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SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION, GE PART
DOCKET NO. BER-C-47-21

Gramkow, Carnevale, Seifert & Co.
Plaintiff,

v.

CPAs4MDs, P.A., Sylvain Syboni, &
MedTax CPAs P.A.
Defendants.

CPAs4MDs, P.A., Sylvain Syboni, &
MedTax CPAs P.A.
Third-Party Plaintiffs,

v.

Ted A. Carnevale,
Third-Party Defendant

Decided: August 19, 2021

Appearances:

Paul Doherty III, attorney for Plaintiff and Third-Party Defendant (Hartmann Doherty Rosa Berman & Bulbulia).

Anthony S. Bocchi, attorney for Defendant and Third-Party Defendant (Cullen and Dykman LLP).

The Honorable Edward A, Jerejian, P.J.Ch. Div.

This matter comes before the court by way of a motion to dismiss counts five, six and seven of the Defendant's counterclaim and to dismiss the third-party complaint in its entirety, filed May

28, 2021, by Hartman Doherty Rosa Berman & Bulbulia LLC (Paul Doherty Esq., appearing) attorneys for Plaintiffs Gramkow, Carnevale, Seifert & Co. LLC and Third Party Defendant Ted A. Carnevale.

Opposition was filed July 16, 2021 by Cullen and Dykman LLP (Anthony S. Bocchi, Esq., appearing) attorneys for Defendants CPAs4MDs, P.A., Sylvain Siboni, and MedTax CPAs, P.A. Plaintiff's reply submission was filed July 19, 2021. The Court heard oral argument on Friday July 23, 2021.

Plaintiff is an accounting firm located in Bergen County, New Jersey. In or around 2012, Defendant Sylvain Siboni and Plaintiff began lengthy negotiations for Plaintiff to buy Defendant Siboni's accounting practice which Siboni operated through Defendant CPAs4MDs, P.A.

Specifically, on or about May 19, 2015, Plaintiff and Defendants entered into an Accounting Practice Acquisition Agreement (the "Agreement"). Under the Agreement, CPAs4MDs/Siboni sold to Plaintiff all of CPAs4MDs/Siboni's rights and interests in certain client accounts, which are specifically listed on Schedule A to the Agreement, as well as the name CPAs4MDs. (Agreement ¶ 1.1 ("Purchased Accounts").)

In addition to selling these assets to Plaintiff, Defendants CPAs4MDs and Siboni also agreed to a non-compete for a period of five years, under which they were prohibited from performing accounting work within 100 miles of Plaintiff's offices in Oradell, New Jersey, and prohibited from soliciting Plaintiff's clients. Further, the Agreement only places time-restrictions on the non-compete portion of the Agreement: while the sale of client accounts listed on Schedule A, and the sale of the name CPAs4MDs are both permanent.

After the transaction closed difficulties arose between the parties. Defendant Siboni formed a new entity, of which he is admittedly the principal, Defendant MedTax CPAs, P.A., ("MedTax")

in 2018, which operates out of Alpine, New Jersey. It is undisputed that Medtax was formed within the time-restriction covered by the Agreement.

Plaintiff alleges that Defendant Siboni formed his new entity, Defendant Medtax, for the purposes of competing with Plaintiff in the territory covered by the non-compete. Further, Plaintiff alleges Defendants directly solicited, and in some instances, provided services to Plaintiff's clients during the restricted time-period between 2018-20 (including clients purchased by Plaintiff through the Agreement.)

In the instant motion, Plaintiff seeks to dismiss three of Defendants' seven asserted counterclaims, as well as the entire third-party complaint, in Defendants' capacity as Third-Party Plaintiffs', against third-party Defendant Ted A. Carnevale.

Plaintiff does not seek to dismiss the first four contractual counterclaims, but rather seeks to dismiss multiple tort claims[1] that are based upon the premise that Plaintiff reached out to clients, including some clients whose accounts Plaintiff purchased under the Agreement, and informed them that the Defendants are restricted from providing services to them pursuant to the Agreement. Defendants also assert these tort claims against Plaintiff's CEO, Ted Carnevale, personally.

Plaintiff moves to dismiss the tort counterclaims and the entire third-party complaint under the economic loss doctrine, that Plaintiff alleges should bar Defendants from bringing tort claims, while asserting that the Third-Party Complaint against Ted A. Carnevale must be dismissed as he was not a party to the Agreement and all his actions were in his capacity as CEO of Plaintiff Gramkow Carnevale Seifert P.A.

[1] Count Five of the Counter-Claim is for Tortious Interference with Prospective Economic Advantage, Count Six is for Unfair Competition, Count Seven is for Defamation. All three counts are repeated in the Third-Party Complaint filed against Ted A. Carnevale individually.

Plaintiff further argues the dual defamation claims in both the Third-Party Complaint and counterclaim should be dismissed, as contacting clients and informing them that Plaintiff purchased their accounts does not meet the elements of defamation.

Defendants oppose the motion on the grounds that the economic loss doctrine solely applies when a tort remedy is sought against an individual's conduct when said conduct is governed by a contract between the parties, and in this matter the Defendants allege that Plaintiff undertook its tortious conduct following the expiration of any contractual time-restrictions between the parties.

Defendants argue that therefore no contract was in force at the time the alleged tortious conduct occurred, thereby rendering the economic loss doctrine inapplicable. Alternatively, Defendants argue, if the economic loss doctrine were to apply it should not apply to Defendant MedTax as MedTax was not a party to the Agreement.

Further, Defendants argue that Plaintiff and Third-Party Defendant contacted Defendant's clients and stated that Defendants do not have the right to service the clients because of restrictions included in the Agreement. As the contract had expired at the time of some of those calls, Defendants allege that these statements were false and therefore defamatory.

Legal Analysis

A party may move to dismiss for failure to state a cause of action under R. 4:6-2(e). Dismissal is warranted where no cause of action is identified or suggested by the facts. Printing Mart-Morristown v. Sharp Elecs. Corp, 116 N.J. 739, 746 (1989).

When reviewing the pleadings under such a motion, courts will accept well-plead facts as true and provide the non-moving party favorable factual inferences that are reasonable. Ibid. Moreover, a court must search in depth and with liberality to determine if a cause of action can be

gleaned even from an obscure statement, particularly if further discovery is taken. Ibid. Accordingly, if there is no basis for relief and discovery would not provide one, dismissal is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). However, if a generous reading of the allegations "merely suggests a cause of action," it will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

At this stage of the litigation, the Court should not be concerned with the plaintiff's ability to prove the allegations, but rather should ascertain whether the facts alleged suggest a cause of action. Somers Const. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961).

While legitimate inferences are to be drawn in favor of the non-moving party, a court need not credit bald assertions or legal conclusions. Printing Mart, supra, 116 N.J. at 768. A motion to dismiss for failure to state a claim may be addressed to specific counts, and the court, on a motion to dismiss, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims but sustaining intentional interference and promissory estoppel theories).

Under New Jersey's economic loss doctrine, the rights and remedies of parties to a contract are governed solely by that contract, and neither party can bring tort claims against the other for economic loss unless there is some specific, independent duty separate and apart from the contract. Saltiel v. GSI Consultants, 170 N.J. 297, 316 (2002) ("Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law.").

For instance, a patient can bring a tort action against a doctor, even if they have a contract, because the law specifically requires doctors to act with a degree of care, knowledge and skill

ordinarily possessed and exercised by the average doctor in the same situation, and a client can bring a tort action against an attorney, because the law imposes a similar duty of care on attorneys.

But, if there is no such specific additional duty imposed by law, the rights and remedies of parties to a contract are only those under the contract. See Saltiel, 170 N.J. at 316-18; see also Dean v. Barrett Homes, Inc., 204 N.J. 286, 296-297 (2010) (holding that the economic loss doctrine prohibits the recovery in a tort action of economic losses arising out of a breach of contract); Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579 (1985) (dismissing plaintiff's tort-based claims as a matter of law where plaintiff alleged that defendant did not fulfill its contractual obligations); Schenker, Inc. v. Expeditors Int'l of Wash., Inc., No. A-3555-14T1, 2016 N.J. Super. Unpub. LEXIS 1535, at *4 (App. Div. July 1, 2016) ("New Jersey courts have consistently held that contract law is better suited to resolve disputes between parties where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities with equal bargaining power and that could have been the subject of their negotiations.").

Accordingly, "courts look to the parties' contract, where it applies, and preclude claims based on extra-contractual purported rights and duties." Namerow v. PediatriCare Associates, LLC, 461 N.J Super. 133, 145 (Ch. Div. 2018) (citing Spring Motors, 98 N.J. 555).

Specifically, "the economic loss doctrine prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract." Coleman v. Deutsche Bank Nat. Trust Co., 2015 WL 2226022 at *4 (D.N.J. May 12, 2015) (internal citations omitted). See also Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 579 (1985) (dismissing plaintiff's tort-based claims as a matter of law where plaintiff alleged that defendant did not fulfill its contractual obligations).

Further, as set forth in Saltiel, the distinction between contract liabilities and tort liabilities arises from the "initial" relationship between the parties (initial relationship being a contract between the parties). Saltiel v. GSI Consultants, 170 N.J. 297, 310 (2002).

Saltiel does not stand for the proposition that the economic loss doctrine is applicable solely to concurrent conduct. See id. Rather, "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Id. at 316.

Here, the parties' initial relationship was governed by contract, and as discussed in greater detail below, the conduct at issue in each of the Defendants tort counterclaims is governed by contract. Defendants' contention that each of their tort-claims arose after the non-compete portion of the Agreement expired is not dispositive.

Instead, the Court looks, as directed by Saltiel, to distinguish contract liabilities and tort liabilities by looking to the "initial" relationship between the parties. Here, the initial relationship, the Agreement, was a contract between Plaintiff and Defendants. Therefore, the fact that the Agreement terms may have expired is insufficient to maintain the tort causes of action.

Defendant Siboni admittedly formed Defendant MedTax in 2018, well within the proscribed five year non-compete time restriction (2015-2020) set forth in the Agreement. Further, Defendants also admittedly conduct business at 6 Tulip Tree Lane, Alpine, New Jersey, well within the one-hundred-mile geographic area restricted by the Agreement.

Therefore, the economic loss doctrine dictates that these extra-contractual claims cannot be "bootstrapped" to the contract claim. Namerow, 461 N.J. Super. at 146.

To suggest otherwise is to intimate that contracts become worthless pumpkins at the proverbial stroke of midnight when they expire, forcing contract suits to immediately transform into tort suits once a contract expires.

Additionally, the fact that MedTax CPAs, P.A. is not a signatory to the "Agreement" is also irrelevant, as MedTax's principal is Sibonni, and Siboni admits to founding MedTax during the period covered by the Agreement's non-compete. (Ans. at ¶26-27). Therefore, MedTax is an extension of Siboni for the limited purposes of this Agreement. To hold otherwise would allow individuals to evade non-compete restrictions simply by forming a new LLC and claiming said LLC is not bound by said non-compete.

First, Count Five of the Counterclaim alleges tortious interference with prospective economic advantage. The elements of tortious interference with prospective economic advantage are: i) the existence of a reasonable expectation of economic advantage; ii) an intentional and malicious interference with the expectation; iii) a causal connection between the interference and the loss of prospective gain; and iv) damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-60 (1989).

Malice does not mean ill-will; rather it means "the harm was inflicted intentionally and without justification or excuse," specifically, the harm must be the result of fraudulent or illegal conduct. Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 306-07 (2001) ("[T]he line clearly is drawn at conduct that is fraudulent, dishonest, or illegal and thereby interferes with a competitor's economic advantage.").

Accordingly, actions taken to advance a party's own interest and financial position, so long as not fraudulent or illegal, do not amount to malice for purposes of a tortious interference claim. See Dello Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003).

On its face, the tortious interference with prospective economic advantage claim states "[b]y its refusal to acknowledge that the Post-Closing Covenants are no longer enforceable and its unlawful efforts to convince clients not to do business with Defendants after those Post-Closing

Covenants had expired, [Plaintiff] interfered with Defendant's prospective advantage." (Counterclaim ¶57).

The sole factual allegation contained in the unfair competition claim relates to the Plaintiff and Defendants disputed contract interpretation regarding the Agreement, and therefore is directly tied to the contract, which bars a tort action that fails to allege an independent duty of care.

Further, the Court notes that Defendants opposition does not address Plaintiff's argument that the counterclaim fails to state a claim for unfair competition.

Given the applicability of the economic loss doctrine, Count Five of the Counterclaim is dismissed.

Next, Count Six of Defendants' counterclaim alleges unfair competition. New Jersey Courts have long held that "the purpose of the law regarding unfair competition is to promote higher ethical standards in the business world. … The judicial goal should be to discourage or prohibit the use of misleading or deceptive practices which renders competition unfair." Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92 (App. Div. 2001).

Facially, the unfair competition claim states "[b]y its refusal to acknowledge that Post-Closing Covenants are no longer enforceable and its unlawful efforts to convince clients not to do business with Defendants after those Post-Closing Covenant's expired [Plaintiff] behavior violates fair play and renders competitions unfair." (Counterclaim ¶60).

The only allegation contained in the unfair competition claim relates to the Plaintiff and Defendants disputed contract interpretation regarding the Agreement. This specific set of facts does not meet the factors that the Appellate Division enumerated in evaluating unfair competition claims, namely: (1) actual confusion in the public, or (2) an actual intent by a party to practice deception. See Goldscheider v. Schnitzer, 3 N.J. Super. 425, 433 (Ch. Div. 1994).

Defendants' have not demonstrated that Plaintiff's actions caused "actual confusion in the public, nor [do Plaintiff's actions evidence] an actual intent by Plaintiff to practice deception, [with] either of those factors [bearing] significance in determining whether [defendants] are entitled to equitable relief." Id. Plaintiff's contacting of clients cannot be reasonably construed as attempting to practice deception, much less an attempt to confuse the public.

Given the applicability of the economic loss doctrine, similarly to Count Five, Count Six of the Counterclaim must also be dismissed.

Count Seven of the Counterclaim alleges defamation.

A defamatory statement is a statement that "tends to lower the subject's reputation in the community or to deter third persons from associating with him." W.J.A. v. D.A., 210 N.J. 229, 238 (2012).

A classic example of a defamatory statement is a statement accusing another of criminal or corrupt conduct. See e.g., Lynch v. New Jersey Educ. Ass'n., 161 N.J. 152, 174-175 (1999) (statements that plaintiff was under federal investigation for corruption, used city funds to loan money for personal reasons, forged voter registration documents, and had "mobsters" for clients and business partners, are defamatory).

To plead a claim for defamation, Defendants are required to allege, specifically, the actual statements that serve as the basis of the claim and when they were made. See Darakjian v. Hanna, 366 N.J. Super. 238, 248-49 (App. Div. 2004) ("In the case of a complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough."); Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003) ("In order to properly plead a claim for libel or slander the defamatory words must be identified."). The reason for this heightened pleading requirement is to avoid the

potential for infringement on the constitutional right to free speech involved. See Foxtons, Inc. v. Cirri Germain Realty, No. A-6120-05T3, 2008 WL 465653, at *5 (App. Div. Feb. 22, 2008) ("In defamation actions, which by their nature implicate the potential curtailment of cherished freedoms of expression, a plaintiff must plead its cause of action with a greater level of specificity.").

Here, the Court initially notes this claim is barred by the economic loss doctrine as explained above. However, the Court will still address the defamation counterclaim, briefly, on the merits. Defendants allege the following statement as defamatory:

> Based upon information and belief, sometime after July 1, 2020 Carnevale reached out to [the principal of two clients purchased by GCS under the Agreement], both now MedTax clients, and told [him] in substances that it is illegal for MedTax and Siboni to provide accounting services to [these clients] because of the restrictions set forth in the Agreement.

(Counterclaims ¶41).

Assuming arguendo the above statement was made to the respective clients by Plaintiff, the Court does not find that the alleged statement would "tend to lower the subject's reputation in the community." Rather, it is the statement of one businessperson to another, with Plaintiff allegedly at most advising other businesspersons' as to the nature of the contractual restrictions between Plaintiff and Defendants.

For the Court to find otherwise, it would be greatly expanding what constitutes defamation, and, as Plaintiff points to in their papers, if such a statement is defamatory then anyone who asserts that a counterparty to a contract is barred from doing something under the contract would then be potentially liable for defamation.

As a result, the defamation claim must be dismissed by the Court as the Court has not been provided with what the actual defamatory statement is alleged to be. No exact words were provided to the Court, nor was an exact date given as to when same were supposedly said.

Finally, in the Third-Party Complaint**,** Third Party Plaintiffs' allege Counts 5-7 of the Defendants' Counterclaim against Ted A. Carnevale individually.

Under the "participation theory," corporate officers may be liable for torts committed by or on behalf of a corporation if the officer personally participates in commission of the tort. See Saltiel, 170 N.J. at 309.

However, there obviously must be a viable tort claim against the corporation before there can be a claim against a corporate officer for participating in that tort: "… [T]he essential application of the theory is the commission by the corporation of tortious conduct, participation in that tortious conduct by the corporate officer, and resultant injury to the plaintiff.

If, however, "the breach of the corporation's duty to the plaintiff is determined to be governed by contract rather than tort principles, the participation theory of tort liability is inapplicable." Id.; see also New Mea Construction Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985) (holding that a claim against a principal of construction company for negligent supervision of construction sounds in contract, not in tort and, therefore, there could not be any personal liability).

Here, Defendants' third-party complaint against Carnevale simply incorporates by reference the allegations of Defendants' counterclaims and then asserts the same three tort claims against Carnevale as Defendants asserted against Plaintiff.

As discussed at length above each of these three tort claims are barred by the economic loss doctrine. Without a viable tort claim against the Plaintiff GCS, there can be no viable tort claim against Ted A. Carnevale.

Therefore, Plaintiff and Third-Party Defendant's motion is granted in its entirety. An order accompanies this decision.

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GRAMKOW CARNEVALE SEIFERT & CO., LLC

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TED A. CARNEVALE,

Third-Party Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

Civil Action

Docket No. BER-C-47-21

ORDER

This matter having been brought before the Court by Plaintiff Gramkow Carnevale Seifert & Co., LLC and Third-Party Plaintiff Ted A. Carnevale, by and through their attorneys, Hartmann Doherty Rosa Berman & Bulbulia, LLC (Paul S. Doherty, III, Esq. appearing) for entry of an Order dismissing

Counts Five, Six, and Seven of Defendants' Counterclaims and the Third-Party Complaint in its entirety, and the Court having considered the moving papers and any opposition thereto; and the Court having heard oral argument and for good cause shown;

IT IS on this 14th day of ~~June~~ August, 2021;

ORDERED that Plaintiff and Third-Party Defendant's motion to dismiss be and is hereby **GRANTED**; and it is further

ORDERED that Counts Five, Six, and Seven of Defendants' Counterclaims be and are hereby dismissed with prejudice; and it is further

ORDERED that the Third-Party Complaint be and is hereby dismissed in its entirety with prejudice; and it is further

ORDERED that a copy of this Order shall be served by Plaintiff's counsel on all Counsel of Record via email within five (5) days of receipt.

Hon. Edward A. Jerejian, P.J.Ch.