

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 07 CVS 1400

TRACI BOLICK,)
)
Plaintiff,)
)
v.)
)
TODD SIPE:)
ESTON BUSINESS GROUP, INC.)
and ESTON INDUSTRIAL, LLC,)
)
Defendants,)
)
JASON FINGER, WINK FINGER, Unknown))
Unknown Defendants, each acting in their)
personal capacity and doing business as)
"Classi Clean" and CLASSI CLEAN, INC.,)
)
Third Party Defendants.)
_____)

**MEMORANDUM OF FACTS
AND LAW OPPOSING THIRD
PARTY DEFENDANTS
MOTION FOR SUMMARY
JUDGMENT**

Defendants and Third Party Plaintiffs, Todd Sipe and Eston Business Group, Incorporated (hereinafter, "Eston") (hereinafter, together, "Third Party Plaintiffs") submit this memorandum of facts and law in opposition to Third Party Defendants' Motion for Summary Judgment. For the reasons stated herein, and based upon the verified pleadings, deposition testimony and the affidavits already submitted in the matter, Third Party Plaintiffs' respectfully submit that Third Party Defendant's motion should be denied.

PRELIMINARY STATEMENT OF THE CASE

Third Party Plaintiff Sipe started the commercial cleaning business that is Eston in 2002. Eston's largest customer at all times relevant hereto was, and currently is, CommScope, Inc. of North Carolina (an operating subsidiary of CommScope, Inc., hereinafter all relevant companies together, "CommScope"). Eston contracted with Plaintiff in 2003 to assist Eston, and its related

affiliates and subsidiaries, in cleaning and servicing Eston's accounts, which included CommScope. Eston taught Plaintiff the commercial cleaning business and introduced Plaintiff to larger, higher paying commercial accounts in the Hickory-area market. Third Party Plaintiffs contend that after showing Plaintiff the money that could be made using Eston's business model with certain corporate accounts, that Plaintiff became disgruntled and wanted more money than she deserved or was entitled. As a result, Plaintiff started causing numerous problems with CommScope through unprofessional, immoral and unethical behavior, which threatened Eston's business with CommScope. Then, after meeting and starting a romantic relationship with Third Party Defendant Jason Finger (hereinafter, "Jason"), Plaintiff and Third Party Defendants began coordinated efforts to sabotage and/or neglect certain CommScope facilities, as well as other Eston accounts, including but not limited to the "Lincoln Charter Schools" for the purpose of harming Eston's business. Third Party Plaintiffs contend that Jason and Plaintiff intended to use Jason's contacts, position in CommScope and access to information at CommScope to (1) hurt Defendant's business, and (2) give Plaintiff and Third Party Defendants an opportunity and comparative advantage when the then current CommScope contract expired. Defendant and Third Party Plaintiff Eston contends that it first became aware that the behavior was intentional was sometime in approximately July of 2006. Defendants monitored Plaintiff's behavior, and notified Plaintiff that her behavior was unacceptable after approximately two (2) months of covert but noticeable efforts. Third Party Plaintiffs believe that after Plaintiff and Third Party Defendants efforts to sabotage the CommScope account failed, Plaintiff expressed a willingness to repent to save her job and signed a non-compete and non-disclosure to among other things avoid being terminated and avoid legal action by Third Party Plaintiffs. Third Party Defendants now contend that Plaintiff's behavior shows that Plaintiff never intended to comply with the non-

compete and non-disclosure, but actually, only intended to delay action by the Third Party Plaintiffs while, in actuality, Plaintiff continued to receive payments from Third Party Plaintiffs to help finance her conspiracy with Third Party Defendants to start a competitive company and succeed in stealing the Lincoln Charter School account from Eston, thereby profiting from Eston's business method, model, secrets and contacts.

Defendants and Third Party Plaintiffs contend that Plaintiff filed the lawsuit for inappropriate purposes and motivations that appear more personal than supported by legitimate legal positions. Since filing the Complaint, Defendants and Third Party Plaintiffs have shown restraint, and there has been only limited discovery. Third Party Defendants have instituted no discovery of the Third Party Plaintiff. In fact, the only discovery that Plaintiff has requested has been one deposition of Plaintiff's sister lasting less than two (2) hours, in and to which Third Party Plaintiffs assert, virtually all of the testimony (if not entirely) was favorable to Third Party Defendant. A trial date has not yet been set in this matter. It is with this backdrop that Third Party Defendants filed their Motion for Summary Judgment (the "Motion"). Defendants and Third Party Plaintiffs contend that they are the only parties to the lawsuit with valid legal positions which are supportable by evidence gathered to date.

Based on the evidence gathered to date, including the deposition testimony of Third Party Defendants, it is evident is that there are genuine issues of material fact with respect to Eston's claims that Third Party Defendants conspired with Plaintiff. A jury must decide these issues.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the third party defendants can show that, taking the evidence in the most favorable to the Third Party Plaintiffs, accepting all of Third Party Plaintiff's asserted facts as true, and drawing all reasonable inferences in Third Party Plaintiff's

favor: (1) there is no genuine issue as to any material fact, (2) there is no standard that must be applied to the facts by the jury, (3) there are no gaps in the proof, (4) there are no inferences inconsistent with recovery arising from the evidence; and (5) the moving party is entitled to judgment as a matter of law. See *Thompson v. Bradley*, 142 N.C.App. 636, 639, 544 S.E.2d 258, 260 (2001); *Parks Chevrolet v. Watkins*, 74 N.C.App. 719, 721, 329 S.E.2d 728, 729 (1985); *Staton v. Russell*, 2001 NCBC 05, 11 (Forsyth County Superior Ct., May 31, 2001) (Tennille, J.).

The credibility of witnesses is to be resolved by the fact finder and “where matters of the credibility and weight of the evidence exist, summary judgment ordinarily should be denied.” *State Farm v. Allison*, 128 N.C.App. 74, 77, 493 S.E.2d 329, 330 (1997). Summary judgment...should be denied if the movant’s supporting evidence is self contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect...”*Allison*, 128 N.C.App. at 77, 493 S.E.2d at 330 (emphasis added). By these standards, Third Party Defendants’ motion must be denied.

PLAINTIFF’S FORECAST OF EVIDENCE

At a minimum, a jury could determine the following facts, which may be considered uncontested, from the record:

Eston is a provider of commercial cleaning services with its principal market being the Hickory, North Carolina area (see verified “Counterclaims and Third Party Complaint”, paragraphs 5 through 8, which are admitted by all parties). Plaintiff worked with Defendants Sipe and Eston for 4 years, and at all relevant times prior to being terminated, was paid by Eston to her personally, with checks being made out to “Molly Mops, LLC” (see Todd Sipe Affidavit dated December 7, 2007 at paragraph 7, attached hereto at **Exhibit 1**). CommScope had a “Code of Ethics” and that suppliers were required to comply with that Code of Ethics (see

verified "Counterclaims and Third Party Complaint", numbered paragraphs 59 and 70, which are not denied by Plaintiff). Plaintiff was aware that CommScope had addressed at least one prior incident of alleged sexual harassment that resulted in a long-term CommScope employee being fired, and thereafter, Plaintiff had other romantic and sexual relationships with other CommScope employees (see verified "Counterclaims and Third Party Complaint", numbered paragraphs 76 through 104, the majority of which are admitted in whole or in part).

A jury will also be able to determine that Third Party Defendant Jason worked for CommScope, knew that Gerry Cooper was responsible for managing CommScope's cleaning contracts, and that Third Party Defendant Jason worked with Gerry Cooper in the ordinary scope of Jason's job (see Dep. Jason Finger pp. 37 through 39 at **Exhibit 2**). Third Party Defendant Jason testified that that he had no authority over cleaning contracts or management of the cleaning crew (see Dep. Jason Finger pp. 12 through 16 attached at **Exhibit 3**). Third Party Defendant Jason met Plaintiff by and through her job servicing the CommScope account (See Dep. Jason Finger pp. 12, lines 11 and 12 at **Exhibit 3**). Third Party Defendant Jason emailed Plaintiff from his CommScope email account on at least a weekly basis, (see Dep. Jason Finger pp. 23 at **Exhibit 4**), and on July 31, 2006 Third Party Defendant Jason emailed Plaintiff a chart created by CommScope concerning CommScope's janitorial needs in July of 2006, and that Plaintiff could not provide any explanation why he had access to or reason to email the janitorial chart to Plaintiff in July 2006 (see Dep. Jason Finger pp. 52 through 57 attached at **Exhibit 5**, with the referenced Exhibit 9 attached at **Exhibit 6**).

Further, a jury will also be able to determine that Plaintiff and Third Party Defendant Jason were aware that Defendant Sipe was concerned that Plaintiff's romantic relationships may have caused business problems in the past, and that a romantic relationship with Jason could

potentially jeopardize the business with CommScope, and that neither Plaintiff nor Third Party Defendant stopped their relationship (see Dep. Jason Finger pp. 77 through 82 attached at **Exhibit 7**). That Plaintiff and Third Party Defendant Jason did indeed have a romantic relationship that ultimately resulted in Plaintiff marrying Third Party Defendant Jason (see Dep. Jason Finger pp.83 through 84 attached at **Exhibit 8**). That Defendant Eston had a contract to clean the Lincoln Charter Schools and that Plaintiff was responsible for supervising the account (see verified "Counterclaims and Third Party Complaint", numbered paragraphs 125 and 126, which are admitted, as well as the business records provided in response to subpoena from the Lincoln Charter Schools attached hereto as **Exhibit 9**).

Also, the jury will be able to determine that Plaintiff met Third Party Defendant Wink Finger (hereinafter, "Wink") in 2005 as a result of the relationship between Plaintiff and his brother, Third Party Defendant Jason (see Dep. Wink Finger pp. 18-21 attached at **Exhibit 10**). The jury will be further able to determine that Plaintiff did sign a non-compete agreement in September of 2006 (see verified "Counterclaims and Third Party Complaint", paragraphs 114 and 122, which are effectively admitted). That Plaintiff was terminated from working with Defendant Eston and any affiliated companies on or about March 13, 2007 (see Plaintiff's Complaint and the First Amended Complaint, numbered paragraph 28 in both).

Also, the jury will be able to determine that Classi Clean, Inc. was a commercial cleaning business which formed on April 3, 2007 (see **Exhibit 11**) that Plaintiff and Third Party Defendant Wink were talking about forming the business prior to signing paperwork, and that Third Party Defendant signed the Articles of Incorporation on March 5, 2007 (see Dep. Tr. Wink Finger pp. 39-48 attached at **Exhibit 12** and supporting Deposition **Exhibit at 13**). Thus efforts to form and the intent to form the business occurred prior to Plaintiff's termination. That

Plaintiff continued to clean the Lincoln Charter Schools account after March 13, 2007, that Third Party Defendant Jason helped Plaintiff clean the LCS account for “Classi Clean” after Eston cleaned the school and for the same price that Eston charged (see Dep. Tr. Wink Finger pp. 52 through 53 attached at Exhibit 14).

A. RELATIONSHIP OF PLAINTIFF AND THIRD PARTY DEFENDANTS

At the time the lawsuit was filed, and all times since then, Plaintiff and Third Party Defendant Finger were either dating, engaged or married. Third Party Defendant Jason testified, Plaintiff and Jason married in 2008. Jason has admitted that in December 2007 an accurate characterization of Traci would be his fiancé, rather than a “mere acquaintance”. Further, at all times relevant to the claims made against Third Party Defendants, and currently, Jason has been and is an employee of CommScope. Third Party Defendant Wink Finger (“Wink”) met Plaintiff as a result of her relationship with his brother Jason. Thereafter, Plaintiff and Third Party Defendant Wink started the company called “Classi Clean, Inc.” together, and Third Party Defendant Jason actually helped them operate the company. The relationship of Plaintiff and the Third Party Defendants shows opportunity, knowledge and constant communication, as Third Party Plaintiff has alleged, in the course of an unfair conspiracy in commerce.

B. THE COMMSCOPE ACCOUNT

Plaintiff learned about large commercial contracts and made all of her contacts in CommScope through her work for Eston. She benefited proportionately to her responsibility but upon meeting and dating Third Party Defendant Jason, she intentionally failed to perform her responsibilities. Third Party Plaintiff will show that Third Party Defendant Jason attempted to use his contacts and friendships at CommScope so that Classi Clean, Inc. could replace Eston as CommScope’s cleaning company. Then when that conspiracy failed, Plaintiff and Third Party

Defendants formed a company to compete and take other accounts from Defendants Eston and Sipe. In addition, Third Party Plaintiffs contend that Plaintiff and Third Party Defendants habit of sending inappropriate emails back and forth, including emails which contain confidential information, both threatened to harm the business relationship with CommScope and demonstrate that Plaintiff and Third Party Defendants needed certain information, and did obtain such information to compete with Third Party Plaintiffs.

C. FORMATION OF CLASSI CLEAN, INC. AND PLAINTIFF'S INVOLVEMENT

Third Party Defendant testified that he cleaned the Lincoln Charter Schools West campus because of Plaintiff and that he was paid directly for his work before he considered forming a business with Plaintiff. Plaintiff and Wink began discussing the formation of a competitive business while Plaintiff was working for Eston and while Eston was still a party to a contract with Lincoln Charter Schools. The chronology and deposition testimony demonstrate such. Third Party Defendant Wink testified that he was paid after working and that he was paid at the end of the month that he performed work. The payment records introduced at the deposition and supplied pursuant to subpoena by the Lincoln Charter Schools show that Plaintiff was first paid on March 7, 2007. By reference to the testimony and the records, it appears that Third Party Defendant Wink was cleaning the Lincoln Charter Schools as early as February 7, 2007. Plaintiff was not fired until March 13, 2007. Further, given the relationship of the parties, it is possible (and likely) that a jury will find that Third Party Defendants were more aware of the contractual restrictions on Plaintiff than they have testified to date.

D. LINCOLN CHARTER SCHOOLS ACCOUNT

Defendant Wink testified that he knew: (1) knew Traci had another cleaning company; (2) that other company had a contract for cleaning the Lincoln Charter Schools prior to “Classi Clean”; and (3) he charged the same amount to clean the school as the prior company did. They testified that they knew that Traci was previously cleaning the account and that there were aware of complaints with the cleaning prior to Classi Clean taking over the account. Each of the testified Plaintiff cleaned the LCS account before Wink ever did any commercial cleaning. Then while Eston had a contract with LCS, Plaintiff recruited Defendant Wink to clean the account, and LCS paid Wink directly (see Dep. Wink Finger pp. 26 through 27). Then, Plaintiff and Wink started cleaning the LCS account immediately after Eston, and benefited from Eston’s contract and pricing (see Dep. Wink Finger pp. 50 through 66 attached **Exhibit 15**).

Although the parties denied the pleading allegations, the testimony mirrors the opportunity and timeframe described in factual allegations made in the verified Counterclaims and Third Party Complaint.

E. THIRD PARTY DEFENDANT MOTIVATIONS & WITNESS CREDIBILITY

Finally, Deposition of the witnesses reveals that Third Party Defendants are trying to hide the extent of their relationship with Plaintiff, their knowledge of Plaintiff’s affairs, and the planned, concerted efforts to sabotage Third Party Plaintiff’s business and then set up a competitive business. The Third Party Defendants’ testimony is inconsistent (at a minimum), contradicts more objective evidence and tends to reveal that witnesses are uncredible. In addition to the objective evidence, Defendant contends that a jury will find that there was an intentional and coordinated effort to destroy at least some of the Defendant’s business accounts and then take-over those accounts for the benefit of Plaintiff and Third Party Defendants.

Third Party Defendants Memorandum and affidavits state that they never discussed business and did not do business with Plaintiff (see Dep. Tr. Jason Finger 40 through 42 at **Exhibit 16**). However, Third Party Defendants also attempt to argue that they are “non-related acquaintances of Plaintiff.” After review of the transcripts and objectively provable facts, the relationship was not casual, but rather extensive, romantic and eventually resulted in marriage.

For example, testimony reveals that Third Party Defendant Jason did not like Todd Sipe and was motivated because Todd Sipe did not and would approve of the relationship between Plaintiff and Jason. Jason was motivated both by frustration with Mr. Sipe, was likely influenced by the Plaintiff. Defendant contends that Defendant Jason’s trial testimony will show his obvious frustration and animosity towards Defendant Sipe. The obvious animosity of Plaintiff and her poor decision making, combined with his own dislike Todd Sipe, a jury will likely determine that they had incentives to do as alleged by Defendants.

Eston and Sipe contend that initially Defendant Jason attempted to hide the extent and scope of his relationship with Traci. However, objective review of objective evidence reveals an extensive relationship with Plaintiff. For example, when initially questioned about email correspondence between Plaintiff, Jason said he emailed Plaintiff no more than twice, then the deposition of Jason revealed at least 8 emails some of which contained confidential information of Eston’s largest customer (“CommScope) and Defendant Jason eventually admitted that he likely emailed Plaintiff at least on a weekly basis.

ARGUMENT

The commercial cleaning business can be lucrative to a properly managed business with large commercial cleaning contracts. To the casual observer, the gross revenues appear to make the business look extremely lucrative, but the challenge in the business is to make the business

net profitable on large gross revenues. Defendants contend that they taught Plaintiff some of the important traits of the business, and that Plaintiff, at a minimum, was aware of gross revenue figures and of Defendant's accounts. Sometime after developing a romantic relationship with Third Party Defendant Jason, Plaintiff shared confidential information with Jason and his brother Wink. In July 2006, Third Party Defendant Jason began assisting Plaintiff by using his contacts and access to information at CommScope to compete with Defendant Eston. Defendant Eston discovered the conspiracy, threatened to pursue legal action, but resolved the potential dispute by having Plaintiff agree in writing to not pursue competitive business. However, Plaintiff did not intend to stop, but rather, intended to find additional help (that being Wink) and a smaller account that would not pose as much difficulty in procuring and managing. In both instances, Defendant Jason assisted in strategic planning and tactical operation of each business. Assuming arguendo that the legal theories and elements presented by Third Party Defendants counsel are accurate, then the evidence already presented is sufficient to withstand a summary judgment analysis. For example:

A. Civil Conspiracy

Using the evidentiary support alluded to above, it is clear that at a minimum, overt acts by and between Plaintiff and the Third Party Defendants include but are not limited to (1) sharing information about CommScope's janitorial needs; (2) forming a competitive cleaning company; (3) immediately cleaning one of Eston's accounts occurred by and between Plaintiff and each one of the Third Party Defendants; and (4) all three individuals cleaning the Lincoln Charter Schools account after Eston was terminated by Lincoln Charter Schools. Even without direct admission, the inferences and objective evidence prove these actions.

B. Fraudulent Inducement

Third Party Plaintiffs have alleged and shown through deposition testimony that Third Party Defendants were aware that Eston and/or Todd Sipe had commercial cleaning contracts with both CommScope and the Lincoln Charter Schools. Both Third Party Defendants were aware of such contracts and they each had independent motivations to encourage Plaintiff to start a competitive business. Finally, that Third Party Defendant Wink did start a competitive business with Plaintiff, they cleaned at least one account of Estons, and Jason helped Plaintiff and Classi Clean clean the account. Further, Third Party Plaintiffs contend that Third Party Defendants discussed with Plaintiff the need to “buy more time” to set up their competitive business and thus signing the non-compete would give them more time to complete their conspiratorial plans. As a result, even if they weren’t a party to the contract, they were aware and influenced Plaintiff entering into a contract that Plaintiff never intended to perform.

C. Tortious Interference with Existing and Prospective Contracts and Business Relations.

Both Third Party Defendants have feigned ignorance about the existence of contracts between Third Party Plaintiffs and (1) CommScope and (2) Lincoln Charter Schools. Further, Third party Defendants have claimed to know nothing about the “non-compete” “non-disclosure” and other contractual obligations of Plaintiff. However, at a minimum, we know from testimony that Third Party Defendant Jason was aware that CommScope had a contract with an entity owned by Defendant Sipe. Plaintiff will show that Plaintiff and Third Party Defendant Jason’s efforts were intended to interfere with such contract. In addition, Third Party Plaintiff will show at trial that Plaintiff, with the assistance of each of the Third Party Defendants, did a poor job at the Lincoln Charter Schools so that Third Party Defendants could take over the account. Further, in light of the other objective testimony and the other deposition

testimony, Third Party Plaintiff's contend that a jury will find that Third Party Defendants Wink and Jason are uncredible and liars.

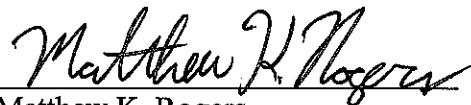
D. Unfair Trade Practices

As described in all other prior claims, the acts and omissions of Third Party Defendants, raise numerous and several legal theories which support the conclusion that both Plaintiff and Third Party Defendants are guilty of unfair and deceptive trade practices. Counsel has provided no analysis regarding such claims and thus, the independent claim should survive summary judgment.

CONCLUSION

For the reasons stated above, Defendants and Third Party Plaintiffs respectfully request that the Court deny Defendant's motion summary judgment as to all claims alleged against Third Party Defendants Jason Finger, Wink Finger and Classi Clean, Inc.

This 15th day of April, 2008.



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