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| UWY-CV-14-6026552-S | : | SUPERIOR COURT |
| | : | |
| NUCAP INDUSTRIES, INC. et al. | : | JUDICIAL DISTRICT |
| | : | OF WATERBURY |
| Plaintiffs, | : | |
| v. | : | |
| | : | AT WATERBURY |
| PREFERRED TOOL AND DIE, INC., et al., | : | |
| | : | |
| Defendants. | : | July 27, 2015 |

**DEFENDANT'S OBJECTION TO PLAINTIFFS'
MOTION TO STRIKE COUNTERCLAIM**

The Defendant Robert Bosco, Jr. submits this Objection to Plaintiffs' Motion to Strike Counts Five and Six of Defendant's Counterclaim.

INTRODUCTION

As detailed below, Count Five of the Defendant's Counterclaim (Tortious Interference with a Business Expectancy) sufficiently alleges that the Plaintiffs were willfully and maliciously interfering with Mr. Bosco's business prospects. This is an intentional action outside of the four corners of a contract, therefore the economic loss doctrine does not apply. The claim for abuse of process in Count Six sufficiently alleges that the Plaintiffs have brought this action for an improper purpose. For the reasons set forth herein, the Defendants' Motion to Strike should be denied.

I. **Law and Argument**

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . A motion to strike . . . consequently, requires no factual findings by the trial court . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in

the manner most favorable to sustaining its legal sufficiency . . ." (Citations omitted; internal quotation marks omitted.) Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498 (2003). For the purposes of a Motion to Strike, "the facts alleged in the complaint are to be construed in the light most favorable to the plaintiff." Amodio v. Cunningham, 182 Conn. 80 (1980). The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) Hill v. Williams, 74 Conn. App. 654, 656 (2003); Beaudoin v. Town Oil Co., 207 Conn. 575, 587-88 (1988).

A. Facts

Mr. Bosco was the Co-Manager and 50% owner of Eyelet Tech, LLC ("Eyelet Tech" or "ETNC"), a Connecticut limited liability company. Counterclaim at ¶4. Eyelet Tech was in the business of manufacturing eyelet and spring brake pad components used in trains, airplanes, automobiles, trucks and other vehicles, as well as providing stamping and machining services for the component parts. Id. at ¶5. Eyelet Tech had customers located in Connecticut, certain other states located within the United States, as well as certain parts of Canada and Mexico. Id. at ¶6.

On November 19, 2009, Mr. Bosco and his co-owner sold Eyelet Tech to NUCAP and ETNC pursuant to an Asset Purchase Agreement. Id. at ¶7. Under the terms of the Asset Purchase Agreement ("APA"), ETNC purchased certain assets and assumed certain liabilities of Eyelet Tech. Id. at ¶8. As part of the sale transaction, Mr. Bosco entered into a Confidentiality, Non-Competition and Non-Solicitation Agreement with ETNC and NUCAP, made effective on November 19, 2009 (the "Non-Competition Agreement"). Id. at ¶9.

Under Section 3 of the Non-Competition Agreement, Mr. Bosco agreed to certain restrictive covenants for a period of five years after the closing of the sales transaction, which occurred on November 19, 2009. Id. at ¶10. These restrictions expire on November 19, 2014, or became void in the event of a default by the Plaintiffs of their obligations under the APA or the Non-Competition Agreement. Id. at ¶10. As consideration for the restrictions imposed upon Mr. Bosco set forth in the Non-Competition Agreement, ETNC agreed that it would pay Mr. Bosco the gross amount of \$1,000,000 ("Covenant Payments") in five equal annual installments, payable as follows:

- \$200,000 payable within five business days of the first anniversary of the closing;
- \$200,000 payable within five business days of the second anniversary of the closing;
- \$200,000 payable within five business days of the third anniversary of the closing;
- \$200,000 payable within five business days of the fourth anniversary of the closing; and
- \$200,000 payable within five business days of the fifth anniversary of the closing. Id. at ¶13.

Pursuant to Section 8 of the Non-Competition Agreement, NUCAP guaranteed the obligation of ETNC to duly and punctually make the Covenant Payments to Mr. Bosco. Id. at ¶14.

As part of the sale transaction in November 2009, Mr. Bosco also entered into an employment agreement with another wholly owned subsidiary of NUCAP called Anstro Manufacturing, Inc. ("Anstro"). Id. at ¶16. On January 23, 2012, Mr. Bosco's employment with Anstro ceased and Mr. Bosco entered into negotiations with NUCAP

to set the terms of his separation from Anstro. Id. at ¶17. On May 31, 2012, Mr. Bosco and NUCAP entered into a Confidential Separation Agreement and General Release (the "Separation Agreement"), which set the terms of Mr. Bosco's separation from Anstro. Id. at ¶18.

In Section 7(b) of the Separation Agreement, NUCAP and Mr. Bosco expressly ratified the parties' obligations to each other under the Non-Competition Agreement. Id. at ¶19. Section 15 of the Separation Agreement provides that, in the event of breach of any party's obligations under the Non-Competition Agreement, the non-breaching party has the right to recover its attorney's fees and costs incurred in the investigation, enforcement, and litigation on account of such breach. Id. at ¶20. The parties agreed in the Separation Agreement that Connecticut law would govern the enforcement of **all** the Agreements -- the Non-Competition Agreement, the APA and the Separation Agreement (Section 17). The provision for attorneys' fees did not exist in the Non-Competition Agreement, but was included in the Separation Agreement as new consideration between the parties, and represents a significant modification to the parties' obligations and understandings of the Non-Competition Agreement.

ETNC made the Covenant Payments to Mr. Bosco on the first, second and third anniversaries of the closing (Id. at ¶22), but has not made the payments due on the fourth or the fifth anniversary.

On or about November 11, 2013, Mr. Bosco received a letter from NUCAP, the stated purpose of which was "to inquire about [Mr. Bosco's] actions that reasonably may be construed as violating the terms of the Confidentiality, Non-Competition, and Non-Solicitation Agreement, dated as of November 2009." Id. at ¶23. NUCAP alleged that it

understood “from its monitoring of [Mr. Bosco’s]” behavior” that Mr. Bosco had met with people to explore business opportunities and had attended the 2013 SAE Brake Colloquium. Id. at ¶24.

Mr. Bosco denied these allegations and explained to NUCAP that he had not violated the Non-Competition Agreement. Id. at ¶25.

On November 18, 2013, Mr. Bosco received notice from NUCAP that it deemed him to be in violation of the Non-Competition Agreement on the basis that he: (1) attended the SAE Brake Colloquium (“your mere attendance and registration at the SAE Brake Colloquium is a violation of your agreements”); (2) spoke to NUCAP’s customers and suppliers; and (3) and socialized with high school friends that had a booth at the conference in Florida (suggesting that socializing with these same individuals in Connecticut where they all lived would not have been a violation). Id. at ¶26.

NUCAP admitted to Mr. Bosco that its position was based on mere suspicions and not any actual impact on NUCAP or ETNC’s business caused by Mr. Bosco’s alleged actions. Id. at ¶27.

The Defendants, in bad faith and with reckless disregard for Mr. Bosco’s rights under the Non-Competition Agreement and Separation Agreement, declared that Mr. Bosco was in violation of the covenants and refused to tender the 2013 Covenant Payment of \$200,000 when due. Id. at ¶28. Mr. Bosco performed all of his obligations under the Non-Competition Agreement and Separation Agreement. Id. at ¶29. The Plaintiffs deliberately refused and have continued to refuse to make the Covenant Payments due to Mr. Bosco under the terms of the Non-Competition Agreement and have violated the terms of the Separation Agreement. Id. at ¶30.

B. Bosco's Tortious Interference Claim Is Not Legally Defective.

1. Bosco Is Not Required To Plead An Actual Business Relationship That Was Interfered With.

The elements of a claim for tortious interference with business expectancies are: "(1) a business relationship between a plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss." (Citations omitted; internal quotation marks omitted.) American Diamond Exchange, Inc. v. Alpert, 302 Conn. 494, 510 (2011); Lawton v. Weiner, 91 Conn. App. 698, 706 (2005).

"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." Daley v. Aetna Life & Casualty Co., 249 Conn. 766, 805, 734 A.2d 112 (1999) (quoting 4 Restatement (Second), Torts §766, comment (s) (1979)). "The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." 4 Restatement (Second), Torts §766B, comment (d) (1979).

Mr. Bosco has alleged that the Plaintiffs have willfully and maliciously made misrepresentations about Mr. Bosco to individuals working the brake industry with whom the Plaintiffs were aware Mr. Bosco would seek employment and, as a result of these misrepresentations, Mr. Bosco has been unable to gain work in the industry. The cases cited by the Plaintiff in support of their Motion to Strike turn on the question of proof, namely the tortious interference claims in the cases cited by the Defendants failed at the summary judgment stage because the party could not prove the

interference, not that it was not properly alleged in the pleading. See Golek v. St. Mary's Hospital Inc., 133 Conn. App. 182 (2012)(summary judgment granted as there was no proof of interference); Tassmer v. McMannus, 2009 Conn. Super LEXIS 982 (Conn. Super. Ct. Apr. 8, 2009)(summary judgment granted due to lack of proof of interference). Admittedly, in the case of Baer v. New Eng. Home Delivery Servs., LLC, 2007 Conn. Super. LEXIS 2696 (Conn. Super. Ct. Oct. 18, 2007) cited in the Plaintiffs' brief, the court (Lopez, J.) did strike the count for failure to "allege and prove" the tortious interference claim. Baer relied on RW Group, Inc. v. Pharmacare Mgmt. Servs., Inc., 2006 Conn. Super. LEXIS 1256 (Conn. Super. Ct. Apr. 27, 2006) as the authority for this proposition. It is respectfully submitted that the court in Baer misapplied RW Group, Inc., as RW Group, Inc. was a decision on an application for a temporary injunction. Again, the Court (Sferrazza, J.) found the plaintiffs did not **prove** the interference that was alleged, not that the Complaint would be stricken for failure to allege an actual business relationship that was interfered with. The claim of tortious interference with a business expectancy is sufficiently pleaded. The issue of the actual business relationships that were interfered with is an evidentiary issue and should not be dispositive in ruling on a Motion to Strike. See, e.g., Knight v. Southeastern Council on Alcoholism and Drug Dependency, Superior Court, Judicial District of New London, Docket No. CV 01 557182 (September 21, 2001, Hurley, J.T.R.) citing Kileen v. General Motors Corp., 36 Conn. Supp. 347, 348 (1980).The Motion to Strike Count Five should be denied.

2. Bosco's Claims Are Not Barred By The Economic Loss Doctrine.

It is generally true, as the Defendants' argue, that "[t]he economic loss doctrine bars negligence claims for "commercial losses arising out of the defective performance of contracts" (emphasis added) Flagg Energy Development Corp. v. General Motors Corp., 244 Conn. 126, 153 (1998). This, however, is not a negligence claim but a claim for tortious interference. The economic loss doctrine does not apply to claims that are distinct and independent of the breach of contract claims, such as those that seek punitive damages or other relief. Wiygul v. Thomas, 2014 Conn. Super. LEXIS 1339 (Conn. Super. Ct. June 3, 2014). The tortious interference claim does not sound in negligence and is independent of any contract claims made in this case. Therefore, the economic loss doctrine is inapplicable and the Motion to Strike Count Five of the Counterclaim should be denied.

C. The Abuse of Process Claim Is Sufficient as Pleaded.

An action for abuse of process lies against any person using "a legal process against another in an improper manner or to accomplish a purpose for which it was not designed . . . the gravamen of the action for abuse of process is the use of a legal process . . . against another primarily to accomplish a purpose for which it is not designed . . ." (Internal quotations, citations omitted) Mozzochi v. Beck, 204 Conn. 490, 494 (1987).

To properly plead an action sounding in abuse of process, the party must allege "(1) the defendant instituted proceedings or process against the plaintiff and (2) the defendant used the proceedings primarily to obtain a wrongful purpose for which the proceedings were not designed." Coppola Constr. Co. v. Hoffman Enters. Ltd. P'ship,

157 Conn. App. 139, 191 (2015); relying on 1 D. Pope, Connecticut Actions and Remedies, Tort Law (1993) § 8:02.

Here, the Mr. Bosco has alleged in his Counterclaim that the Plaintiffs have brought this action to dissuade other competitors from hiring Mr. Bosco (Counterclaim at ¶¶58-61) and to discourage Mr. Bosco from working in the brake industry. Id. ¶¶65. The Plaintiffs are pursuing their Complaint primarily for an improper purpose. The abuse of process claim is sufficient and the Motion to Strike Count Six of the Counterclaim should be denied.

CONCLUSION

The Defendant respectfully requests the Court sustain his objection to the Plaintiffs' Motion to Strike.

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CERTIFICATION

I hereby certify that on this 27th day of July, 2015 I mailed a copy of the foregoing to:

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