[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED J.S.C. PART 60

Index Number : 600032/2005

APPINTELLIGENCE, INC.

vs

HALPER, STEVEN

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

... were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

**This motion is decided in accordance with the accompanying memorandum decision.**

**SO ORDERED**

Dated: 3/31/06

BERNARD J. FRIED J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------X

APPINTELLIGENCE, INC.

Plaintiff,

Index No. 600032/2005

-against-

STEVEN HALPER,

Defendant.

----------X



**APPEARANCES:**

For Plaintiff:

Lowenstein Sandler PC
1155 Avenue of the Americas; 18th Flr.
New York, New York 10020
(Steven M. Hecht)

For Defendant:

Law Offices of Eric J. Grannis
620 Fifth Avenue
New York, New York 10020
(Eric J. Grannis)

**FRIED, J.:**

Defendant Steven Halper moves for an order dismissing the fifth, sixth, and seventh causes of action on the grounds that plaintiff AppIntelligence, Inc. does not have the legal capacity to sue and the pleadings fail to state a cause of action.

The following allegations are taken from the complaint. AppIntelligence provides fraud detection services to mortgage lenders throughout the country. In 1995, defendant, Udi Toledano, Herbert Turk, and Steven Hourigan founded New City Asset Management, Inc., (NCAM), the predecessor company of AppIntelligence. Initially, defendant, Toledano, and Turk owned thirty percent of NCAM, and Hourigan owned a ten percent interest in NCAM. In April 1998, defendant, Toledano, and Turk transferred five percent of their respective

ownership interests of NCAM to Hourigan (Hourigan Transfer), so that each of the founders would have an equal twenty-five percent interest in the company.

On October 23, 2000, defendant, in his capacity as President of NCAM, executed an agreement and plan of merger between NCAM and M/C Acquisition Sub, Inc. (NCAM Agreement) and AppIntelligence became NCAM's successor by merger. During the same month, AppIntelligence obtained a "Series A" round of financing. As a result, defendant received various stock options from AppIntelligence and from Toledano that doubled his ownership interest in AppIntelligence to more than one million shares. A stockholders' agreement was executed on October 13, 2000 and was amended on October 23, 2000 and February 25, 2002 (Stockholders' Agreement).

Pursuant to Section 5(a) of the Stockholders' Agreement, if stockholders owning a majority of the shares of AppIntelligence subject to the Stockholders' Agreement (Controlling Stockholders) propose to sell, transfer, or otherwise dispose of (including by merger): (i) 75% or more of the outstanding capital stock of AppIntelligence; or (ii) all or substantially all of the company's assets, for cash in a bona fide arms-length transaction to a third-party who is not an affiliate of AppIntelligence or of the Controlling Stockholders, then the Controlling Stockholders may, at their option, require the other stockholders who are parties to the Stockholders' Agreement (Minority Stockholders) to consent and raise no objections to such sale (Drag Along Right).

Defendant was removed as AppIntelligence's Chief Executive Officer in 2002 and his employment was terminated in April 2003. On December 16, 2004, defendant forwarded a letter to AppIntelligence threatening to sue the company for oppression, corporate waste,

and coercion. The letter also maintained that his ownership in AppIntelligence had been unfairly diluted pursuant to a "Series B Preferred Stock and Warrant Purchase Agreement" dated February 25, 2002.

On December 31, 2004, AppIntelligence entered into an agreement and plan of merger whereby it would be sold for cash to a third-party buyer (Buyer) that formed a new entity, ISO Acquisition, Inc. On the same date, AppIntelligence's Controlling Stockholders provided defendant with notice of their exercise of the Drag Along Right under the Stockholders' Agreement. The merger closed on January 14, 2005 (Merger).

On March 4, 2005, AppIntelligence commenced this action for a declaratory judgment against defendant asserting that: (1) defendant had not been oppressed, (2) defendant's interests had not been unfairly diluted as a shareholder of AppIntelligence or its predecessors, (3) the documents, agreements and representations that defendant signed as a corporate officer, director, or shareholder of AppIntelligence were made without duress or coercion, and (4) there had been no waste or misuse of company assets with respect to which defendant has been damaged. The complaint also sets forth causes of action for tortious interference with contract, tortious interference with prospective business advantage, and prima facie tort.

Defendant contends that he is entitled to dismissal of the fifth cause of action (tortious interference with contract), the sixth cause of action (tortious interference with prospective business advantage, and the seventh cause of action (prima facie tort) because the pleadings fail to allege the elements necessary to establish each individual tort. Defendant also contends that the injuries alleged in the complaint do not harm

AppIntelligence as a corporation or the newly-formed merged entity. Defendant argues that if the complaint has alleged an injury, that injury applies only to AppIntelligence's former *shareholders and not the corporation itself.* Therefore, as to the claims for tortious interference with contract, tortious interference with prospective business relations, and prima facie tort, AppIntelligence lacks capacity to sue.

Defendant has not demonstrated that AppIntelligence lacks the legal capacity to sue as to the causes of action that are the subject of this motion. However, discussed below, the factual allegations in the fifth, sixth, and seventh causes of action fail to manifest causes of action cognizable at law (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994])

Defendant has not established his entitlement to dismissal under CPLR 3211(a) (3). The parties do not dispute, and I agree, that Delaware law governs the threshold issue of legal capacity to sue. Under New York law, issues relating to the internal affairs of a corporation, which include matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders, are decided in accordance with the law of the state of incorporation (*see BBS Norwalk One, Inc. v Raccolta, Inc.*, 60 F Supp 2d 123, 129 [SD NY 1999], *affd* 205 F3d 1321 [2d Cir 2000]). AppIntelligence is seeking a declaratory judgment against defendant, a former officer and current shareholder of AppIntelligence, stating that it has not committed acts of corporate waste, dilution, duress or coercion. Thus, the law of Delaware, the state where Appintelligence was incorporated, governs the threshold issue of legal capacity to sue.

Under Delaware law, a court must first ascertain whether a controversy involves a direct or derivative action before it can determine if a party has legal capacity to sue (*Tooley*

*v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del 2004]). The analysis to distinguish between direct and derivative actions must be based on the following two questions: (1) who suffered the harm - the corporation or the suing stockholder individually - and (2) who would receive the benefit of the recovery or other remedy (*id.* at 1035).

The complaint alleges that defendant improperly interfered with the Merger between AppIntelligence and Buyer. Specifically, defendant forwarded a letter to AppIntelligence wherein he threatened to commence a lawsuit against the corporation. The letter expressed defendant's belief that he had a valid claim against AppIntelligence for corporate waste, dilution, coercion, and oppression following the Series B Preferred Stock and Warrants Purchase Agreement, a Stock Incentive Plan, and the proposed merger between AppIntelligence and Buyer (Exhibit A, ¶¶ 22-30 to Affirmation of Eric J. Grannis). As a result, AppIntelligence was required to establish an escrow account in the sum of $2.9 million to cover defendant's claims and compelled to incur unnecessary fees and expenses in connection with the Merger. Consequently, the complaint alleges harm to the corporation directly and to all of the shareholders indirectly.

As for the second prong of the two-part test, it appears that an escrow fund was designed to protect Buyer from any costs involving indemnification or liability arising from defendant's allegations of corporate waste and dilution against AppIntelligence. Although the complaint alleges that wrongful transactions associated with the Merger (such as the creation of an escrow account due to defendant's wrongful conduct and statements) reduced the amount paid to AppIntelligence's stockholders, it does not allege that the price paid in the Merger was unfair or that the Merger involved unfair dealing (*see Parnes v Bally*

*Entertainment Corp.*, 722 A2d 1243, 1245 [Del 1999]). A stockholder must challenge the validity of the merger itself in order to obtain relief for injuries that are independent of any injury to the corporation (*id*). Here, there is no such allegation, and thus, the relief is owed to AppIntelligence. Therefore, defendant has failed to establish that AppIntelligence lacks capacity to sue.

In the alternative, defendant argues that the fifth, sixth, and seventh causes of action are not validly stated. The test on a motion to dismiss for insufficiency of the pleadings is not whether the pleader has artfully drafted the pleading but whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (e.g., *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243 [1st Dept 2000]).

AppIntelligence has failed to validly plead a cause of action for tortious interference with contractual relations. A cause of action for tortious interference with contractual relations requires: (1) the existence of a valid contract between plaintiff and a third-party, (2) defendant's knowledge of that contract, (3) defendant's intentional procurement of the third-party's breach of the contract without justification, (4) actual breach of the contract, and (5) damages resulting therefrom (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]).

The fifth cause of action alleges that defendant knew of the merger agreement between AppIntelligence and Buyer and that he intentionally, and without justification, engaged in improper acts to derail the Merger. It further alleges that defendant engaged in

such conduct for the sole purpose of harming AppIntelligence (Exhibit A, ¶¶ 23-28 to Affirmation of Eric J. Grannis). The degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of their enforceable legal rights (*NBT Bancorp v Fleet/ Norstar Fin Group*, 87 NY2d 614, 621 [1996]). It is undisputed that the Merger between AppIntelligence and Buyer was effectuated on January 14, 2005 (Exhibit A, ¶¶ 20-23 to Affirmation of Eric J. Grannis). It is also undisputed that on December 31, 2004, defendant received notice of the pending Merger (*id.*). However, AppIntelligence fails to allege an actual breach of the parties' agreement and fails to allege any damages (*id.* at ¶¶ 84-87). What AppIntelligence desired was a merger, and, upon sale of the controlling shares, the Merger was effectuated (*id.* at ¶¶ 20-23). Thus, without an allegation that defendant's deliberate interference resulted in a breach of that contract, AppIntelligence's fifth cause of action for tortious interference with contract cannot be sustained (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d at 621).

AppIntelligence has also failed to validly plead a cause of action for tortious interference with prospective business relations. AppIntelligence must demonstrate that a contract would have been entered into but for defendant's conduct (*American Preferred Prescription v Health Mgt. Inc.*, 252 AD2d 414, 418 [1998]). In addition, AppIntelligence must establish that defendant acted solely out of malice or employed wrongful means to procure said breach (*id.*). The sixth cause of action alleges that: (1) defendant knew of the Merger and attempted to derail its execution through improper acts, (2) defendant's conduct was intentional and done solely for the purpose of harming AppIntelligence, (3) AppIntelligence was damaged by defendant's interference because it was required to

establish the escrow account in the amount of $2.9 million dollars to cover defendant's false claims, and (4) the establishment of the escrow account will deprive AppIntelligence's shareholders of receipt of those funds for years to come (Exhibit A, ¶¶ 88-92 to Affirmation of Eric J. Grannis). As stated above, the Merger was successfully consummated between AppIntelligence and Buyer on January 14, 2005, fourteen days after AppIntelligence entered into an agreement and plan of merger with Buyer (*id.* at ¶¶ 20-23). The complaint fails to allege that the contract was thwarted or that it would have been executed but for defendant's conduct (*American Preferred Prescription v Health Mgt., Inc.*, 252 AD2d 414, *supra*).

AppIntelligence has also failed to validly plead a cause of action for prima facie tort. The requisite elements of a cause of action for prima facie tort include: (1) intentional infliction of harm, (2) that results in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise by lawful (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d at 258). The seventh cause of action alleges that: (1) the false allegations and other actions by defendant in attempting to derail the Merger were intentional, malicious and without moral or social justification, (2) as a direct and proximate result of defendant's conduct described therein, AppIntelligence has suffered substantial losses in an amount to be determined at trial, and (3) AppIntelligence stands to suffer additional injury that cannot be fully compensated at law (Exhibit A, ¶¶ 93-95 to Affirmation of Eric J. Grannis). The complaint states, in a conclusory fashion, unsupported by factual allegations, that defendant's sole intent was to harm AppIntelligence. Generally, on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations such as these consisting of bare legal conclusions are not

entitled to such consideration (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d at 259). The seventh cause of action also fails to allege any special damages, a required element to establish a prima facie tort (*9 E. 38th St. Assoc. LP v George Feher Assoc.*, 226 AD2d 167, 168 [1st Dept 1996]).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the fifth, sixth, and seventh causes of action of the complaint are dismissed.

Dated: May 3, 2006

ENTER:

J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
MAY 05 2006
COUNTY CLERK'S OFFICE
NEW YORK