

FILED IN DISTRICT COURT
SEP 30 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SEP 30 2010
Deputy Clerk

DBG BENEFIT SOLUTIONS, INC.,)
)
Plaintiff,)
)
v.)
)
ARGUS HOLDINGS, INC.,)
)
Defendant.)

CIVIL ACTION FILE
NUMBER 1:10-cv-281-TCB

ORDER

In this action, Plaintiff DBG Benefit Solutions, Inc. alleges that Defendant Argus Holdings, Inc.—a competing insurance benefits brokerage company—used confidential information given to it by one of DBG’s customers, Comcar Industries, Inc., to induce Comcar to breach its contract with DBG. As a result, DBG alleges that Argus is liable for tortious interference with contractual relations, business relations, or potential business relations.

The case is before the Court on Argus’s motion to dismiss, or in the alternative, to order that DBG provide a more definite statement of its

claims against Argus [6]. For the following reasons, the Court grants Argus's motion to dismiss.

I. Background

On June 16, 2005, DBG entered into a products and services agreement ("client agreement") with Comcar. Under this client agreement, DBG was appointed the exclusive broker of record to provide certain products and services to Comcar.

The term of the client agreement was two years. However, it was automatically renewed under the terms of the agreement in 2007 and 2008, thereby extending its term through June 15, 2009. Pursuant to the agreement, any termination or cancellation short of completion of the products and services agreed upon would be considered a material breach. On or about May 29, 2008, Comcar notified DBG that it was terminating the client agreement, effective immediately.

DBG and Comcar subsequently signed a contract termination agreement setting forth DBG and Comcar's respective post-termination rights and obligations. Comcar has since filed for declaratory relief concerning the contract termination agreement, and that action is currently

pending in the United States District Court for the Middle District of Florida.

In connection with the Florida litigation, DBG discovered that in the fall of 2007 Comcar asked Argus to offer an opinion as to whether the commissions being paid to DBG were reasonable and provided Argus with various documents for review. DBG alleges that these documents were confidential and included the DBG/Comcar scope of service agreement and the financial renewal calculation. Argus alleges that the information provided was not confidential and surrounded Comcar's insurance plan, which came from United Health Care and not DBG. DBG also discovered that following Comcar's termination of its client agreement with DBG, Comcar hired Argus to provide its brokerage services.

This lawsuit arises out of DBG's claim that Argus used the confidential information provided to it by Comcar to create a lower competing offer and thereby wrongfully induced Comcar to breach its client agreement with DBG. DBG claims that because Argus had knowledge of DBG's pricing information, Argus knew that its "bad-faith take-over of DBG's relationship with Comcar" would cause DBG significant losses. DBG asserts claims for tortious interference with contractual relations, business

relations, or potential business relations, attorney's fees and expenses pursuant to O.C.G.A. § 13-6-11, and punitive damages.

In its motion to dismiss, Argus asserts that DBG has failed to state a claim upon which relief can be granted and that DBG has failed to join Comcar as an indispensable party. Argus also requests, in the alternative, that the Court order that DBG provide a more definite statement of its claims.

II. Discussion

A. Legal Standard

A pleading must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (modifying the traditional 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Furthermore,

“where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

The allegations in DBG’s complaint are presumed to be true at this stage, and all reasonable factual inferences must be construed in its favor. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft*, 129 S. Ct. at 1949.

B. Analysis

To establish a claim for tortious interference under Georgia law, “whether asserting interference with contractual relations, business relations, or potential business relations,” a plaintiff must prove the following four elements: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third party to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and

(4) the defendant's tortious conduct proximately caused damage to the plaintiff. *Disaster Servs. v. ERC P'ship*, 228 Ga. App. 739, 740, 492 S.E.2d 526, 528 (1997). To satisfy this four-part test, a plaintiff must show more than that the defendant simply persuaded a person to break a contract. *Sommers Co. v. Moore*, 275 Ga. App. 604, 605-606, 621 S.E.2d 789, 791 (2005).

Although DBG may have arguably pleaded facts to support the establishment of the third element of its tortious interference claim, it has failed to do so with respects to elements one, two and four.

With respect to the first element, Georgia courts have defined "improper action or wrongful conduct" as "wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." *Sommers*, 275 Ga. App. at 606, 621 S.E.2d at 791 (quoting *Disaster Servs.*, 228 Ga. App. at 741-42, 492 S.E.2d at 528-29). DBG alleges that in "[u]sing DBG's confidential pricing structure, fee schedules, and Scope of Services Agreement and other confidential and proprietary information of DBG, Argus improperly and without privilege induced Comcar to breach the

Client Agreement with DBG.” DBG claims that “Argus was able to use DBG’s confidential and proprietary information to gain an unfair negotiating advantage” and that “[b]ased on Argus’s agreement to provide Comcar broker services for a lower fee than DBG was providing, on or about May 29, 2008, Comcar provided notice to DBG that it was terminating the Client Agreement effective immediately, in breach of paragraph 2 of the Client Agreement.”

Although the “use of confidential information” fits squarely within the Georgia courts’ definition of improper action or wrongful conduct, there are no facts to support DBG’s contention that Argus used the allegedly confidential information in a predatory manner, outside the scope of its role as a consultant to Comcar, to create a deliberately lower offer for insurance brokerage services. DBG’s allegations are nothing more than legal conclusions, which are not entitled to the presumption of validity.

With respect to the second element—whether Argus acted purposely and with malice with the intent to injure—DBG again relies on broad statements and legal conclusions. DBG claims that “[s]ince, among other things, Argus had reviewed and was familiar with the confidential, proprietary information of DBG, including the Client Agreement, in the fall

of 2007 and had conversations with Comcar about its continuing relationship with DBG, Argus knew that the Client Agreement between DBG and Comcar was renewed until June 15, 2009 because no party had timely terminated the Client Agreement.” Thus, DBG alleges that “Argus wrongfully misappropriated the confidential/propriety information to unjustifiably end the DBG/Comcar business relationship.” However, DBG never explains what actions Argus took to induce Comcar to breach its contract or why these actions amount to malice with the intent to injure. Nor does DBG otherwise support its many legal conclusions with facts.

Finally, with respect to the fourth element—causation—despite DBG’s repeated insistence that Argus induced the Comcar’s breach and that DBG was injured by this action, DBG has failed to plead any facts regarding what steps Argus took to persuade Comcar to end its relationship with DBG. It remains unclear why Comcar breached the agreement, and there are no facts in the complaint to suggest that Comcar’s breach was a proximate result of Argus’s advice, which was given many months prior to Comcar’s decision to breach the client agreement. Indeed, the fact that Comcar requested Argus’s consultation on the reasonableness of the commissions being paid to DBG suggests that Comcar may have become displeased with

its contract with DBG well before it entered into any relationship with Argus. The alleged actions taken by Argus strike the Court as being characteristic of fair competition rather than any tortious interference. See *Orkin Exterminating Co. v. Martin Co.*, 240 Ga. 662, 666, 242 S.E.2d 135, 138 (1978). Georgia law requires a plaintiff to establish a causal connection between the improper act and the interrupted relationship. *McDaniel v. Green*, 156 Ga. App. 549, 551, 275 S.E.2d 124, 127 (1980). DBG has failed to allege facts to support a causal connection here.

In sum, DBG has failed to plead facts sufficient to state a claim for tortious interference with contractual relations, business relations, or potential business relations that is plausible on its face. Ultimately, the facts in the complaint do not permit the Court to infer more than the mere possibility of misconduct, which is insufficient to show that DBG is entitled to relief.¹

The Court makes one additional finding. In three sentences at the end of its response in opposition to Argus's motion to dismiss, DBG appears to make a request for leave to amend its complaint. However,

¹ Because the Court has granted Argus's motion to dismiss on the grounds that DBG has failed to state a claim upon which relief can be granted, there is no need to address Argus's additional argument that DBG's claim should be dismissed for failure to join Comcar as an indispensable party.

DBG's request is improper. It is well settled in the Eleventh Circuit that a party seeking to amend its complaint must file a motion and attach the proposed amendment. *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006) (denying the plaintiff's request to amend its complaint that was made in a brief because the plaintiff failed to file a motion stating the grounds upon which the court should grant leave, along with the substance of the proposed amendment). Because DBG has failed to follow these steps, its request to amend its complaint is denied.

III. Conclusion

For the foregoing reasons, the Court GRANTS Defendant Argus Holdings, Inc.'s motion to dismiss for failure to state a claim [6]. The CLERK is DIRECTED to close this case.

IT IS SO ORDERED this 30th day of September, 2010.



Timothy C. Batten, Sr.
United States District Judge