Algomod Tech. Corp. v Price
2007 NY Slip Op 34510(U)
January 30, 2007
Sup Ct, New York County
Docket Number: 110464/06
Judge: Richard B. Lowe III
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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ALGOMOD TECHNOLOGIES CORP.

Index No: 110464/06

Plaintiff

-against-

DECISION AND ORDER

KEVIN PRICE and DONNA LANGDON

Defendants

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FILED
FEB 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE III, J:

Motion sequences 001 and 003 are consolidated for disposition.

Plaintiff Algomod Technologies Corp. ("Algomod") brings this action against defendants Kevin Price ("Price") and Donna Langdon ("Langdon") (collectively "the Defendants") for their alleged interference with its contract with Verizon 's IT Global Resource Vendor Management Organization ("VMO"). In Motion Sequence 001, Defendant Langdon moves to dismiss the action pursuant to CPLR 3211(a)(1) and (a)(7). Defendant Price moves for dismissal on the same grounds in Motion Sequence 003.

001
003

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BACKGROUND

Algomod is a corporation organized under the laws of New York with its principal place of operations there. It is in the business of placing technology consultants in temporary and permanent jobs.

In 1998, Algomod became a preferred supplier of consultants for VMO. Known as a "Tier 1 Vendor", Algomod joined a small group of vendors who receive requests for consultants from VMO through a computer system known as the Vendor Management System ("VMS"). In response to VMO's requests, the Tier 1 Vendors submit their candidate's resumes through the VMS. The VMS was a blind submission system; VMO never knew which vendors sent in specific resumes. Furthermore, vendors were prohibited from contacting VMO's hiring managers regarding open positions and candidate applications; this was to continually preserve the blind-submission process' integrity. In 2003, the blind-submission process was eliminated; now it is known who sent each resume, and vendors are free to contact the hiring managers regarding their respective candidates.

In 2001, Algomod and VMO entered into a contract that governed the provisions for the consulting services. This included, *inter alia*, the manner in which VMO would pay Algomod, and the consultant's required background and obligations should they be selected. The contract does not mandate that VMO maintain Algomod's Tier-1 status, nor does VMO guarantee that it will select any candidate submitted by Algomod.

Langdon is a New York resident, and a manager at VMO. She is responsible for supervising the procurement process, and assessing the performance and selection of Tier 1 Vendors. Price is a Texas resident, and a VMO executive. He is Langdon's supervisor.

In early November 2004, VMO and Algomod executed an amendment to their agreement that extended it until November 30, 2007. Shortly thereafter, Algomod was removed from its preferred-vendor status. This was despite the fact that VMO previously gave it accolades for the high-quality consultants it procured. Algomod alleges that since early November 2004, it has not received any requests from VMO and cannot access the VMS.

In the instant action, Algomod avers that it is because of the Defendants' malicious actions that they were initially removed from the Tier-1 status and no longer receive any requests from VMO. In the instant motion, the Defendants aver that Algomod fails to sufficiently plead a cause of action against them, warranting the action's dismissal pursuant to CPLR 3211(a)(1) and (a)(7).

DISCUSSION

In its complaint, Algomod does not clearly identify the cause of action it is pursing against the Defendants. Rather it alleges "Upon information and belief, said defendants intended to and did induce the VMO to terminate the contract by, among other things, engaging in malicious practices. . ." (*Complaint at page 2, paragraph 6*) Since the contract at issue is terminable at will, it therefore appears that Algomod is asserting a cause of action for tortious interference with a prospective business relationship.[1] "Agreements that are terminable at will

[1] In its Opposition Papers, Algomod avers that it "adequately plead all of the elements for a claim for

are classified only as prospective contractual relations. . ." (*American Preferred Prescription, Inc v Health Management, Inc,* 252 AD 2d 414 [1st Dept 1998].)

I. *Dismissal Pursuant to CPLR 3211(a)(1)*

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is grounded in documentary evidence." (*CPLR 3211(a)(1)*) Factual claims that are "either inherently incredible or flatly contradicted by documentary evidence" are to be dismissed pursuant to CPLR 3211(a)(1). (*Kliebert v. McKoan,* 228 AD 2d 232 [1st Dept 1996].) Algomod avers that its contract with VMO was breached. The Defendants contend that the contract was not breached and is still in effect, since its termination date is not until November 30, 2007.

In further support of their contention, they direct this Court to the fact that the contract was terminable at will because it entitled VMO to end it "for its own convenience. . .without any liability." (*Obeid Aff, Ex.A at page 5, paragraph 9.4*) Furthermore, it also expressly states that VMO "does not promise or guarantee that it will order any amount or type of Technical Services from Supplier." (*Id at page 1, paragraph 1.2*) The contract also does not reference Algomod's Tier-1-Vendor status, nor does it mandate that VMO must retain its status for the duration of the contract. (*Id*) Therefore, they conclude, VMO had no obligation to retain Algomod's preferential status and was free to select or not select its candidates.

Dismissal pursuant to CPLR 3211(a) is proper when "the documentary evidence utterly refutes plaintiff's factual allegations. . ." (*Goshen v Mutual Life Insurance Co of New York,* 98

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tortious interference with contractual relations, be it current or prospective." (*Memo in Opp'n at page 11*)

NY 2d 314 [2002].) The fact that the contract does not provide for VMO to retain Algomod's Tier-1 status nor require the former to select any of the latter's candidates does not refute the complaint's factual allegations. Indeed, while these may not have been VMO's contractual obligations, that is not to say that the Defendants could not have influenced it to decide as it did. Therefore, the contract itself does not provide a sufficient basis to refute Algomod's allegations, and the motion to dismiss pursuant to CPLR 3211(a)(1) is therefore denied.

II. *Dismissal Pursuant to CPLR 3211(a)(7)*

"A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. . ." (*CPLR 3211(a)(7)*) In a motion to dismiss, the court takes the facts as alleged in the complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see AG Capital Funding Partners, LP v State Street Bank and Trust Co*, 5 NY 3d 582 [2005]). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Ackerman v 204 East 40th Owners Corp.*, 189 AD 2d 665 [1st Dept 1993].)

<u>*The Complaint*</u>

The elements of a tortious interference with a prospective business relationship are that the Defendant knew of the proposed business relationship between the Plaintiff and a third party and wrongfully and intentionally interfered with it; the parties would have commenced the relationship but for the Defendant's interference; and the Plaintiff sustained damages. (*See, NBT*

Bancorp v Fleet/Norstar Financial Group, Inc, 87 NY 2d 614 [1996].) In reviewing the Defendants' motions to dismiss pursuant to CPLR 3211(a)(7) , a court need not look to see if Algomod proves its claim in the pleadings; rather it will look only to see if it states a cognizable cause of action despite how poorly drafted it may be. (*See Mandelblatt v Devon Stores,* 132 AD 2d 162 [1st Dept 1987].)

Here, there is no dispute that Defendants, as the VMO executives charged with overseeing the consultant-selection process, knew about the existence of the Algomod-Verizon relationship. There is also no dispute that as of November 2004, Algomod lost its preferred status and has not received the amount of business it did in previous years. This Court is now left to determine whether Algomod sufficiently pleads an interference with said business relationship and that VMO would have selected its candidates but for the alleged interference.

Within its complaint, Algomod avers that:

> [The] defendants intended to and induced the VMO to terminate the contract by. . .engaging in malicious practices that lead to the abuse of the procurement process by certain vendors; purposely overlooked the practices of certain vendors who were in clear violation of [the VMO policies]; steering assignments to less qualified vendors; and showing favoritism in allowing certain vendors to shortcut the purchasing process.

(*Id, page 6, paragraph 20*)

It also alleges that the Defendants hired JV Kelly Associates, a company with questionable credentials, to conduct an internal audit of the quality of candidates VMO receives through VMS. Upon Algomod's information and belief, the Defendants in conjunction with the auditor misrepresented the latter's report in order to steer VMO business towards those vendors "whom [the Defendants] were receiving reciprocating favoritism or promises." (*Id.*) Algomod ends its

complaint by contending that the Defendants perpetrated their "surreptitious goals by, *inter alia,* eliminating the blind VMS selection process (*Id at page 7, paragraph 21*) and...

In order for Algomod to overcome the motion for dismissal, the complaint must not allege mere conclusions; it must plead that she acted outside the employment scope or received a personal benefit from her alleged interference; and it must plead that the her conduct was a crime, independent tort, or was done for the sole purpose of inflicting intentional harm on Algomod. (*See Joan Hansen & Co, Inc v Everlast World's Boxing Headquarters Corp,* 296 AD 2d 103 [1st Dept 2002].) Each will be addressed in turn.

a. Conclusory Allegations

"Failure to plead in nonconclusory language establishing all the elements of. . .[an] intentional interference in the contractual relationship requires dismissal of the action." (*Joan Hansen & Co, supra*) First, Algomod concludes that its removal as a Tier-1 Vendor is due to the Defendants' malfeasance. But it fails to plead specific allegations to support the contention. Instead, Algomod reaches its ultimate determination that only the Defendants could have caused its demotion without demonstrating how they induced VMO to do this. This "mere conclusion" is insufficient to avoid a motion to dismiss.

Second, Algomod summarily concludes that the Defendants caused VMO to no longer select its candidates, but it does not aver how this alleged interference occurred. Rather, it builds its broader, final conclusion that the Defendants tortiously interfered with the business relationship by enumerating a number of smaller conclusory contentions that the Defendants "abused" the system, "overlooked" other vendors' improper behavior, and improperly "steered"

favored clients to VMO. But Algomod fails to specify how the Defendants "abused, overlooked, and improperly steered" in order to reach their untoward goal. Accordingly, Algomod does not establish the elements needed to sufficiently plead that VMO did not select its candidates because of the Defendants' interference.

Third, Algomod contends that the Defendants improperly collaborated with JV Kelly Associates and derived a personal benefit from the vendors who benefitted from this collusion. However, Algomod fails to plead the reciprocating favors the Defendants allegedly received from these vendors. Nor does Algomod identify those competitors who participated in this alleged conspiracy, or the manner in which the plan was carried out.

Finally, Algomod's complaint is void of any nonconclusory allegation that but for the Defendants' alleged interference, VMO would not have demoted Algomod and would have continued to select its candidates. Algomod therefore fails to plead an element of the cause of action it is pursuing against the Defendants, which warrants the complaint's dismissal (*See NBT Bancorp, supra*)

b. Within the Employment Scope or Personal Benefit Received

A plaintiff who brings a wrongful interference claim against an employee of one of the parties to the contract "must allege that their acts were taken outside the scope of their employment or that they personally profited from it." (*Courageous Syndicate Inc v People-to-People Sports Committee,* 141 AD 2d 599 [2nd Dept 1988].) First, while Algomod concludes that the Defendants acted "outside the scope of their employment" (*Complaint at page 7, paragraph 22*), it does not plead how these alleged actions were performed outside of the

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employment relationship. The Defendants were employed by VMO when the decision was made to terminate Algomod's preferred status and no longer select any of its candidates. The complaint does not contain any pleading that indicates to this Court that the Defendants were not acting in accordance with VMO's directives. An employee charged with inducing the breach of a contract is immune from liability if it appears she/he acted within the employment relationship. (*See Murtha v Yonkers Child Care Assoc,* 45 NY 2d 913 [1978].) Since it appears the Defendants were acting within their employment scope, they cannot be held responsible for interfering with the Algomod-VMO relationship.

Second, Algomod only offers a conclusory allegation that the Defendants received a personal benefit from the alleged scheme with JV Kelly Associates. As discussed, *supra,* since Algomod fails to identify the personal benefit received, the complaint is insufficient to sustain its claim.

c. Crime, Independent Tort, or Done to Inflict Harm on Algomod

To successfully plead wrongful interference, the plaintiff must allege that the Defendants' conduct was a "crime, independent tort, or was done for the sole purpose of inflicting intentional harm on [the] plaintiff." (*Carvel Corp v Noonan,* 785 NYS 2d 359 [2004].) A pleading "cannot be maintained on bare allegations that [defendant's] acts were wrongful. . ." (*Bonanni v Straight Arrow Publishers, Inc,* 133 AD 2d 585 [1st Dept 1987].) In the complaint, Algomod conclusively alleges that the Defendants manipulated the auditor's report and received a *quid pro quo* for steering certain business towards unnamed vendors. But it fails to identify the tort or crime that this alleged action falls under. Furthermore, it is true that VMO removed

Algomod from its preeminent status. But Algomod does not sufficiently plead how the act of demoting it is a crime or tort on the Defendants' part. That the Defendants allegedly acted "maliciously", with no additional aversions, is insufficient.

Moreover, while there is no doubt that Algomod was harmed financially when VMO stopped sending consultant-requests to it, there is no allegation that this was done "for the sole purpose of inflicting harm" on Algomod. (*Lawrence v Union of Orthodox Jewish Congregations of America*, 32 AD 3d 304 [1st Dept 2006].) Indeed, the Algomod-VMO contract clearly stipulates that VMO bears no obligation to select Algomod's candidates. Algomod fails to plead that VMO did not act in accordance with the contract's terms.

Finally, even if Algomod plead the torts or crimes associated with the above-referenced bad acts, there is no indication that the Defendants conducted said activities outside of the scope of their employment. [2]

Accordingly, Algomod's complaint contains mere conclusory allegations; does not sufficiently plead that the Defendants' actions were outside their employment scope or that they received a personal benefit from it; and it does not identify any crimes or torts that they committed or that it was done for no other reason other than to intentionally harm Algomod. Therefore, the complaint insufficiently pleads a cause of action for tortious interference with a prospective contract.

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[2] See, *supra*.

If a complaint is found to be insufficient, "affidavits that contain sufficient detail, which are submitted in opposition, may cure any defects found in the complaint." (*See Leiderman v Gilbert,* 176 AD 2d 525 [1st Dept 1991].) Algomod proffers affidavits from two of its executives to supplement its complaint. Each will be addressed in turn.

The Obeid Affidavit

Diya Obeid, Algomod's CEO, attests that JV Kelly Associates was selected as the independent auditor because one of its principals, William Heaton, had a "personal relationship" with Langdon. (*Obeid Aff'd at page 8, paragraph 18*). Obeid additionally avers that JV Kelly Associates has "dubious qualifications" and was "sponsored by organizations which compete in the marketplace for. . .consulting positions. . ." (*Id*) Algomod was also told that it was removed as a Tier-1 Vendor as a "direct result" of JV Kelly's analysis. (*Id at page 9, paragraph 19*) Furthermore, Ryder Daniels, a JV Kelly Associates principal, told Obeid that Algomod provided "excellent consultants. . . to the business community" but there "was nothing he could do to get Algomod back on [VMO's Tier-1-Vendor] list." (*Id*)

Here, Obeid's attestation expands upon the allegations set forth in the complaint. He provides further detail as to Algomod's aversion that the Defendants improperly caused VMO to terminate its Tier-1-Vendor status. However, he fails to cure the complaint's defects.

First, because an executive in one entity conducts business with another entity due to an ongoing relationship does not rise to the level of inappropriateness. Indeed, it is common in the corporate world for executives to steer business towards favored individuals. Additional

allegations are needed to question this business deal; the mere conclusion that it is improper is insufficient to plead the instant cause of action.

Second, the aversion that JV Kelly Associates' reputation is questionable is unsupported. Obeid fails to specify why this auditor is ill-reputed, and therefore does not support the conclusion that he reached.

Third, while certain vendors who compete with Algomod for VMO's business may have supported the selection of JV Kelly Associates as the auditor, that fact alone is insufficient to demonstrate that the Defendants may have interfered with the Algomod-VMO relationship. Obeid concludes that because certain unidentified vendors benefitted from the auditor's report, the auditor's report must have been skewed. This conclusion is unsupported by additional allegations, and cannot survive a motion to dismiss.

Next, Obeid attests that Global Consultants, Inc ("GCI"), a Tier-1 Vendor, broke into the VMS system in order to "undercut the prices submitted [by competing vendors] on behalf of a given candidate" for the purpose of giving its own consultants an unfair advantage. (*Id at page 9, paragraph* 20). He further attests that GCI is known for "creating relationships and offering personal incentives to managers who subvert the procurement process." (*Id at pages 9-10, paragraph 21*) Despite GCI's alleged dubious actions, Langdon did not remove it as a Tier 1 Vendor, nor did she conduct any investigation on how GCI managed to penetrate the VMS. (*Id*) Obeid concludes by averring that "Langdon played favorites and allowed certain vendors. . .to undercut and undermine the process..." and thereby tortiously interfered with the Algomod-Verizon contract (*Id*)

Here, while Langdon did not reprimand GCI for improperly infiltrating the VMS after she learned about it, this is not evidence that she conspired with it regarding the actual break-in. First, the failure to move against GCI for its actions may indeed raise a question about VMO's business judgment. But to conclude that this proves acquiescence to GCI's alleged wrongdoing, without additional averments, is insufficient to plead the instant cause of action. Second, "but-for" pleading is absent. Algomod does not plead that VMO would have selected their candidates if not for Langdon's alleged malfeasance. Third, Obeid fails to attest that Langdon's failure to prosecute GCI was not at VMO's direction. Obeid's conclusion that Langdon acted outside the employment scope because he believes she "was forced into early retirement in or about July 2006" will not suffice. With no pleading to the contrary, this Court is left to assume that Langdon followed VMO's policy because she was in its employment at the time. Finally, while the allegation that GCI hacked VMO's computer system amounts to criminal behavior, there are insufficient allegations that Langdon participated in said criminal activity.

Lastly, Obeid attests that the Defendants violated VMO's protocols by hiring candidates outside of the VMS. Specifically, he avers that illegal aliens were hired from VMO's Texas office. (*Id at page 10, paragraph 22*). Since these candidates "do not have valid work documents, they cannot be processed through the VMS" because "VMS requires a social security number for processing" candidates. (*Id at pages 10-11, paragraph 22*). This interfered with Algomod's candidates because it circumvented a playing field that is supposed to be equal. (*Id)* Furthermore, Obeid alleges that the Defendants concocted this scheme in order for them to give preference to vendors of their choice, and was "no doubt. . .perpetrated outside the scope of

employment." (*Id*) In support that the Defendants acted outside of her employment relationship with VMO, Obeid attests that "Langdon was forced into early retirement in or about July 2006." (*Id at page 11, paragraph 23*)

Here, Obeid attests that the Defendants tortiously interfered with the contract because undocumented aliens were hired out of the Texas office. Indeed, this is a specific allegation about the Defendants' behavior that appears to support Obeid's conclusion. However, he does not attest that if the Defendants had not allegedly interfered, VMO would have given Algomod its business. Nor does he lend supporting allegations to this effect. Accordingly, Obeid's affidavit fails to rectify Algomod's defective pleadings.

The Lah Affidavit

Cynthia Leh, Algomod's Managing Director, attests that Langdon's subordinate Ann Marie Soto informed her that VMO was "terminating Algomod as a Tier-1 Vendor." (*Leh Aff'd at page 2, paragraph 4*) She affirms that while Soto provided that the reason for VMO's demotion was that it needed to "decrease its supplier base and Algomod" did not have a sufficient number of IT consultants, other VMO employees "seemed puzzled" by the decision. (*Id at paragraph 5*). Finally, Lah "was advised that [the decision to terminate Algomod's status] was made by defendants Langdon and her direct supervisor Kevin Price." (*Id*)

Here, Leh's attestation summarily includes that an audit was conducted, the results indicated that a cut-back was needed, Algomod did not meet the established criteria, and VMO executives made a permissible business decision to terminate Algomod's status. This affidavit is void of any allegations, nor does it supplement the complaint's deficiencies, that this was

wrongful; that VMO would have decided differently but for the Defendants' behavior; that this was not done within the employment scope; and that the Defendants committed a tort/crime or that this decision was meant solely to harm Algomod. Because some VMO staff members were perplexed as to the rationale for Algomod's demotion, that is insufficient to infer the Defendants' interference. Accordingly, Leh's affidavit does not cure Algomod's complaint's defects.

III. Algomod's Request for Discovery Pursuant to CPLR 3211(d)

Although Algomod requests discovery pursuant to CPLR 3211(d), this Court finds that the factual allegations in its complaint reveal no basis for establishing the Defendants' interference with the Algomod-VMO prospective business relationship. Accordingly, the request is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Langdon's motion to dismiss the complaint is granted and the Clerk of the court is directed to enter judgment in favor of Langdon, dismissing the complaint against her, with costs and disbursements to defendant as taxed by the Clerk; and it is further

ORDERED that Price's motion to dismiss the complaint is granted and the Clerk of the court is directed to enter judgment in favor of Price, dismissing the complaint against him, with costs and disbursements to defendant as taxed by the Clerk.

This shall constitute the decision and order of this Court.

Dated: January 30, 2007

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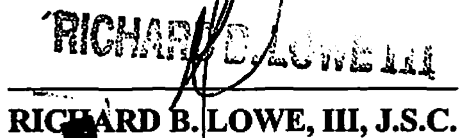

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