STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STRATEGY AND EXECUTION, INC.,
Plaintiff,

v

LXR BIOTECH, LLC,
Defendants.
_____/

Case No. 2015-146756-CK
Hon. Wendy Potts

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF DEFENDANT'S COUNTERCLAIM (COUNT II)

At a session of Court
Held in Pontiac, Michigan
On
JUN 09 2016

This matter is before the Court on Plaintiff's Motion for Partial Summary Disposition of Defendant's Counterclaim (Count II). The parties appeared before the Court for oral agument on Plaintiff's motion for partial summary disposition on June 8, 2016. At that time, Defendant attempted to present the Affidavit of Adam Fovenesi, the "Declaration of Wade Dann[1]," and emails authored by Thomas Morse under MCR 2.116(H). Pursuant to that provision, "[a] party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." MCR 2.116(H)(1). Notwithstanding Defendant's assertion that the Affidavit of Wade Dann is not attainable at the present time, Defendant presents this argument on the date and time scheduled

[1] Defendant attempted to file the Declaration of Wade Dann on June 7, 2016, however, that document was rejected as untimely.

for oral argument of the summary disposition motion after the deadline for filing the Response Brief, namely May 18, 2016, has since passed.

Moreover, the Court observes that Plaintiff outlined Mr. Dann's involvement in its motion for partial summary disposition, which was filed on March 16, 2016. Defendant has had over two months to attempt to obtain Mr. Dann's Affidavit in support of its position. The Court finds that the Affidavit of Adam Fovenesi, the "Declaration of Wade Dann," and the emails are untimely and will not consider these documents for purposes of determining Plaintiff's summary disposition motion.

By way of background, Plaintiff is a corporation organized to provide sales, marketing, and management services to companies. Defendant is a manufacturer and distributor of energy supplements in the retail market. In July 2014, the parties signed a letter in which they memorialized the terms of their agreement whereby Plaintiff would provide sales and marketing services to Defendant in return for financial payment. Plaintiff is alleging in its Complaint that Defendant has failed to pay for the services rendered.

It is undisputed that Defendant was in the process of attempting to obtain funding by discussing with Robert Kovach the possibility of a potential infusion of capital in exchange for equity and/or debt financing for Defendant. At the request of Defendant's president, Andrew Krause, an officer of Plaintiff by the name of Thomas Morse met with Mr. Kovach regarding the potential investment opportunity. A change in the management structure of LXR Biotech was discussed between Mr. Kovach and Mr. Morse and ultimately, Mr. Kovach presented Mr. Krause with a plan for significant investment, conditioned on a management change. Mr. Krause declined Mr. Kovach's proposal and as a consequence, Mr. Kovach declined to invest in Defendant. Defendant subsequently filed as Count II in its Counter-Complaint a claim against Plaintiff for Tortious Interference with Advantageous Business Relationship or Expectancy.

Plaintiff has now filed this motion, requesting the Court to dismiss Count II of Defendant's Counter-Complaint with prejudice and pursuant to MCR 2.116(C)(10).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant[2], an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Labs v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-99; 552 NW2d 919 (1996).

It is well settled that "one who alleges tortuous interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green,* 138 Mich App 360, 378; 360 NW2d 881 (1984).

"A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co,* 193 Mich App 1, 12-13; 483 NW2d 629 (1992). "To establish that a lawful act was done with malice and without justification, the

[2] In this case, Defendant, as the Counter-Plaintiff, is alleging that the Plaintiff, as the Counter-Defendant, engaged in tortious interference with an advantageous business relationship or expectancy.

plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Labs, supra.*

In its motion, Plaintiff argues that Defendant has failed to plead or come forward with evidence that suggests that Plaintiff intentionally interfered in a per se wrongful manner, or in a lawful way with malice and without justification, relative to any relationship or expectancy Defendant had with Mr. Kovach. Conversely, Defendant asserts that Mr. Morse intentionally interfered with the business relationship between Defendant and Mr. Kovach by attempting to arrange an ouster of current LXR management by denigrating management to Mr. Kovach in order to prevent the infusion of capital upon the terms that Defendant and Mr. Kovach were pursuing. As a result of Plaintiff's alleged conduct, Defendant claims that it has suffered substantial damages in the amount of three million dollars. It is Plaintiff's belief, however, that Defendant has continued an ongoing business relationship with a company known as BEMO USA WLL (Qatar), in which Mr. Kovach allegedly has an ownership interest. As such, Plaintiff argues that any business relationship or expectancy Defendant had with Mr. Kovach has not been interrupted or interfered with.

Upon review of Plaintiff's motion and Defendant's response as well as the parties' supporting documentation, the Court takes note of the Affidavit of Richard Kovach, in which Mr. Kovach explained that his discussions with Mr. Krause concerning further investment were elevating and he "wanted to know more details of the company's operations." Both parties agree that Mr. Morse had met with Mr. Kovach at Defendant's suggestion. In its responsive brief, Defendant indicates that the purpose of that meeting was for Mr. Morse to update Mr. Kovach on sales strategy, results and opportunities being pursued. Defendant stated further in its responsive brief that Mr. Morse was to provide company information as well for the contemplated capital infusion.

In his Affidavit, Mr. Kovach indicated that "Tom Morse and I discussed structuring a transaction as a capital infusion to the company, as a condition to a closing. I informed Tom Morse that a change of top management would need to take place." Mr. Kovach stated further that "[a] plan was presented to Andy Krause regarding a significant investment requiring a management change and he declined. At which point I felt the investment opportunity was too risky and I declined." The Court observes that the substance of Mr. Kovach's Affidavit is consistent with the statements made by Mr. Morse in his Affidavit.

Based upon the foregoing, the Court concludes that Defendant has failed to prove that Plaintiff committed any per se wrongful act that was inherently wrongful or unjustified simply by participating in discussions with Mr. Kovach regarding a potential investment opportunity. Further, the Court finds that Defendant has failed to demonstrate with specificity any lawful acts done with malice and without justification on the part of Plaintiff that intentionally interfered with Defendant's business relationship or expectancy with Mr. Kovach.

That is, the Affidavits of Mr. Kovach and Mr. Morse as well as the other exhibits do not support Defendant's claim for tortious interference with a business relationship or expectancy for the reason that it was Defendant that sent Mr. Morse to meet with Mr. Kovach, it was Mr. Kovach who indicated that a change of top management needed to take place and in fact incorporated this requirement into his investment proposal, and finally, it was Mr. Krause who declined Mr. Kovach's proposal, which resulted in the lost investment opportunity. No evidence has been presented to support Defendant's allegations that Mr. Morse tortiously interfered with the business relationship at issue. It is merely Defendant's speculation that Mr. Morse must have tortiously interfered with that business relationship during his conversations with Mr. Kovach.

The Court agrees with Plaintiff's argument in its Reply Brief that Defendant cannot rely on the conclusory allegations set forth in the Counter-Complaint to defeat the motion for partial

summary disposition. "The party opposing the motion may not rest upon mere allegations or denials in the pleadings. It must set forth specific facts using documentary evidence to show the existence of a genuine issue for trial." *Libralter Plastics, Inc. v Chubb Grp. of Ins. Companies*, 199 Mich App 482, 485; 502 NW2d 742 (1993).

In further support of its position, Defendant relies on answers to Plaintiff's second set of interrogatories that were verified by John Lee, an authorized agent on behalf of LXR Biotech. Yet, Answer No. 17 indicates that the people working and contributing in response to those interrogatories included Mr. Andrew Krause, Adam Fovenesi, John Lee, William Gruits, and counsel. The Court agrees with Plaintiff that the interrogatories were not properly sworn by all of the participating individuals pursuant to MCR 2.309(B)(3), for the reason that "[t]he answers must be signed by the person making them." "A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10)." *Pioneer State Mut. Ins. Co. v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

Only after the alleged loss of the business expectancy had occurred did Mr. Morse discuss the possibility of pursuing a collection matter and debtor possession claim in order to secure the debt and ongoing liability that Defendant owed to Plaintiff. Plaintiff asserts that its actions were motivated by a justifiable business interest in that Defendant owed Plaintiff money under the parties' ongoing contractual relationship. In opposition, Defendant contends that it was Mr. Morse's plan to place LXR Biotech in bankruptcy and through that process, Plaintiff would be able to assume control and Mr. Morse would become president of LXR Biotech.

Michigan Courts have long held that "defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship]." *Formall, Inc v Community Nat'l Bank*, 166 Mich App

772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986). The Court is persuaded by Plaintiff's assertion that it had (and currently has) a legitimate business reason to pursue legal action to secure the outstanding debt owed by Defendant pursuant to the parties' contract.

In consideration of the parties' arguments and supporting documentation in the light most favorable to the opposing party, the Court finds that Defendant has not provided evidence to establish the necessary elements of a tortious interference with a business relationship or expectancy claim. Moreover, Defendant has failed to offer evidence to establish a genuine issue regarding the material facts related to Count II of its Counter-Complaint. Thus, Plaintiff is entitled to judgment as a matter of law.

In the event that the Court finds in favor of Plaintiff, Defendant has requested the opportunity to amend its Counter-Complaint pursuant to MCR 2.116(I)(5). Under that provision, "if the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."

While Plaintiff's motion for partial summary disposition is granted as to Count II of Defendant's Counter-Complaint in its present form, the Court shall provide Defendant with an opportunity to amend its Counter-Complaint to adequately plead its Count II claim. Defendant shall file an amended Counter-Complaint within ten (10) days of the date of this Opinion and Order.

IT IS SO ORDERED.

Dated: JUN 09 2016

Hon. Wendy Potts,
Circuit Court Judge