STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FORSYTH COUNTY	08 CVS 85
GATEWAY MANAGEMENT SERVICES, LTD., Plaintiff, v. ADVANCED LUBRICATION TECHNOLOGY, INC., Defendant.	BRIEF IN SUPPORT OF DEFENDANT'S PARTIAL MOTION TO DISMISS

Pursuant to BCR 15.2, defendant Advanced Lubrication Technology, Inc. ("ALT") respectfully submits this brief in support of its partial motion to dismiss the complaint of plaintiff Gateway Management Services, Ltd. ("Gateway").

INTRODUCTION

This case concerns Gateway's contract with ALT to purchase lubricant manufactured by ALT. Gateway alleges that the lubricant did not function properly and that Gateway suffered damages as a result. In its complaint, Gateway attempts to use this one alleged contract breach to support nine separate causes of action.

The complaint, however, does not allege the elements of most of these claims, and certain claims are also barred by the economic loss doctrine. Accordingly, eight of Gateway's nine claims merit dismissal, leaving Gateway with a breach of warranty claim under the Uniform Commercial Code — the very statute intended to apply to contracts for the sale of goods.

For these reasons, and for those explained more fully below, ALT respectfully requests that the Court grant its partial motion to dismiss.

STATEMENT OF RELEVANT ALLEGATIONS

ALT manufactures a lubricant used by automobile and truck dealers.[1] (Compl. ¶ 6.) Gateway provides warranties covering automobiles and truck parts. (Id. ¶ 5.) From 2001 to 2006, Gateway contracted with ALT to order over $1,000,000 worth of ALT's lubricant. (Id. ¶ 9.)

In March 2006, Gateway began receiving claims for damage to vehicles purportedly caused by "ALT's faulty lubricant." (Id. ¶ 10.) Gateway alleges that ALT "altered" its product without notice to Gateway, and that the "altered product" had "possible hazards" or was "unusable." (Id. ¶¶ 11, 14, 17.) The complaint states that Gateway has paid out over $80,000 in claims for vehicular damage caused by ALT's altered lubricant and sold about $130,000 worth of "unusable altered product" to dealers for which it was not, and will not, be paid. (Id. ¶¶ 15, 17.)

Gateway also alleges that ALT "entered into a business arrangement" with American Guardian, "a direct competitor of Gateway." (Id. ¶ 19.) According to the complaint, ALT made available "Gateway's list of confidential clients" to American Guardian and that, as a result, "American Guardian was able to contact and attempt to interfere with Gateway's contracts and business relationships with its ongoing clients." (Id. ¶ 20.) The complaint further alleges that American Guardian "repeatedly slandered" Gateway's "methods of doing business and corporate integrity." (Id. ¶ 21.) The complaint does not allege that ALT made defamatory statements about Gateway.

Based on these allegations, Gateway alleges claims for violation of N.C. Gen. Stat § 75-1.1 (Count I), negligent misrepresentation (Count II), "Wrongful Interference with Contract

[1] Solely for purposes of this motion to dismiss, the allegations in plaintiff's complaint are treated as true. E.g., Pinewood Homes, Inc. v. Harris, 646 S.E.2d 826, 830 (N.C. Ct. App. 2007).

Right" (Count III), misappropriation of trade secrets (Count IV), slander per se (Count V), constructive fraud (Count VI), "Negligence and Breach of Implied Warranty of Merchantability" (Count VIII),[2] and common law breach of contract (Count IX).

STANDARD OF REVIEW

Under Rule 12(b)(6), a complaint warrants dismissal when it (1) reveals that no law supports the claim; (2) reveals the absence of facts sufficient to make a good claim; or (3) discloses some fact that necessarily defeats the claim. Toomer v. BB&T, 171 N.C. App. 58, 65, 614 S.E.2d 328, 334 (2005). The complaint's allegations are treated as true, but legal conclusions are not entitled to that presumption. Miller v. Rose, 138 N.C. App 582, 592, 532 S.E.2d 228, 235 (2000).

ARGUMENT

Nearly every claim pleaded by Gateway is subject to dismissal:

- First, Gateway's claim for violation of N.C. Gen. Stat. § 75-1.1 fails because the complaint does not allege the "substantial aggravating circumstances" required to elevate a breach-of-contract claim into a chapter 75 violation.
- Second, Gateway's claim for negligent misrepresentation is barred by the economic loss rule and, even if it were not, Gateway has not alleged the elements of this claim.
- Third, Gateway's claim for tortious interference with existing and future contracts fails because the complaint does not allege (1) that Gateway actually lost an existing contract or that Gateway would have entered into a prospective contract but for any alleged interference, (2) that ALT's conduct lacked justification, or (3) that ALT acted maliciously.

[2] The complaint does not allege a Count VII.

- Fourth, Gateway's claim for misappropriation of trade secrets fails because Gateway does not allege the existence of a trade secret.

- Fifth, Gateway's claim for slander per se fails because the complaint itself shows that ALT did not make the allegedly defamatory statements and because the claim is not pleaded with the requisite particularity.

- Sixth, Gateway's claim for constructive fraud fails because the complaint does not allege the existence of — or breach of — any fiduciary duty.

- Seventh, Gateway's claim for negligence is barred by the economic loss rule and, even if it were not, the complaint does not plead any elements of a negligence claim.[3]

- Finally, Gateway's common law breach-of-contract claim fails because the parties' contract is governed by the Uniform Commercial Code (UCC).

I. GATEWAY'S CLAIM FOR VIOLATION OF SECTION 75-1.1 FAILS TO PLEAD "SUBSTANTIAL AGGRAVATING CIRCUMSTANCES."

Gateway's claim for violation of N.C. Gen. Stat. § 75-1.1 (Count I) alleges that ALT, in the course of performing its contract with ALT, failed to supply goods that conformed to Gateway's expectations. (Compl. ¶¶ 28-32.) A mere breach of contract, however, does not constitute a violation of chapter 75. E.g., Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006). A chapter 75 violation is stated only if the complaint alleges "substantial aggravating circumstances" attendant to the breach. E.g., Miller, 138 N.C. App. at 235, 532 S.E.2d at 593.

[3] Gateway's claim for negligence is styled, "Negligence and Breach of Implied Warranty of Merchantability." ALT is moving to dismiss any claim for negligence, but not a claim for breach of implied warranty of merchantability (if Gateway has actually attempted to state that claim).

At most, Gateway's chapter 75 claim alleges that ALT failed to warn Gateway about its "deliberately altered" lubricant. (Compl. ¶ 32.) This type of allegation does constitute "substantial aggravating circumstances." See, e.g., Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771, at *9-10 (E.D.N.C. July 23, 1998) (attached as Exhibit 1) (dismissing chapter 75 claim where plaintiff alleged that defendant deliberately misrepresented traits of its product because "the facts supporting plaintiff's unfair trade practices claim are indistinguishable from those of plaintiff's breach of warranty claim"); accord Aerospace Mfg., Inc. v. Clive Merch. Group, LLC, No. 1:05CV00597, 2006 WL 1476906, at *4 (M.D.N.C. May 23, 2006) (attached as Exhibit 2) (dismissing chapter 75 claim because defendant's alleged "misrepresentation" amounted to failure to perform contract).

For these reasons, Count I of Gateway's complaint merits dismissal.

II. GATEWAY'S CLAIM FOR NEGLIGENT MISREPRESENATATION IS BARRED BY THE ECONOMIC LOSS RULE AND FAILS TO PLEAD THE ELEMENTS OF THE CLAIM.

The complaint's claim for negligent misrepresentation (Count II) should be dismissed for two independent reasons.

First, this claim is barred by the economic loss rule. Under this doctrine, "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract." Spillman v. Am. Homes of Mocksville, Inc., 108 N.C. App. 63, 65, 422 S.E.2d 740, 741 (1992). In such cases, recovery is limited to a contract or warranty action — even if the failure to properly perform was caused by negligent or intentional conduct. E.g., id., 422 S.E.2d at 741.

Here, Gateway's negligent misrepresentation claim alleges that ALT, by supplying lubricant that did not meet "the quality and consistency" required by the contract, breached its

contractual duty. (Compl. ¶ 44.) The economic rule applies squarely to these allegations, which form the basis for Gateway's breach-of-warranty claim. See, e.g., Terry's Floor Fashions, 1998 WL 1107771, at *3-4 (dismissing negligence claim because it pertained to the defendant's "negligent design, manufacture, inspection, and assembly" of goods to be supplied under the parties' contract).

Second, separate and apart from the economic loss rule, Count II does not allege the elements of a claim for negligent misrepresentation. To state that claim, the complaint must allege that the plaintiff justifiably relied to its detriment on information prepared without reasonable care by one who owed the relying party a duty of care. Bob Timberlake, 176 N.C. App. 33 at 40, 626 S.E.2d at 321. In a contractual setting, the duty of care owed must be distinct from any contractual duty, and the plaintiff must also allege an aggravating factor such as malice or recklessness. See US LEC Commc'ns, Inc. v. Qwest Commc'ns Corp., No. 3:05-CV-00011, 2006 WL 1367383, at *2 (W.D.N.C. May 15, 2006) (attached as Exhibit 3).

Gateway's complaint fails to allege three of these elements: (1) any duty of care owed by ALT to Gateway; (2) justifiable reliance on any alleged misrepresentations; and (3) malice or reckless conduct. The omission of any of these elements is fatal to Count II. See, e.g., Bob Timberlake, 176 N.C. App. 33 at 40, 626 S.E.2d at 321.

For all of these reasons, Gateway has failed to state a claim for negligent misrepresentation.

III. GATEWAY'S CLAIM FOR WRONGFUL INTERFERENCE WITH CONTRACT FAILS TO PLEAD THE ELEMENTS OF THAT CLAIM.

In Count III, Gateway tries to state two different claims: (1) tortious interference with contract, and (2) tortious interference with prospective economic advantage. The complaint fails to plead the elements of either claim.

Tortious interference with contract requires "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff." Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003). Because business competition justifies contractual interference, malice or bad motive must be shown where a tortious interference claim involves a business competitor. E.g., Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consol., 2003 NCBC 3, ¶ 66 (N.C. Super. Ct. April 28, 2003).

To state a claim for tortious interference with prospective economic advantage, the plaintiff must allege interference "with a man's business, trade, occupation by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference." Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). The plaintiff must further show damages and that that the interference was not done "in the legitimate exercise of the interfering person's rights, but with a malicious design to injure the third person or gain some advantage at his expense." Id.

Gateway has failed to plead the necessary elements of either of these claims. As to tortious interference with contract, Count III does not allege (1) that ALT intentionally induced a breach of an existing contract, (2) that ALT acted without justification, (3) that Gateway suffered

actual damage, or that (4) ALT acted with malice. (Compl. ¶¶ 51-61.) As to tortious interference with prospective advantage, Gateway does not allege (1) that it would have entered into a specific contract but for the alleged interference, (2) that the interference was not justified, or (3) that ALT acted with malice.[4]

Accordingly, Gateway's failure to plead any of these elements merits dismissal of Count III. See, e.g., Spartan, 263 N.C. at 559, 140 S.E.2d at 11.

IV. GATEWAY'S CLAIM FOR MISAPPROPRIATION OF TRADE SECRETS FAILS TO ALLEGE THE EXISTENCE OF A TRADE SECRET.

Gateway has failed to state a claim for misappropriation of trade secrets (Count IV) because the complaint does not plead the existence of a trade secret.

Business or technical information is a legally cognizable "trade secret" if it satisfies two statutory requirements. First, the information must "derive[] independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use." N.C. Gen. Stat. § 66-152(3). Second, the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Id.

Here, Count IV alleges only that Gateway had a "list of confidential clients." (Compl ¶ 63.) The complaint does not allege (even in conclusory terms) that this list derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development. See, e.g., Combs & Assocs. v. Kennedy, 147 N.C. App. 362, 370-71, 555 S.E.2d 634, 640 (2001) (customer list is not a trade secret per se). In addition, the

[4] The complaint not only fails to plead unjustified interference, but also expressly pleads facts that show ALT acted in furtherance of justifiable business competition by "attempt[ing] to gain a larger customer base." (Compl. ¶ 56.)

complaint fails to allege any efforts, let alone reasonable efforts, to maintain the secrecy of this list of "confidential clients." See Thortex, Inc. v. Standard Dyes, Inc., No. COA05-1274, 2006 WL 1532136, at *4 (N.C. Ct. App. June 6, 2006) (attached as Exhibit 4) ("Without any allegation of reasonable efforts to maintain secrecy, the mere assertion that the dye formulation and manufacturing methods were kept confidential is not enough to withstand a 12(b)(6) motion to dismiss.")

Accordingly, Count IV fails to state a claim for misappropriation of trade secrets.

V. GATEWAY'S CLAIM FOR SLANDER PER SE IS LEGALLY INSUFFICIENT.

Gateway's claim for slander per se (Count V) not only fails to allege that ALT made any defamatory statements (Compl. ¶¶ 21-22, 67-75), but also falls short of North Carolina's heightened pleading requirements.

Slander per se requires a false statement by one party, and communicated to a person other than the defamed party, which tends to "disgrace and degrade" the defamed party "or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided." Andrews v. Elliot, 109 N.C. App. 271, 274, 426 S.E. 2d 430, 432 (1993). Gateway's complaint, however, does not allege that ALT made any defamatory statement. Instead, Gateway alleges that its competitor, American Guardian, "verbally defamed Gateway's methods of business." (Compl. ¶ 71.) The complaint apparently alleges that these statements by American Guardian should be charged to ALT. (Id. ¶ 75.)

Gateway, however, has not pleaded any allegations to support liability on a principal-agent theory. Instead, the complaint alleges only that ALT and American Guardian had "entered into a business arrangement" for the supply of lubricant. (Id. ¶ 19.) This allegation does not create an agency or other fiduciary relationship to support liability. See, e.g., C&H P'ship v.

Shaw Indus. Group, Inc., No. 1:04CV00323, 2006 WL 1229001, at *5 (M.D.N.C. May 4, 2006) (attached as Exhibit 5) ("The mere fact that one party contracts with another party to perform a task does not make them agent and principal.").

Even if the complaint properly alleged a principal-agent theory of liability, Count V merits dismissal for a second, distinct reason: it does not satisfy the heightened pleading standard for slander claims. See N.C. Gen. Stat. § 1A-1, Rule 9(i) (2007). Under this standard, the allegedly defamatory statements must be pleaded "with sufficient particularity to enable the court to determine whether the statement was defamatory." Andrews, 109 N.C. App. at 274, 426 S.E. 2d at 432 (quoting Stutts v. Duke Power Co., 47 N.C. App. 76, 83-84, 266 S.E. 2d 861, 866 (1980)). This requirement ensures "that defendants have adequate notice of the slanderous words attributed to them. It would be unduly harsh to require defendants to venture a response to weighty accusations of slander couched in only the most general of terms." Webb Builders, LLC v. Jones, No. 01 CVS 00457, 2002 WL 34197740, at *3 (N.C. Super. Ct. January 24, 2002) (attached as Exhibit 6).

The complaint does not refer to any allegedly defamatory statements with particularity. Gateway alleges that American Guardian "repeatedly slandered Gateway's methods of business and corporate integrity" and "verbally defamed Gateway's methods of doing business, as well as other aspects of Gateway's business relations with its customers." (Compl. ¶¶ 21-22, 71, 73.) These allegations are legal conclusions, not defamatory statements, and do not provide sufficient information to enable the Court to determine whether they were indeed defamatory. Count V should be dismissed for this reason alone. See, e.g., Morrow v. King's Dept. Store, Inc., 57 N.C. App. 13, 21, 290 S.E. 2d 732, 737 (1982) (affirming 12(b)(6) dismissal of defamation claim for failure to set for allegedly defamatory acts with sufficient particularity).

VI. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONSTRUCTIVE FRAUD.

Gateway's claim for constructive fraud (Count VI) omits the elements required to state that claim.

A constructive fraud claim requires "facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'" Watts v. Cumberland Cty. Hosp. Sys., 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (quoting Rhodes v. Jones, 232 N.C. 547, 549, 61 S.E. 2d 725, 726 (1950)). In addition, a constructive fraud claim "must contain an allegation of the particular representation made." Sidden v. Mailman, 137 N.C. App. 669, 677, 529 S.E.2d 266, 272 (2000).

Here, Gateway's complaint does not allege facts that show a fiduciary relationship or a relation of trust and confidence. The complaint shows that Gateway and ALT shared a contractual relationship, but that does not make them fiduciaries. E.g., Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 667, 391 S.E.2d 831, 833 (1990) (no fiduciary duty between manufacturer and distributor even though parties were "mutually interdependent businesses"). Likewise, the complaint does not plead any facts and circumstances that surrounded the consummation of the transaction in which ALT allegedly took advantage of its position of trust and confidence. See, e.g., Toomer, 171 N.C. App. at 68, 614 S.E.2d at 336 (dismissing constructive fraud claim because plaintiff failed to allege that defendant sought to benefit itself).

Because it lacks the elements of a constructive fraud claim, Count VI should be dismissed.

VII. GATEWAY'S NEGLIGENCE CLAIM IS BARRED BY THE ECONOMIC LOSS RULE AND DOES NOT PLEAD THE ELEMENTS OF THE CLAIM.

Count VIII — styled by Gateway as "Negligence and Breach of Implied Warranty of Merchantability"—fails insofar as Gateway has attempted to state a claim for negligence.

As an initial matter, see supra pp. 5-6, the economic loss rule bars a tort action based on ALT's alleged failure to perform its contract with Gateway.

Even if the economic loss rule did not apply, Gateway's negligence claim still merits dismissal because the complaint has failed to plead the elements of negligence. A negligence claim "must allege the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." Lambeth v. Media Gen., Inc., 167 N.C. App. 350, 352, 605 S.E. 2d 165, 167 (2004).

Here, the complaint does not allege a duty of care, a breach of that duty, or causation. Accordingly, any negligence claim that Gateway purports to state should be dismissed.

VIII. GATEWAY'S CLAIM FOR COMMON LAW BREACH OF CONTRACT IS SUPERSEDED BY THE UNIFORM COMMERCIAL CODE.

Finally, Gateway's common law breach of contract claim (Count IX) should be dismissed because the Uniform Commercial Code (UCC) governs the rights and obligations between Gateway and ALT concerning their contract for the sale of goods. See Compl. ¶ 92; accord N.C. Gen. Stat. § 25-2-204.

Under the UCC, principles of law and equity survive only to the extent that they are not displaced by particular UCC provisions. See id. § 25-1-103. The UCC provides specific remedies for a breach of warranty claim. See id. §§ 25-2-713, -714, -715. Accordingly, these provisions — and not the common law — govern Gateway's breach-of-contract claim. See

Terry's Floor Fashions, Inc., 2007 WL 1107771, at *5-6.[5] Count IX should therefore be dismissed.

CONCLUSION

For the reasons stated herein, ALT respectfully requests that the Court grant ALT's partial motion to dismiss and grant all other relief that it deems necessary.

This 14th day of March, 2008.

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[5] Dismissal of the breach-of-contract claim does not leave Gateway without a remedy. Gateway has at least attempted to plead a claim for breach of implied warranty in Count VIII, and ALT has not moved to dismiss that claim.

CERTIFICATE OF SERVICE

In accordance with BCR 6, I hereby certify that on March 14, 2007, I electronically filed the foregoing with the Clerk of Court through the Court's electronic filing system, which will send notification of such filing to the following and that employees of Ellis & Winters LLP acting at my direction deposit a copy in the United States mail, postage prepaid and addressed as follows:

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This 14th day of March, 2008.

/s/ Stephen D. Feldman
Stephen D. Feldman

CERTIFICATE OF COUNSEL REGARDING RULE 15.8

Undersigned counsel for defendant Advanced Lubrication Technology, Inc., hereby certifies that the foregoing Brief in Support of Defendant's Partial Motion to Dismiss complies with the requirements of Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court. The basis for this certification is the word count of the word-processing system used to prepare this memorandum.

This the 14th day of March, 2008.

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