

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

DAMAR INC. : CIVIL ACTION
 :
 v. :
 :
 ADVANCED GLOBAL DESIGN, INC et al. :
 :
 v. :
 :
 DAVID M. PITCHKO : NO. 98-CV-3433

O R D E R - M E M O R A N D U M

AND NOW, this 18th day of November, 1998 the motion of third-party defendant David M. Pitchko to dismiss the amended third-party complaint is granted. Fed. R. Civ. P. 12(b).¹ Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367.

This is an action for violation of the Trademark Act, 15, U.S.C. § 1125(a), unfair competition, misappropriation of trade secrets, and tortious interference. Between January and April of 1997, plaintiff and defendants shared a building in Cherry Hill, New Jersey for the purpose of producing "rotating shaft seals." Compl. ¶¶ 21-22; third-party compl. ¶¶ 4-6. According to plaintiff, following the termination of the relationship, defendants began "selling and distributing rotating shaft seals virtually identical to plaintiff's." Compl. ¶ 24. Defendants

¹Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997). Contrary to third-party plaintiff's position, Pitchko's erroneous citation of Rule 12(b)(2) instead of Rule 12(b)(6) is immaterial.

filed an amended third-party complaint against David M. Pitchko, an officer of plaintiff, alleging various instances of misconduct on his part related to the joint venture.

Under Fed. R. Civ. P. 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of plaintiff's claim against the third-party plaintiff." Our Court of Appeals has held that:

A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. If the claim is separate or independent from the main action, impleader will be denied.

FDIC v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994) (quoting C.A. Wright, A. Miller, M.K. Kane, Federal Practice and Procedure, Vol. 6, § 1446, at 355-58 (1990)). A third-party complaint "is limited to claims of secondary or derivative liability." In re One Meridian Plaza Fire Litig., 820 F. Supp. 1492, 1496 (E.D. Pa. 1993); see also Resolution Trust Corp. v. Farmer, 836 F. Supp. 1123, 1129 (E.D. Pa. 1993) ("To assert a claim properly under Rule 14, the third-party plaintiff must implead a person against whom it can assert a claim of joint or secondary liability arising from the original plaintiff's claim against the third-party plaintiff.")

The amended third-party complaint does not allege that Pitchko is "liable to the third-party plaintiff[s] for all or part of the plaintiff's claim against the third-party plaintiff[s]." Fed. R. Civ. P. 14(a). Pitchko is alleged to have committed a variety of

torts against the third-party plaintiffs and to have violated the contract with them. Third-party compl., ¶¶ 9-34. There is no allegation of secondary or derivative liability. *Id.* Rather, the third-party complaint resembles a counterclaim. *Cf. Bathgate*, 27 F.3d at 873-74 (permitting obligors to join directors of a bank as parties to counterclaim in action by FDIC to recover on promissory notes but denying third-party claim against the directors).

Accordingly, the third-party complaint is dismissed.²

Edmund V. Ludwig, J.

²Given the improper impleader, there is no need to reach Pitchko's claim of lack of personal jurisdiction.