

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PILOT AIR FREIGHT CORPORATION,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TARGET LOGISTICS SERVICES	:	
	:	
Defendant/Third-Party Plaintiff	:	
	:	
v.	:	
	:	
SANDAIR SYSTEM, INC.	:	
	:	
Third Party-Defendant.	:	
	:	NO. 00-5190
Reed, S.J.		August 20, 2001

MEMORANDUM

Pilot Air Freight Corporation (“Pilot”) filed suit against Target Logistics Services, Inc. (“Target”), alleging violations under the Lanham Act, 15 U.S.C. § 1125 (a), Pennsylvania and Federal Wiretapping statutes, misuse of confidential information and misappropriation of trade secrets, and various other state law causes of action. Target has asserted two counterclaims: tortious interference with existing contractual relations and tortious interference with prospective contractual relations. Presently before this Court is the motion of Pilot to dismiss the amended counterclaims (Document No. 13), pursuant to Federal Rule of Civil Procedure 12 (b) (6), and the response thereto.¹ For the reasons that follow, the motion will be granted.

¹ Jurisdiction is proper pursuant to 28 U.S.C. § 1332 based upon the citizenship of the parties as diverse and the amount in controversy exceeds \$100,000, exclusive of interest and costs. Jurisdiction is also proper pursuant to 28 U.S.C. § 1331 based upon claims arising under the laws of the United States.

I. Background

Pilot and Target are competitors in the freight forwarding business. In a related case, which provides useful background information, Pilot brought a similar suit against third-party defendant Sandair Systems, Inc. (“Sandair”), Joann Sandler, and Eric Sandler (collectively referred to as “the Sandlers”). In 1992, the Sandlers entered into discussions with Pilot about the possibility of operating Pilot’s Hartford station. Parties negotiated the terms of a proposed management agreement drafted by Pilot, and the Sandlers operated Pilot’s station, which was named Sandair, however, the parties never actually signed the agreement. The relationship unraveled in the summer of 1999, at which time it appears that the Sandlers began to conduct business with Target instead of Pilot. The case which Pilot brought against Sandair and the Sandlers has since settled.

Pilot initiated this parallel action against Target on October 12, 2000. Target asserted counterclaims on January 29, 2001, which Pilot moved to dismiss. Target exercised its right under Federal Rule of Civil Procedure 15 (a) and amended its pleading thereby mooting Pilot’s original motion. Pilot filed this second motion to dismiss which is the subject of this adjudication.

II. Standard

Rule 12 (b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.” In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).

Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

A motion to dismiss should be granted if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, the proper inquiry is not whether a plaintiff will ultimately prevail, but rather whether a plaintiff is permitted to offer evidence to support its claims. See Children’s Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 2742 (2000) (quoting Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996)). The moving party bears the burden of showing that the non-moving party has failed to state a claim for which relief can be granted. See Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

III. Analysis

A. Count I: Tortious Interference with Existing Contractual Relations

The elements of tortious interference with an existing contract have generally been described as:

- (1) the existence of a contractual [relation] . . . between [plaintiff] and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation . . . ;
- (3) the absence of a privilege or justification on the part of the defendant; [and]
- (4) the occasioning of actual legal damage as a result of the defendants’ conduct[.]

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 530 (3d Cir. 1998) (citing

Pelagatti v. Cohen, 370 Pa. Super. 422, 536 A.2d 1337, 1343 (1988)).²

Courts have varied some of these elements. For instance, the second element has also been described as: “the defendant interfered with the performance of that contract by inducing a breach or otherwise causing the third party not to perform.” National Data Payment Sys. v. Meridian Bank, 18 F. Supp. 2d 543, 549 (E.D. Pa. 1998), *aff’d*, 212 F.3d 849 (3d Cir. 2000); Salisbury House Inc. v. McDermott, Civ. A. No. 96-6486, 1998 WL 195693, at *13 (E.D. Pa. Mar. 24, 1998); Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (1994). The fourth element has also been explained as: “the plaintiff suffered pecuniary loss as a result of the breach of contract.” National Data, 18 F. Supp. 2d at 549; Salisbury, 1998 WL 195693, at *13; Al Hamilton, 434 Pa. Super. at 497, 644 A.2d at 191.

These nuances become clearer in light of the Pennsylvania Supreme Court’s adoption of certain provisions of the Restatement, and its rejection of other provisions. Significantly, the Court of Appeals for the Third Circuit has determined that while the Pennsylvania Supreme Court has adopted section 766 of the Restatement, it would not adopt Section 766A. See Gemini Physical Therapy and Rehab. Inc. v. State Farm Mut. Auto Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994). Both sections address the tort of interference with an existing contract. See Windsor Sec. Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 660 (3d Cir. 1993). Section 766 “states the rule applicable to interference by intentionally inducing or otherwise causing a third party not to

² A district court sitting in a diversity case is directed to apply the conflict of law rules of the forum state. See Kirschbaum v. WRGSB Assoc., 243 F.3d 145, 150 (3d Cir. 2000). Parties agree that the substantive law of Pennsylvania applies to this case, and I will not *sua sponte* rule otherwise.

perform his contract with the injured party.”³ Restatement (Second) of Torts, §§ 708 to End, Division Nine, Interference with Advantageous Economic Relations, Scope Note, at 2 (1979). In contrast, Section 766A “states the rule applicable to intentional interference by preventing the injured party from performing his own contract with a third person or by making it more expensive or burdensome.”⁴ Id. at 2-3.

Thus, the two section not only focus on different targets, but only section 766A provides for recovery where the performance of the contract was rendered more expensive or burdensome. See Gemini Physical Therapy, 40 F.3d at 66. In other words, section 766 requires either a breach or nonperformance of the contract at issue. See Wood v. Cohen, Civ A. Nos. 96-3707, 97-1548, 1998 WL 88387, at *14 (E.D. Pa. Mar. 2, 1998) (determining that interference with performance of contract resulting in making performance more costly is not cognizable claim under Pennsylvania law); Al Hamilton, 434 Pa. Super at 497-98, 644 A.2d at 191 (claim may not lie where there is no allegation that party refused to perform, was precluded from partially performing, or was prevented from meeting contractual responsibilities); Pawlowski v. Smorto, 403 Pa. Super. 71, 79, 588 A.2d 36, 40 (1991) (claim may not lie where there is no allegation that

³ Section 766 provides:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

⁴ Section 766A provides:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

party had failed to perform under contract); Gilbert v. Otterson, 379 Pa. Super. 481, 488, 550 A.2d 550, 554 (1988) (no cognizable claim where there is no evidence that actual breach occurred); Restatement (Second) of Torts § 766 cmt. k (under section 766, “it is not necessary to show that the third party was induced to break the contract. Interference with the third party's performance may be by prevention of the performance, as by physical force, by depriving him of the means of performance or by misdirecting the performance, as by giving him the wrong orders or information.”); Restatement (Second) of Torts § 766A cmt. g (“It is . . . sufficient that the performance of the contract to which the plaintiff is obligated is made more expensive to him, so that he loses all or part of the profits that he would otherwise have obtained, or is subjected to a financial loss”).⁵

Target alleges that Pilot improperly and intentionally interfered with the contract between Target and Sandair by filing what Target calls a “sham” lawsuit.⁶ (Counterclaim ¶ 12.) Count I, which asserts a claim for tortious interference with an existing contract, reads in relevant part:

22. The Target suit alleges, *inter alia*, that the damages Pilot suffered are “continuing in nature.” (Pilot’s Complaint, ¶ 82.) When Pilot filed the Target suit, it knew that the Exclusive Forwarding Agreement [referring to the contract

⁵ Target relies on Total Health Care Sys., Inc. v. Coons, 860 F. Supp. 236, 242 (E.D. Pa 1994) (citing Consolidation Coal Co. v. District 5, United Mine Workers of Am., 336 Pa. Super 354, 371, 485 A.2d 1118, 1126-27 (1984)), for the proposition that Target must only allege that the contract has been interfered with, not that the contract has been permanently severed. To the extent that the Court in Coons determined that a claim brought under section 766 need not require an allegation of a *permanent* breach of contract, this Court agrees. However, to the extent that the Court in Coons reasoned that sections 766 and 766A are only distinguishable on the basis of the target of the conduct, and not the fact that section 766 requires an actual breach or nonperformance, whether or not partial in nature, this Court disagrees. The above discussion and the actual language of the two sections support this Court’s conclusion.

⁶ This Court recognizes that litigation or the threat of litigation can amount to tortious interference. See Crivelli v. General Motors Corp., 215 F.3d 386, 394-95 (turning to Restatement (Second) of Torts, § 767, cmt. c (1979) for factors to consider in determining whether an interference is improper; Restatement specifically provides that unmerited litigation or threat of unmerited litigation is an example of improper interference).

between Target and Sandair] contained an indemnity clause that would obligate Sandair to indemnify Target for any damages and other losses Target sustained as a result of the Target suit.

23. Because Pilot competed with Target in the region served by Sandair, Pilot knew that the filing of the Target lawsuit would significantly burden both Target and Sandair in the performance of its obligation in the Exclusive Forwarding Agreement, while also resulting in harm to the relationship between Target and Sandair.

24. Under the Exclusive Forwarding Agreement, Target is compensated based upon a percentage of Sandair's revenues.

25. Because of the continuing effects of the Target suit, Sandair's ability to adequately perform on the Exclusive Forwarding Agreement has resulted in damages to Target.

26. Pilot, without privilege or justification, pressured Sandair to breach the Exclusive Forwarding Agreement and did this with the deliberate intent to injure Target.

27. As a result of Pilot's interference with the Exclusive Forwarding Agreement, Sandair has been deterred from its ability to fully perform its obligations under the Exclusive Forwarding Agreement.

28. As a result of Pilot's interference with the Exclusive Forwarding Agreement, Target has suffered actual damages in excess of one hundred thousand dollars (\$100,000).

(Counterclaim, ¶¶ 20-28.)

I begin by addressing those allegations which assert merely that the performance of the contract was made more expensive or burdensome. Target alleges that the filing of the Target lawsuit caused Sandair, under the terms of the contract between Target and Sandair, to indemnify Target for any losses Target sustained as a result of the suit. (Counterclaim ¶ 22.) The fact that Sandair would need to indemnify Target does not mean that Sandair in any way breached the contract. In fact, the opposite would be true because Sandair would be acting as instructed under the terms of the contract. Target asserts that Pilot knew that the filing of the Target lawsuit

“would significantly burden” both Target and Sandair. (Counterclaim ¶ 23.) Clearly, such language fails to assert any breach or nonperformance of a contract. Target alleges that Pilot pressured Sandair to breach the agreement between Sandair and Target. (Counterclaim ¶ 26.) This allegation does not assert that Sandair actually breached such agreement. Target also asserts that it is compensated upon a percentage of Sandair’s revenues. (Counterclaim ¶ 24.) The relevance of this allegation appears to lie in the next allegation which reads that Sandair’s ability to “adequately perform” under the agreement between Sandair and Target was impacted by the Target lawsuit. (Counterclaim ¶ 25.) It seems that Target is alleging that the lawsuit translated into a revenue decrease which meant that Target was making less money under the agreement. Again, this allegation fails to assert nonperformance of the contract. Rather, it appears that Target was making less money under the contract. These allegations fail to constitute a viable claim under Pennsylvania law.

Target makes a bald allegation that Pilot’s interference with the agreement between Sandair and Target caused Sandair to be unable to “fully perform its obligations” under such agreement. (Counterclaim ¶ 27.) Likewise, the allegation that as a result of the Target lawsuit, Sandair has been unable to “adequately perform” could be construed as an allegation that Sandair did not perform its obligations; however, this assertion is equally naked. (Counterclaim ¶ 25.) While all facts in the complaint must be accepted as true, this Court “need not accept as true unsupported conclusions and unwarranted inferences.” Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 2000 (2001) (citations omitted). “Courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation

which is or is not justiciable. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.” *Id.* at 184 (citations omitted). Having examined the complaint in its entirety, I find that there is no reference to the possibility that Pilot’s alleged interference in any way caused the contract between Sandair and Target to be breached. The background section asserts reasons why the current lawsuit is baseless. The counterclaim merely asserts facts that if proven would show that Target made less money from its business relationship with Sandair because of the Target lawsuit. The sum total is that no set of facts exist that would be consistent with the counterclaim and which would show that Pilot has tortiously interfered with the contract between Sandair and Target.

Thus, I conclude that Target has failed to state a claim for tortious interference with an existing contract.⁷

B. Count I: Tortious Interference with Existing Contractual Relations

The elements of tortious interference with a prospective contract are nearly identical to the elements of tortious interference with an existing contract, except that Target must also allege a “reasonable likelihood that the [prospective contractual] relationship would have occurred but for the interference” of Pilot. Brokerage Concepts, 140 F.3d at 530. Target makes no such allegation. Target alleges that it “sought to talk to and negotiate with” certain unnamed freight forwarders who had a relationship with Pilot to learn if they would be interested in becoming freight forwarders with Target. (Counterclaim ¶ 30.) Target further asserts that Pilot “interfered

⁷ Pilot argues that this Court should dismiss Target’s counterclaims because they are both essentially a claim for wrongful use of civil process. Because I find that the motion to dismiss should be granted on other grounds, I do not address the merits of Pilot’s argument here.

with such prospective contracts.” (Counterclaim ¶ 31.) Seeking to talk to and negotiate with unidentified freight forwarders does not amount to a reasonable likelihood that any contractual relationship would have existed but for the alleged misconduct of Pilot. Moreover, Target admits that it was able to contract with at least one freight forwarder: Sandair. The fact that Target did not name any additional freight forwarders would make any allegations concerning a reasonable likelihood of a prospective contractual relationship appear quite suspect at best. Such analysis is not necessary here, however, because Target did not plead a required element of the tort. Thus, I conclude that Target has failed to state a claim for tortious interference with a prospective contract.

IV. Conclusion

Having concluded that as to each counterclaim, Target has failed to plead a cause of action, the motion to dismiss will be granted. This litigation is mature and ready to move forward, and I note that Target has not requested that it be allowed to amend its counterclaims for a second time.

A suitable Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PILOT AIR FREIGHT CORPORATION,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TARGET LOGISTICS SERVICES	:	
	:	
Defendant/Third-Party Plaintiff	:	
	:	
v.	:	
	:	
SANDAIR SYSTEM, INC.	:	
	:	
Third Party-Defendant.	:	
	:	NO. 00-5190

ORDER

AND NOW this 20th day of August, 2001, upon consideration of the motion by Pilot Air Freight Corporation to dismiss the counterclaims brought by Target Logistics Services, Inc. (“Target”) (Document No. 13), and the response thereto, and having concluded for the reasons set forth in the foregoing memorandum that Target failed to set forth any claim upon which it can be granted relief, it is hereby **ORDERED** that the motion is **GRANTED** and the counterclaims set forth in the amended counterclaim (Document No. 9) are **DISMISSED**.

LOWELL A. REED, JR., S.J.