SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

PHILIP COCHEMS, individually and d/b/a FILMOR INDUSTRIES, COMPUTER HELP CENTER and JOHN BUDRIS,

Plaintiffs,

INDEX NO.: 013998/2006
MOTION DATE: 01/25/2008
MOTION SEQUENCE: 006

-against-

ROSICKI, ROSICKI & ASSOCIATES, P.C., ENTERPRISES PROCESS SERVICES, INC., THRESHOLD LAND, INC., WHITTIKER LEGAL PUBLISHING, INC., CYNTHIA ROSICKI, THOMAS ROSICKI, INTERNATIONAL ASSOCIATION OF INFORMATION TECHNOLOGY ASSET MANAGERS, INC. and "JOHN DOES 1 through 10",

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed..... 1
Affirmation in Opposition of Jeffrey L. Solomon, Esq. & Exhibits Annexed..... 2
Reply Affirmation of Ellen R. Stein, Esq. & Exhibits Annexed..... 3

This motion by defendant, International Association of Information Technology Asset Manages, (IAITAM), for an order dismissing the complaint is determined as follows.

Plaintiffs commenced this action on August 29, 2006 to recover the sum of $167,193.88 from the defendant law firm, Rosicki, Rosicki & Associates, (Rosicki), as compensation due for computer services provided in June and July of 2006. The above captioned action is related to

another action between, inter alia, Rosicki and plaintiff, concerning plaintiff's alleged practice of installing software for the law firm without ensuring that it was software license compliant. The moving defendant, IAITAM, was hired by Rosicki in April of 2006 to provide compliance audit services. At that time the Software & Information Industry Association (SIIA) had alleged that Rosicki was not in compliance with certain licenses of the software publishers whom SIIA represented.

After IAITAM finished its compliance audit, and reported it's findings which are not disclosed in the record sub judice, it continued to provide services to Rosicki to resolve the SIIA audit. It was at this time that Rosicki stopped paying plaintiff for the services it had provided over a long relationship. The issue underlying both law suits is whether plaintiff failed to keep Rosicki software license compliant or whether Rosicki instructed plaintiff to install unlicensed software as a cost saving plan. However, that issue need not be resolved for purposes of this motion.

The Amended Complaint, insofar as it pertains to IAITAM, pleads a cause of action for defamation, prima facie tort and interference with contractual relations.

Movant first argues a procedural dilemma which is that it is unclear whether Filmor Industries and Computer Help Center are corporations licensed to do business in the State of New York, or whether one or the other is a mere d/b/a of Philip Cochems, now deceased. See CPLR § 3015(b).

ITAIM also argues that jurisdiction is improper under CPLR § 302(a)(1) insofar as it is a foreign corporation and plaintiff's claim does not arise out its transaction of business within the State. It is argued that the moving defendant's business in the State was with Rosicki yet this law suit arises out of plaintiff's business relationship with Rosicki not with movant. See McGowan v Smith, 52 N.Y.2d 268, 272 (1981) (an arguable nexus between the business conduct in this state by a foreign corporation and the cause of action sued upon is necessary to create long arm jurisdiction.) However, it is the determination of the court that lack of jurisdiction is not a basis for dismissal of the suit insofar as ITAIM's compliance audit of a New York corporation is the basis for plaintiff's claim of defamation and other business torts. The fact that the compliance audit may have been conducted from the State of Ohio does not compel a different result given

the fact that the gravamen of the complaint against ITAIM is defamation and words know no boundaries. Both the conduct of a compliance audit with a New York business and public statements emanating from the process justify suit in New York.

Plaintiff's fifth cause of action for defamation arises out of movant's alleged statements to industry regulatory entities and diverse firms in the industry that plaintiffs "provided Defendants with illegal, pirated and unlicensed desktop software," and that they negligently performed computer services. Amended Complaint at ¶ 68.

The sixth and seventh causes of action allege prima facie tort as the aforesaid defamatory statements are alleged to have been made out of sheer ill will and were intended to deflect blame from the perceived truth that Rosicki invited plaintiff to install unlicensed, unauthorized software on a regular basis.

Movant argues that the alleged statements are not defamatory on their face, and the special damages which must, therefore, be alleged are lacking. Boyle v Stiefel Laboratories Inc., 204 A.D.2d 872, 875 (3d Dept 1994). Further, when the alleged attack is upon a corporation, it must impugn its reputation and is actionable only when the corporation is a public figure. If it is a public figure, the Bose test of whether the public corporation is embroiled in a public controversy and to what extent the plaintiff participated in that public controversy is applied. Bose Corp v Consumers Union of U.S. Inc., 466 U.S. 485 (1984).

Plainly a public controversy is an undercurrent in these lawsuits. The use of unlicensed software is an ongoing concern to the software industry and an irritation to compliant users. Plaintiffs are smack in the middle of it vis-a-vis the Rosicki firm. However, the cause of action for defaming loses its punch against ITAIM since they were hired to do exactly what they did which is to express an opinion, based on the findings of the audit, that Rosicki was or was not using pirated software. Those statements rather than being born of naked malice are cloaked with the common interest privilege which is afforded a person making a statement upon a subject upon which he or she or it has an interest or a duty to speak. Wyllie v District Attorney of County of Kings, 2 A.D.3d 714, 719 (2d Dept 2003); Boyle at 875.

In sum, the plaintiffs, as public figures either as a business or a corporation, must prove special damages and malice in the fifth and sixth causes of action to survive a motion to dismiss,

and, insofar as they have failed to do so, the motion is granted. Whatever was the motivation of defendant Rosicki in accusing plaintiffs of installing software without complying with licenses, it is not successfully imputed to ITAIM on the same factual allegations.

The sixth cause of action for prima facie tort requires a showing of an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful. It is necessary to show that there were special damages and that malevolence was the sole motivating factor. Lerwick v Kelsey, 24 A.D.3d 931 (3d Dept 2005); Mandelblatt v Devon Stores, 132 A.D.2d 162, 168 (1st Dept 1987). Moreover the special damages must be plead with particularity. Dembitzer v Chera, 305 A.D.2d 531, 533 (2d Dept 2003)(citing Freihofer v Hearst Corp., 65 N.Y.2d 135 (1985)). Based upon the reasoning for dismissal of the fifth cause of action so also is the sixth dismissed. A licensing software investigation by SIIA brought ITAIM's to Rosicki's computer system. Therefore, its findings could be critical without maligning or undermining the professional relationship they were born of, or that they were made with the intent to defame. To go further, what ever negative rhetoric plaintiffs accuse Rosicki of extrapolating from ITAIM's findings, they are imputed to ITAIM without the support of any objective statement, or concern for the basis of their involvement and, therefore, the privilege of common interest.

Generally, a claim of tortious interference with a contract requires proof of 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. White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 425-26 [2007]. An essential element of such a claim is that but for the intentional interference there would have been no breach. Lana & Sama, Inc. v Goldfine, 7 AD3d 300, 301 (1st Dept. 2004); Cantor Fitzgerald Associates, L.P. v Tradition North, 299 AD2d 204 (1st Dept. 2002), lv denied 99 NY2d 508 (2003). Moreover, where the contract breached is terminable at will, there can be no liability for tortious interference unless the means employed to induce the breach were wrongful. Baron Associates, P.C. v RSKCO, 16 AD3d 362 (2nd Dept. 2005); Koeppel v Schroder, 122 AD2d 780, 782 (2nd Dept. 1986).

The contracts between plaintiff and defendant were terminable at will. ITAIM was not a

stranger to the plaintiff before the contract was cancelled. It's advent upon the scene was lawful and its assumption of the responsibility to make Rosicki software licensing compliant is thoroughly reasonable, if not predictable under the circumstances The unfolding of events is the antithesis of wrongful measures used to induce a breach of contract.

On the basis of the foregoing, the motion by defendant ITAIM is granted, and it is ORDERED that the complaint is dismissed against ITAIM.

Dated: March 5, 2008

J.S.C.