present motion to strike and a memorandum of law in support of the motion (memorandum in support). The plaintiff filed a memorandum of law in opposition to the motion to strike (memorandum in opposition) on June 24, 2016. On July 1, 2016, Ross then filed a memorandum of law in reply to the plaintiff's memorandum in opposition (reply memorandum). The court heard oral argument on the motion on July 11, 2016.

DISCUSSION

"A motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted . . ." Practice Book §10-39(a)(1). In ruling on a motion to strike, "[the court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coppola Construction Co. v. Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013).

I. Breach of Implied Covenant of Good Faith and Fair Dealing

As to count eleven, Ross argues in its memorandum in support that the plaintiff's claim for breach of the implied covenant of good faith and fair dealing should be stricken because the plaintiff has failed to allege that Ross acted in bad faith. More specifically, Ross contends that, in the absence of an allegation that the parties' partnership agreement prohibited Ross from hiring the plaintiff's employees, the plaintiff cannot rely on Ross' offer of employment to Wiegman to establish bad faith. According to Ross, the plaintiff likewise cannot rely on its allegation that Ross failed to share sales leads, as there is no allegation that the partnership agreement was exclusive and required Ross to share every lead it had. In its memorandum in opposition, the plaintiff counters that Ross, by engaging in the conduct alleged, evaded the spirit of the partnership, which the plaintiff asserts

"was that Ross would continue selling its respective, distinct products . . . and assist [the plaintiff] by providing sales leads to [the plaintiff] through its [employee], Wiegman, for customers who wanted to purchase [the plaintiff's] products . . . and vice versa." Pl.'s Mem. Opp'n p. 4. The plaintiff thus argues that Ross' conduct undermined this spirit in that Ross "poach[ed] Wiegman for the purpose of using him to sell 3D printers at Ross and competing with [the plaintiff]" and "withh[e]ld sales leads from [the plaintiff] to save them for itself to use once it acquired [Wiegman] and could sell its own 3D printing machines to these potential future customers." Pl.'s Mem. Opp'n pp. 4-5. Ross responds in its reply memorandum that the plaintiff has failed to allege evasion of the spirit of the partnership agreement because the plaintiff has not alleged that Ross violated any of the written terms of the agreement.

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term." (Internal quotation marks omitted.) *Geysen v. Securitas Security Services USA, Inc.*, 322 Conn. 385, 399, 142 A.3d 227 (2016). "[S]tated otherwise, the claim [that the covenant has been breached] must be tied to an alleged breach of a specific contract term, often one that allows for discretion on the part of the party alleged to have violated the duty." (Internal quotation marks omitted.) *Id.*

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith . . . Bad faith in general implies . . . actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose . . . [B]ad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain . . . [W]hen one party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, there is a breach of the covenant of good faith and fair dealing, and hence, a breach of contract, for which damages may be recovered . . ." (Citations omitted; internal quotation marks omitted.) *Geysen v. Securitas Security Services U.S.A., Inc.*, *supra*, 322 Conn. 399-400.

The plaintiff essentially alleges a contract between it and Ross to pay each other for business referrals: "Pursuant to the partnership agreement, Ross would refer potential customers or business partners to [the plaintiff] for the purchase of products . . . and in exchange, [the plaintiff] would pay Ross commission for the sales leads. Additionally, [the plaintiff] would refer any machinery sales to Ross and in exchange Ross would pay [the plaintiff] commissions for the sales leads." Pl.'s Compl. ¶119. The plaintiff does not allege, however, that the parties had any affirmative duty to refer business to each other; the only duty created by the alleged agreement was to pay the other a fee should the other make a referral. Put differently, although it was the act of referring business to the other party that made the other party's duty to pay due, there was no obligation to make the referral in the first place. Thus, under the agreement as it is currently alleged, although each party had a justified expectation of being compensated if it decided to forward a lead to the other, the parties could not have justifiably expected that they would receive every relevant lead the other happened to come across. Therefore, it cannot be said that the purpose of the agreement was undermined or that the plaintiff's justified expectations were dashed when Ross allegedly withheld referrals of business from the plaintiff.⁽²⁾ The court therefore concludes that the plaintiff has not alleged sufficient facts to state a viable claim for breach of the implied covenant of good faith and fair dealing.⁽³⁾

II. Tortious Interference with Contract

As to count twelve, Ross first argues in its memorandum in support that the plaintiff's claim of tortious interference with contract should be stricken because the plaintiff has not alleged the existence of an employment contract between Wiegman and the plaintiff. In its memorandum in opposition, the plaintiff counters that it *has* pleaded the existence of an employment contract, noting that it alleged in its amended

complaint that Wiegman had entered into a noncompetition and nondisclosure agreement as a condition of his employment. The plaintiff also points out that it need not necessarily allege the existence of a contract, as a tortious interference claim may be predicated upon interference with a beneficial relationship. The court agrees with the plaintiff on this element but also agrees with Ross' next argument that the conduct alleged to have interfered with this relationship was not tortious.

"A claim for tortious interference with contractual relations requires the plaintiff to establish (1) the existence of a contractual or beneficial relationship, (2) the defendants' knowledge of that relationship, (3) the defendants' intent to interfere with the relationship, (4) the interference was tortious, and (5) a loss suffered by the plaintiff that was caused by the defendants' tortious conduct." (Internal quotation marks omitted.) *Landmark Investment Group, LLC v. CALCO Construction & Development Co.*, 318 Conn. 847, 864, 124 A.3d 847 (2015). "[F]or a plaintiff successfully to prosecute [an action for tortious interference] it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously." (Internal quotation marks omitted.) *Id.*, 868. "The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification." (Internal quotation marks omitted.) *Id.*, 869. Our Supreme Court has expressly rejected, however, the claim that the defendant bears the burden of proving some justification: "[T]his approach incorrectly relegates the central determination of whether the defendant's behavior was improper to an affirmative defense. In an action for intentional interference with business relations we think the better reasoned approach requires the plaintiff to plead and prove at least some improper motive or improper means." *Blake v. Levy*, 191 Conn. 257, 262, 464 A.2d 52 (1983).

The plaintiff has failed to allege that Ross' alleged interference with the purported contractual or beneficial relationship was tortious. Although the plaintiff sufficiently alleges the existence of a beneficial employment relationship with Wiegman; see Pl.'s Compl. ¶¶158-59; and that Ross knew of this relationship and of Wiegman's nondisclosure and noncompetition agreement with the plaintiff; see Pl.'s Compl. ¶160; the conduct by which the plaintiff alleges Ross interfered with this relationship cannot be considered tortious in light of the Supreme Court's decision in *Robert S. Weiss & Associates, Inc. v. Wiederlight*, 208 Conn. 525, 546 A.2d 216 (1988).

The plaintiff in *Robert S. Weiss & Associates, Inc.*, had employed the defendant Wiederlight as an insurance salesperson pursuant to an employment contract that included a restrictive covenant not to compete. *Robert S. Weiss & Associates, Inc. v. Wiederlight*, *supra*, 208 Conn. 528. The restrictive covenant barred Wiederlight, for two years from the date the agreement terminated, from soliciting the plaintiff's clients and from working in and around Stamford. *Id.* After his contract was not renewed, Wiederlight was hired by the defendant Insurance Associates of Connecticut, Inc. (subsequent employer). *Id.* Prior to hiring Wiederlight, the subsequent employer had reviewed his employment agreement with the plaintiff and was aware of the restrictive covenant. *Id.* Nevertheless, the subsequent employer encouraged and induced Wiederlight to sell insurance to the plaintiff's customers and others in the Stamford area. *Id.* The plaintiff then instituted an action against Wiederlight for breach of the restrictive covenant and theft of trade secrets and later amended its complaint to also assert a claim against the subsequent employer for interference with a business enterprise and theft of trade secrets with the employee acting as its agent. *Id.*, 526. The trial court ruled in favor of the plaintiff on the issues of breach of the restrictive covenant and interference with a business enterprise. *Id.*

On cross appeal to the Supreme Court, the defendants argued that the trial court had erred in finding that the restrictive covenant was valid and in finding that the subsequent employer tortiously interfered with the plaintiff's contract. *Robert S. Weiss & Associates, Inc. v. Wiederlight*, *supra*, 208 Conn. 526-27. Although the court concluded that the restrictive covenant was valid and enforceable; *id.*, 528; it agreed with the subsequent employer that the trial court had erred in finding for the plaintiff on the tortious interference claim; *id.*, 535; holding that "[t]he assertion that [the subsequent employer] 'encouraged' Wiederlight to sell commercial insurance in the restricted area when it knew or should have known of the covenant's terms does not fairly imply that [the subsequent employer] acted with fraud, misrepresentation, intimidation or molestation or that it acted with malice." (Internal quotation marks omitted.) *Id.*, 536.

The tortious interference claim in the present case is substantially similar to that alleged in *Robert S. Weiss & Associates, Inc.* The plaintiff alleges that Ross "contact[ed] and solicit[ed] the plaintiff's customers with Wiegman to move their business from the plaintiff to Ross while Wiegman was still employed by the plaintiff, and . . . contact[ed] the plaintiff's vendor with Wiegman while Wiegman was still employed by the plaintiff"; Pl.'s Compl. ¶161; even though Ross "knew of the relationship between the plaintiff and Wiegman and knew that Wiegman had entered into the [nondisclosure and noncompetition] agreement with the plaintiff." Pl.'s Compl. ¶160. These allegations alone do "not fairly imply that [Ross] acted with fraud, misrepresentation, intimidation or molestation or that it acted with malice." (Internal quotation marks omitted.) *Robert S. Weiss & Associates, Inc. v. Wiederlight*, *supra*, 208 Conn. 536.

Nevertheless, the plaintiff additionally alleges that Ross also "solicit[ed] Wiegman to work in [Ross'] 3D division and compete with the plaintiff." Pl.'s Compl. ¶161. Aside from the nondisclosure and noncompetition agreement, however, the plaintiff does not otherwise allege that Wiegman was bound by an employment contract. "In the absence of fraud, misrepresentation, intimidation, obstruction, molestation, or malicious acts, courts generally recognize no liability for inducing an employee not bound by an employment contract to move to a competitor." *Electronic Associates, Inc. v. Automatic Equipment Development Corp.*, 185 Conn. 31, 34, 440 A.2d 249 (1981). In the present case, the plaintiff appears to rely on its allegation that Ross induced Wiegman to breach the noncompetition agreement to establish that it was improper for Ross to induce Wiegman to also leave the plaintiff's employ. The court has already concluded, however, that inducing the breach of the noncompetition agreement does not necessarily imply improper means or motive, and the plaintiff does not allege any additional conduct by Ross to independently establish the wrongfulness of inducing Wiegman to terminate his employment with the plaintiff. Thus, the plaintiff effectively alleges that Ross' offer of employment to Wiegman was, in and of itself, tortious. Under *Electronic Associates, Inc.*, this is legally insufficient.⁽⁴⁾

III. Violation of CUTPA

As to count thirteen, Ross first argues in its memorandum in support that the plaintiff's CUTPA claim should be stricken because the plaintiff's conclusory allegation that it suffered damages is insufficient to establish CUTPA's "ascertainable loss" requirement. In its memorandum in opposition, the plaintiff counters that its allegation of loss is legally sufficient because, on a motion to strike, all well pleaded facts and those facts necessarily implied are assumed true. The court agrees with Ross.

"The ascertainable loss requirement [of §42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation . . . [A]n ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. (Citations omitted; internal quotation marks omitted.) *Marinos v. Poirot*, 308 Conn. 706, 713-14, 66 A.3d 860 (2013). Because "[a] claim under CUTPA must be pleaded with particularity to allow evaluation of the legal theory upon which the claim is based"; *Keller v. Beckenstein*, 117 Conn.App. 550, 569 n.7, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009); the plaintiff must thus plead specific facts indicative of a deprivation, detriment, or injury in order to sufficiently allege an "ascertainable loss."

The plaintiff alleges that, as a result of Ross soliciting Wiegman, soliciting and contacting the plaintiff's customers, and contacting the plaintiff's vendor, "the plaintiff has suffered an ascertainable loss." Pl.'s Compl. ¶202. Although thus parroting back the words used in the statute, the plaintiff fails to allege any subsidiary facts to support its conclusion that it did indeed suffer an "ascertainable loss." The amended complaint is devoid of any facts that necessarily imply that the plaintiff incurred a deprivation, detriment, or injury. As Ross points out in its memorandum in support, there is nothing in the amended complaint to indicate that the resignation of Wiegman in any way negatively affected the plaintiff's business or that Ross's alleged solicitation and contacting of the plaintiff's customers and vendor negatively impacted in any way its beneficial relationships with these customers or this vendor. Unlike allegations of specific facts, which are well pleaded and thus must be assumed true for the purpose of a motion to strike, the plaintiff's factual conclusion of loss, without any subsidiary factual allegations, is inadequate to apprise Ross of the factual basis for the plaintiff's claim. "A pleading must allege the facts upon which a party proposes to rely in such a way as fairly to apprise the court and the opposing party

of his claims." *Rusch v. Cox*, 130 Conn. 26, 33, 31 A.2d 457 (1943). "The adverse party has the right to have the facts appear so that the question whether they support the conclusion may be determined and that he may have an opportunity to deny them . . . A pleading defective in alleging a conclusion without facts to support it is demurrable." (Citation omitted.) *Smith v. Furness*, 117 Conn. 97, 99, 166 A. 759 (1933). Therefore, because the plaintiff has not alleged specific facts to support its conclusion of "ascertainable loss," its CUTPA claim cannot stand.⁽⁵⁾

CONCLUSION

For the foregoing reasons, Ross' motion to strike counts eleven, twelve, and thirteen of the plaintiff's amended complaint is granted.

¹General Statutes §42-110g(a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §]42-110b, may bring an action . . . to recover actual damages."

²The court notes that, although the plaintiff describes in its memorandum in opposition a scheme between Ross and Wiegman to seek out sales leads to keep for themselves for when Wiegman eventually left the plaintiff's employ, such is not alleged in the complaint. The plaintiff alleges merely that "Ross breached [the] implicit covenant of good faith and fair dealing when it offered Wiegman employment to operate as a competitor [of the plaintiff] and failed to share sales leads with [the plaintiff]." Pl.'s Compl. ¶122. The court cannot consider facts not alleged in the complaint in deciding a motion to strike. See e.g. *Rowe v. Godou*, 209 Conn. 273, 278, 550 A.2d 1073 (1988).

³The court therefore need not address Ross's additional argument that the plaintiff's claim of breach of the implied covenant of good faith and fair dealing fails for lack of sufficient facts to support its conclusory claim of damages.

⁴The court therefore need not address Ross' additional argument that the plaintiff's tortious interference claim fails because the plaintiff has not pleaded any facts to support its conclusory allegation that it suffered damages.

⁵Ross also argues in its memorandum in support that the plaintiff's CUTPA claim is legally insufficient because the acts alleged do not amount to unscrupulous, unfair, or deceptive conduct. Because the court concludes that the plaintiff's conclusory allegation of loss renders its CUTPA claim legally insufficient, the court need not consider this argument.