

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

CENTER FOR CONCEPT : CIVIL ACTION
DEVELOPMENT, LTD., a Delaware :
Corporation, and EUGENE :
CAFARELLI :
 :
 :
v. :
 :
 :
JOHN C. GODFREY and GODFREY :
SCIENCE & DESIGN, INC., a :
Pennsylvania Corporation, :
jointly, severally and in :
the alternative : NO. 97-7910

MEMORANDUM AND ORDER

HUTTON, J.

March 23, 1999

Presently before the Court are Plaintiffs' Motion to File and Serve a Second Amended Complaint (Docket No. 16), Defendants' reply (Docket No. 17), and Plaintiffs' sur reply thereto (Docket No. 18). For the reasons that follow, the Plaintiffs' motion is **GRANTED**.

I. BACKGROUND

On June 11, 1984, Defendant John Godfrey filed a United States patent application-- which was ultimately approved-- for a zinc product which rapidly eliminated the symptoms of the common cold. On September 11, 1984, Plaintiff Center for Concepts Development ("CCD") entered into a written agreement with Godfrey Science & Design, Inc., a New York corporation ("GS&D-NY"). On December 31, 1984, Plaintiff CCD entered into another written agreement with

GS&D-NY. On April 9, 1985, Plaintiff Eugene Cafarelli also entered into a written agreement with GS&D-NY.

Pursuant to these agreements, Plaintiffs were to receive a percentage of royalties from the sale of zinc products that resulted from licensing of the patents. In the two written agreements between Plaintiff CCD and Defendants, the preamble states:

In view of the facts that John C. Godfrey, Ph.D., President of GODFREY SCIENCE & DESIGN, INC., (GS&D) wishes to have the help and in the development and implementation of a business plan relating to marketing certain formulations described in the documents under development, identified as "ZINCO BUSINESS PLAN", and that Gene Cafarelli, President of THE CENTER FOR CONCEPT DEVELOPMENT, LTD., has indicated a willingness to participate in this effort, the following agreement is proposed to more clearly define our relationship

Pls.' Am. Compl. at Exs. A & B. The written agreement between Plaintiff Cafarelli and Defendants stated that "[t]his agreement is in addition to and separate from any other agreement covering similar subject matter which is in force between GS&D and The Center for Concept Development" See id. at Ex. C.

In 1986, Godfrey moved from New York to Pennsylvania and became President of Godfrey Science & Design, Inc., a Pennsylvania corporation ("GS&D-PA"). On May 4, 1992, after GS&D-NY entered into the agreements with the Plaintiffs, GS&D-PA entered into an agreement with The Quigley Corporation. In this agreement, GS&D-PA granted Quigley representation, manufacturing, marketing, and

distribution rights to the patents which were subject to the agreements between Plaintiffs and GS&D-NY. GS&D-PA received approximately \$1,300,000 for the rights to the patents.

On December 22, 1997, Plaintiffs filed suit alleging breach of the three agreements. The Plaintiffs, however, named GS&D-PA, a defendant in their complaint and failed to name GS&D-NY as a defendant. On May 1, 1998, Defendants moved to dismiss the amended complaint because it failed to adequately plead the performance of conditions precedent to the agreements. On November 10, 1998, the Court found that the amended complaint adequately stated a cause of action for breach of contract. See Center for Concept Dev., Ltd. v. Godfrey, No. CIV.A.97-7910, 1998 WL 792157, at *2 (E.D.Pa., Nov 10, 1998).

On February 2, 1999, the Defendants filed an answer to the complaint. In their answer, the Defendants state that GS&D-NY entered the agreement with the Plaintiffs and not the named defendant, GS&D-PA. On February 18, 1999, the Plaintiffs filed a motion to amend the complaint.

II. STANDARD

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Because the Plaintiff seeks to amend their complaint long after the Defendant served their responsive pleading, the Plaintiff

"may amend [their complaint] only by leave of court." Fed. R. Civ. P. 15(a). Rule 15(a) clearly states that, "leave shall be freely given when justice so requires." Id. "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (citations omitted); see also Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). The Third Circuit has found that "prejudice to the non-moving party is the touchstone for denial of an amendment." Id. at 1414.

III. DISCUSSION

The proposed Second Amended Complaint has nine counts. The Defendants do not object to Counts I, II, V, and VIII of the Plaintiffs' proposed Second Amended Complaint. Therefore, the Court grants the Plaintiffs leave to amend the complaint with respect to these counts. The Defendants, however, argue that the Plaintiffs' motion should be denied with respect to Counts III, IV, VI, VII, and IX because these counts are futile. The Court addresses each of these counts.

A. Tortious Interference of Contract - Counts III and VI

In Counts III and VI of Plaintiffs' proposed Second Amendment Complaint, Plaintiffs allege tortious interference with their contractual rights with GS&D-NY. Defendants contend that these

counts are futile because there is no contractual relationship between a plaintiff and third party in this case. Specifically, Defendants argue that GS&D-NY cannot be considered a third party because Plaintiffs' own allegations state that: (1) GS&D-PA and GS&D-NY had identity of ownerships and (2) GS&D-PA was a successor in interest, alter ego or liable for the obligations of GS&D-NY.

Under Pennsylvania law, a plaintiff must establish four elements to sustain a claim for tortious interference: (1) the existence of one or more contracts between plaintiff and a third party; (2) defendant's purpose or intent to harm the plaintiff by preventing completion of a contractual relationship; (3) improper conduct, which is neither privileged nor justified, on the part of the defendant; and (4) actual legal harm resulting from the defendant's actions. See Nathason v. Medical College of Pa., 926 F.2d 1368, 1392 (3d Cir. 1991). Pennsylvania law will only recognize a tortious interference with contractual relations claim where the defendant interfered with a plaintiff's contract with a third party. See A.D.E. Food Servs. Corp. v. City of Phila., No. CIV.A.95-7485, 1996 WL 590906, at *9 (E.D. Pa. Oct. 11, 1996). Thus, the existence of two parties to the contract and one party who tortiously interferes with that contract is essential to a claim of tortious interference with contractual relations. See Daniel Adams Assocs. v. Rimbach Publ'g, Inc., 519 A.2d 997, 1000 (1987).

It is hornbook law that a party or successor party to a contract cannot tortiously interfere with its own contracts. See First & First, Inc. v. Dunkin' Donuts, Inc., No. CIV.A.90-1060, 1990 WL 36139, at *3 (E.D. Pa. Mar 27, 1990). It is also well settled Pennsylvania law that a corporate entity and its agents are not distinct parties for contracting purposes. See id. at 1000 ("A corporation is a creature of legal fiction which can 'act' only through its officers, directors and other agents."). A corporation's agents, therefore, cannot tortiously interfere with its contracts. See Labalokie v. Capital Area Intermediate Unit, 926 F. Supp. 503, 509 (M.D. Pa. 1996) ("As a general rule, under Pennsylvania law a corporate entity and its agents are not distinct parties for purposes of contracting and thus a corporation's agents cannot tortiously interfere with its contracts."). This general rule, however, is limited to circumstances in which an agent's conduct occurs within the scope of employment. See id.

This Court finds that the Plaintiffs' proposed tortious interference with contract counts are proper and not futile as the Defendants contend. While many of the Plaintiffs' allegations may be inconsistent with showing that GS&D-NY is a third party, this is still proper under the Federal Rules. If the Plaintiffs cannot show that GS&D-PA has identity of interest with or was a successor to GS&D-NY, then the Plaintiffs may still maintain their action against GS&D-PA for tortious interference with contractual

relations. See Fed. R. Civ. Pa. 8(e)(2) ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal equitable, or maritime grounds."). Thus, the Plaintiffs may plead in the alternative with respect to GS&D-PA's status as a third party. Accordingly, the Court grants the Plaintiffs leave to file the Second Amended Complaint with respect to these counts.

B. Tortious interference with prospective Economic Advantage - Counts IV and VII

In Counts IV and VII, the Plaintiffs allege tortious interference with prospective economic advantage. In their proposed Second Amendment Complaint, the Plaintiffs allege that they "had a reasonable expectation of deriving a prospective economic advantage as a result of [their] contractual arrangements with, and the services tendered on behalf, and to the benefit of, Defendant Godfrey and GS&D-NY." Proposed Second Am. Compl. at ¶¶ 36, 50. Defendants argue that the Plaintiffs should not be granted leave to plead these claims because the complaint does not allege facts which, if proven, would amount to any prospective economic advantages. See Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc., 801 F. Supp. 1450, 1459 (E.D. Pa. 1992).

To prove tortious interference with prospective contractual relations, the Plaintiffs must show, inter alia, the existence of prospective contracts. See Thompson Coal Co. v. Pike Coal Co., 412

A.2d 466, 471 (Pa. 1979). A prospective contract "is something less than a contractual right, something more than a mere hope." Id. It exists if there is a reasonable probability that a contract will arise from the parties' current dealings. See Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971).

The Court finds that the complaint states sufficient facts which, if proven, would give rise to a reasonable probability that the Plaintiffs would have entered into particular contracts but for Defendants' interference. See Advanced Power Sys., Inc., 801 F. Supp. at 1459. The Plaintiffs allege that they introduced Quigley to the Defendants and that there was a reasonable probability that this relationship would give rise to the Plaintiffs entering into particular contracts but for Defendants' interference. Moreover, the Plaintiffs allege that there was a reasonable probability that their contractual relationship with GS&D-NY would result in particular contracts with other parties but for Defendants' interference. Therefore, while it is true that the Plaintiffs must prove that there was a reasonable probability that a contract would arise from these dealings, the Court finds that these counts are not futile at this stage. Accordingly, the Court grants the Plaintiffs' leave with respect to these counts.

C. Unlawful Conspiracy - Count IX

Finally, in Count IX, the Plaintiffs allege a claim of unlawful civil conspiracy. Defendants argue that this count is

futile because: (1) there can be no conspiracy claim if there is no underlying cause of action and (2) a corporation cannot conspire with its officer. First, the Court already found that the Plaintiffs properly stated an underlying cause of action in their proposed Second Amended Complaint. Therefore, the Court rejects this argument. Second, while the Court agrees with the Defendants that a corporation cannot conspire with its officers, this statement of law does not render the Plaintiffs' conspiracy claim futile. Plaintiffs may show that GS&D-PA and GS&D-NY-- two separate, legal entities-- conspired to commit an underlying action. Accordingly, the Court grants the Plaintiffs' motion in its entirety.

An appropriate Order follows.

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O R D E R

AND NOW, this 23rd day of March, 1999, upon consideration of the Plaintiffs' Motion to File and Serve a Second Amended Complaint, IT IS HEREBY ORDERED that the Plaintiffs' Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiffs **SHALL** file the Second Amended Complaint within ten (10) days of the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.