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

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 602492/2007

ALGOMOD TECHNOLOGIES

VS.

PRICE, KEVIN

SEQUENCE NUMBER : 002

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE 12/20/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/12/08

HON. RICHARD B. LOWE, III 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 56

----------X

ALGOMOD TECHNOLOGIES CORPORATION,

Plaintiff,

-against-

Index No. 602492/07

KEVIN PRICE and DONNA LANGDON,

Defendants.

RICHARD B. LOWE III, J.:

Defendants Kevin Price and Donna Langdon move for an order, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7), dismissing this action in its entirety.

Plaintiff Algomod Technologies Corporation is in the business of procuring and placing temporary and permanent information technology consultants with institutional clients. Price is the director of nonparty IT Global Resource Vendor Management Organization (the VMO) and, as part of his employment, supervises Langdon, a VMO manager. The VMO, a division of Verizon, is one of the largest buyers of information technology consulting services in the United States. Algomod began servicing the VMO in 1985 and, in 1998, was selected as a preferred supplier, referred to as a Tier 1 vendor. In November 2001, Algomod and the VMO entered into a contract governing Algomod's consulting services. They subsequently extended the contract term to November 30, 2007.

In the complaint, Algomod alleges that, through a pattern of tortious and criminal conduct perpetrated outside the scope of their employment by the VMO, Price and Langdon facilitated and permitted others to hack into the VMO internal proprietary requisition and bidding system,

known as the Vendor Management System (the VMS), providing access to Algomod's proprietary information. Algomod alleges that it invested significant time and money into compiling candidate lists, skill sets, and pricing information. Algomod further alleges that defendants placed illegal aliens in positions at the VMO in breach of immigration laws and VMO policy, and hid this misconduct from the VMO by an audit performed by nonparty JV Kelly Associates. Algomod alleges that the audit results were based on data skewed by defendants' illegal hacking and hiring practices.

Algomod further alleges that defendants' conduct resulted in the removal of Algomod as a Tier 1 vendor and the loss of the confidentiality of its proprietary information. Algomod alleges that, but for defendants' misconduct, including defendants' circumvention of the VMO guidelines and applicable law, Algomod could have, and would have, bid on jobs and placed its candidates as it historically had done, receiving perhaps as much as $12 million a year in revenue. Algomod alleges that, since its removal as a Tier 1 vendor, it has not received a single new request for proposal (RFP) from the VMO and can no longer log onto the VMO procurement database to review new RFPs.

Algomod also alleges that the loss of its proprietary data compromised its business with the VMO and with other clients in the market. It further alleges that its damages can only be assessed through information and documentation solely in the possession and control of defendants and the VMO.

Algomod alleges that defendants, at all relevant times, were the gatekeepers of the VMO and thus had direct access to the entire VMS, which stores highly confidential and proprietary Algomod information, including Algomod candidate bids and the identity of potential Algomod

candidates, their skill sets, addresses, telephone numbers, social security numbers, employee work authorizations, qualifications, and hourly rates. Algomod alleges that only the VMO and Algomod itself were authorized to view its proprietary information.

In 2006, Algomod commenced an action before this court against Price and Langdon arising out of the same alleged misconduct as is alleged here (see Algomod Technologies v Price, Sup Ct, NY County, index no. 110464/06 [the prior action]). By decision and order dated January 30, 2007 and filed February 8, 2007 (the prior order), this court granted both defendants' motions to dismiss the complaint, pursuant to CPLR 3211 (a) (7). The court dismissed the claim for tortious interference with prospective business relations as defective on is face, primarily on grounds that the claim was based entirely on conclusory allegations of misconduct and personal gain, and that there was no indication that defendants acted outside the scope of their employment. The court also rejected Algomod's request for discovery, pursuant to CPLR 3211 (d), finding that "the factual allegations in [Algomod's] Complaint reveal no basis for establishing the Defendants' interference with the Algomod-VMO prospective business relationship" (Prior Order, at 15).

Algomod chose not to move to reargue defendants' motions or to appeal the prior order.

Instead, on July 24, 2007, Algomod commenced the instant action against Price and Langdon, asserting causes of action for conversion of Algomod proprietary information, conspiracy in the conversion of the information by an Algomod competitor, nonparty Global Consultants, Inc. (GCI), and tortious interference with Algomod's prospective business relations with the VMO. On these claims, Algomod seeks to recover $50 million.

Defendants now seek to dismiss the complaint, first, as barred by the doctrine of res

judicata.

In opposition, Algomod admits that both actions are asserted against the same two individuals and are based on the same underlying circumstances. However, Algomod contends that the prior order does not bar the instant action because, among other reasons, the dismissal of the prior action was not on the merits.

A judgment dismissing a complaint for legal insufficiency, pursuant to CPLR 3211 (a) (7), is not on the merits, unless the judgment specifies otherwise or is based on a finding that the plaintiff had no viable claim, based on the facts alleged. Such dismissal does not bar a second complaint against the same parties asserting the same cause of action, providing that it corrects the pleading defects or omissions of the original complaint. Adelaide Prods., Inc. v BKN Intl. AG, 15 AD3d 316 (1st Dept 2005); Amsterdam Say. Bank v Marine Midland Bank, N.A., 140 AD2d 781 (3d Dept 1988).

In the original complaint in the prior action, Algomod asserted a claim for tortious interference with the Algomod/VMO contract and business relations with the VMO, while in the instant complaint, Algomod asserts claims for conversion of Algomod proprietary information, conspiracy and aiding and abetting the conversion of the information by another, and tortious interference with Algomod's prospective business relations with the VMO.

With regard to the tortious interference claim, while Algomod has indeed added some factual allegations, it has not cured all the pleading deficiencies that resulted in the dismissal of the original claim. The claim of "[t]ortious interference with business relations applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant. In such an action[,] the

motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact" (M.J. & K. Co. v Matthew Bender & Co., 220 AD2d 488, 490 [2d Dept 1995] [internal citations and quotations omitted]; see NBT Bancorp Inc. v Fleet/Norstar Fin. Group, 87 NY2d 614 [1996]). Further, the plaintiff must plead facts establishing each of these elements in non-conclusory language, in order to assert a legally cognizable claim of tortious interference (id.; Bonanni v Straight Arrow Publs., 133 AD2d 585 [1st Dept 1987]).

In the prior order, the court found that Algomod had failed to plead factual allegations sufficient to support its contentions that defendants intentionally and without justification caused the VMO to remove Algomod as a Tier 1 vendor and to cease selecting Algomod candidates for employment. The court noted that, inasmuch as the contract did not prohibit such actions, they could constitute tortious interference only if taken outside the scope of defendants' employment. The court also found that the prior complaint was devoid of any non-conclusory allegation that, but for defendants' alleged interference, the VMO would not have demoted Algomod and would have continued to select its candidates. In the instant complaint, Algomod has again failed to assert specific factual allegations in support of these contentions.

The court also found in the prior complaint that Algomod had failed to plead specific reciprocating favors that were allegedly reaped by defendants from vendors who benefitted from defendants' alleged collusion with JV Kelly, the identity of those vendors, and that defendants' misconduct occurred for no other reason than to intentionally harm Algomod. These deficiencies continue to exist in the complaint upon which the instant action is based.

The court then concluded that these failures constituted a failure to plead an essential element of the tortious interference claim and warranted dismissal of the claim.

For these reasons, the complaint in this action does not correct all the deficiencies of the original complaint. Therefore, the prior order has a res judicata effect and operates to bar the intentional interference with prospective business relations asserted in this action.

In addition, by its terms, the Algomod/VMO contract, as amended, remained in effect at the times the prior and current actions were commenced and remained in effect at least until November 2007, thus permitting current clients to use Algomod's services at will. In view of the existence of a contract, Algomod cannot satisfy the pleading requirement that it identify a contractual relationship that would have occurred, but for defendants' interference (see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103 [1st Dept 2002]; M.J. & K. Co. v Matthew Bender & Co., 220 AD2d 488, supra).

For these reasons, the branch of defendants' motion to dismiss the third cause of action for tortious interference is granted and the claim is dismissed.

Next, the claim asserted in the instant action for conversion of Algomod's proprietary information is fatally defective on its face. Algomod bases the claim on allegations that defendants allowed, and participated in, by providing confidential codes to GCI, GCI's hacking into the VMS in order to obtain Algomod's proprietary information and use it for GCI's benefit.

"[E]lectronic records that were stored on a computer and were indistinguishable from printed documents [are] subject to a claim of conversion in New York" (Thyroff v Nationwide Mut. Ins. Co., 8 NY3d 283, 292-293 [2007]). In order to state a viable claim for conversion, the plaintiff must plead facts demonstrating "the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights' " (State of New York v Seventh Regiment Fund, Inc., 98 NY2d 249, 259 [2002] [internal quotation

omitted]).

Here, Algomod has failed to allege any facts demonstrating that defendants themselves improperly accessed the VMS and converted the information. Further, and assuming without deciding, that the alleged hacking occurred, Algomod's allegations amount to nothing more than mere speculation that defendants must have helped GCI hack into the information simply because GCI was able to access the information.

Algomod has also failed to allege that defendants ever possessed the proprietary information or excluded Algomod from accessing it. "[A] defendant who, though having custody of goods, does not exclude the owner from the exercise of his rights is not liable for conversion" (id. at 256-260).

For these reasons, the branch of defendants' motion to dismiss the first cause of action for conversion is granted and the claim is dismissed.

The related claim for conspiracy by aiding and abetting GCI in its conversion of Algomod's proprietary information is fatally defective on its face. "In New York, there is no substantive tort of conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort" (Raymond Corp. v Coopers & Lybrand, 105 AD2d 926, 926-927 [3d Dept 1984] [internal citation omitted]; Jebran v LaSalle Bus. Credit, LLC, 33 AD3d 424 [1st Dept 2006]). "Although tort liability may be imposed based on allegations of conspiracy which 'connect nonactors, who might otherwise escape liability, with the [tortious] acts of their coconspirators' . . . , more than a conclusory allegation of conspiracy or common purpose is required to state a cause of action against such nonactor" (Schwartz v Society of N. Y. Hosp., 199 AD2d 129, 130 [1st Dept 1993], quoting Burns Jackson Miller Summit & Spitzer v

Lindner, 88 AD2d 50, 72 [2d Dept 1982], affd 59 NY2d 314 [1983]). As discussed above, Algomod has failed to state a cognizable cause of action for conversion, the tort underlying the conspiracy claim. Therefore, the conspiracy claim is not legally cognizable.

For these reasons, the branch of defendants' motion to dismiss the second cause of action for conspiracy is granted and the claim is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants Kevin Price and Donna Langdon as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 12 , 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III.

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK