SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Joseph J. Luscavage and Jack Sokoloff, D.D.S. v. Dominion Dental USA, Inc.
C.A. No. 06C-07-219 RRC

Submitted: February 12, 2007
Decided: March 20, 2007

Upon Defendant's Motion to Dismiss.
GRANTED.

Dear Counsel:

Before the Court is Defendant's motion to dismiss Plaintiffs' complaint. The issue is whether Plaintiffs' complaint is sufficient to state a claim for tortious interference with contract. Because the complaint fails to allege a breach of contract, it fails to adequately state a claim for tortious interference with contract. Furthermore, for reasons explained below, the

Court declines to allow Plaintiffs to amend their complaint for the second time. Therefore, Defendant's motion to dismiss is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Luscavage executed a one-year employment agreement with Defendant on December 22, 1999. The agreement contained a "non-compete" provision, which in part prohibited him from soliciting within the state of Delaware any customer, or potential customer of Defendant until six months after his employment with Defendant ended. Luscavage's employment agreement was not renewed but he remained an employee at will until August 12, 2005 until he voluntarily terminated his employment with Defendant.

Plaintiff Sokoloff signed an independent contractor agreement with Defendant on December 22, 1999, which in part prohibited him from soliciting or otherwise interfering with the employment relationship of any person employed by or rendering services to Defendant. Sokoloff terminated the agreement with Defendant on August 12, 2005.

In August 2005, both Plaintiffs obtained a contract from Blue Cross/Blue Shield of Delaware ("BCBS Consulting Contract") with an effective period of August 15, 2005 through August 14, 2007. According to Plaintiffs' original complaint, which contained five counts, "as a result of statements made by Defendant", Plaintiffs were "induced and obliged to end" the BCBS Consulting Contract. Defendant then filed its first motion to dismiss and Plaintiff subsequently amended the complaint, dropping four of the counts and altering the language of the one remaining count, tortious interference with contract. The complaint, as amended, now alleges that Defendant contacted BCBS and "caused BCBS to terminate" its agreement with Plaintiffs.

II. THE PARTIES' CONTENTIONS

Defendant claims that the one remaining claim in the complaint should be dismissed because in order to state a claim for tortious interference with contract, a party must allege a breach of contract. Therefore, Defendant asserts that because Plaintiffs' complaint only states that Defendant "caused BCBS to terminate the BCBS Consulting Contract," that as a matter of law, the claim for tortious interference of contract is insufficient. In addition, Defendant argues that Plaintiffs' complaint fails to allege any wrongful conduct on Defendant's part. Rather, Defendant alleges

that the complaint "only contains the conclusory allegation that [Defendant] acted without justification."

In response, Plaintiffs argue that they have pled "sufficient facts to allow the Defendant notice of the claim asserted as required by Superior Court Civil Rule 8." Thus, they do not concede that their complaint is deficient. If needed, however, Plaintiffs request leave to amend paragraph 16 of the complaint only to change the word "terminate" to "breach," thereby addressing Defendant's contention that the complaint does not allege the required breach of contract. Plaintiffs do not propose any other amendments to the complaint; they contend that the rest of the complaint contains all of the necessary elements to state a claim for tortious interference with contract, including that Defendant acted without justification.

III. STANDARD OF REVIEW

When deciding a motion to dismiss, "all factual allegations of the complaint are accepted as true."[1] "Where allegations are merely conclusory, however (*i.e.,* without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss."[2] The test for sufficiency for judging a motion to dismiss is "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[3] Therefore, dismissal will only be warranted "where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[4]

IV. DISCUSSION

A plaintiff must establish five elements to state a claim for tortious interference with contractual relations: "(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[5] Defendant claims that Plaintiffs have not properly pled the third

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[1] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[2] *Lord v. Souder,* 748 A.2d 393, 398 (Del. 2000).

[3] *Spence*, 396 A.2d at 968.

[4] *Hedenberg v. Raber,* 2004 WL 2191164, at *1 (Del. Super.).

[5] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987).

element because nowhere in the complaint is there an allegation that the BCBS contract was breached. Additionally, Defendant asserts that Plaintiffs have failed to adequately plead the fourth element because there is nothing in the complaint to suggest that Defendant acted without justification.[6]

"According to Delaware law, to succeed under [a tortious interference with contract] theory, there must be an actual breach of a valid and enforceable contract."[7] Plaintiffs' amended complaint asserts that Defendant "caused BCBS to terminate" its agreement with Plaintiffs. However, termination of a contract is not the same as breach of a contract.[8] Consequently, Plaintiffs have failed to plead a necessary element required to establish a claim for tortious interference with contract.

Although Plaintiffs do not concede that the amended complaint is deficient, they claimed for the first time at oral argument that Defendant caused BCBS to "breach" the contracts with both Plaintiffs. However, "[g]enerally, matters outside the pleadings should not be considered in ruling on a motion to dismiss."[9] Accordingly, because this allegation does not appear in the amended complaint (or in Plaintiffs' written response to Defendant's motion), the Court will not consider it. Therefore, Plaintiffs' amended complaint fails as a matter of law to state a claim for tortious interference of contract.[10]

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[6] Because the Court finds that the complaint is insufficient as to the third element of its claim, it need not reach Defendant's argument that the fourth and fifth elements are also inadequately pled.

[7] *See Ariba, Inc. v. Elec. Data Sys. Corp.*, 2003 WL 943249, at *5 (Del. Super.) (dismissing a plaintiff's claim for tortious interference of contract because the complaint alleged a termination of contract rather than a breach of contract). *See also Griffin Corporate Servs. LLC v. Jacobs*, 2005 WL 2000775, at *4 (Del. Ch.) (stating "an allegation of a breach is necessary to show entitlement to relief for tortious interference with an existing contract").

[8] *See Ariba*, 2003 WL 943249, at *5 (stating that a party "did not breach the contract, it terminated it"). *See also* Black's Law Dictionary 182, 1482 (7th ed. 1999) (defining "termination" as the "end of something" and "breach of contact" as a "[v]iolation of a contractual obligation").

[9] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del. 1995). *See also Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1987) ("In considering a motion to dismiss, only those matters referred to in the pleadings are to be considered by the Court.").

[10] *See, e.g., Griffin*, 2005 WL 2000775, at *5 (dismissing the plaintiff's claim for tortious interference with contract because the complaint did not allege a breach of contract); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020 (Del. Ch. 2006) (dismissing a plaintiff's tortious interference claim because it did not properly allege an underlying breach of contract claim); *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697 (Del. Ch. 2004) (holding that because the plaintiffs failed to state a claim

At oral argument, Plaintiffs requested an opportunity, if needed, to amend the amended complaint only to substitute the word "breach" for "terminate." A party may amend its complaint under Superior Court Civil Rule 15(a) after a responsive pleading by leave of the Court or by written consent of the adverse party. Leave to amend will ordinarily be granted "unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, or futility."[11]

Even if the Court were to ultimately allow this change, the complaint would still be deficient. As stated previously, conclusory allegations are not sufficient to withstand a motion to dismiss. There are no other facts in the complaint to support the allegation that BCBS breached its contract with Plaintiffs. There is no reference even to the terms of the BCBS contract. Therefore, if changed, the Plaintiffs' complaint would only contain the conclusory allegation that BCBS breached the contract.[12] As such, the complaint would still be subject to dismissal even with the simple substitution of the word "breach" for "terminate."[13]

Furthermore, the Court finds that the procedural history of this case does not warrant allowing Plaintiffs another opportunity to amend. Plaintiffs' first complaint alleged that Plaintiffs terminated the BCBS contract: "As a result of the statements made by the Defendant, [Luscavage/Sokoloff] was induced and obliged to end the consultant agreement with [BCBS] . . . But for the fraudulent and oppressive conduct of Defendant . . . [Luscavage/Sokoloff] would not have ended the consultant agreement."[14] Defendant responded with its first motion to dismiss, which argued, among other things, that Plaintiffs had failed to establish the third element required for a tortious interference with contract claim.

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for breach of contract their claim for tortious interference necessarily failed as well); *Goldman v. Pogo.com, Inc.*, 2002 WL 1358760 (Del. Ch. 2002) (dismissing a plaintiff's tortious interference with contract claim because there was no sustainable claim of breach of contract).

[11] *Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. Ct. 1978).

[12] *See Haber,* 465 A.2d at 357 (stating that when considering a motion to dismiss "[c]onclusions of law or fact, however, will not be assumed to be true without specific allegations of fact which support the conclusion").

[13] *See Dickens v. Costello*, 2002 WL 1463106, at *2 (Del. Super.) (denying a motion to amend because the proposed amendment, on its face, was not legally viable); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 786 (Del. Super. Ct. 1995) (denying a motion to amend because the amended claim would not survive a motion to dismiss).

[14] Pls. Compl., at ¶20-21, 36-37.

Plaintiffs then amended their complaint alleging that BCBS (not the Plaintiffs) terminated the contract: "Defendant contacted BCBS and, without justification, caused BCBS to terminate the BCBS Consulting Contract."[15] Plaintiffs have not adequately explained this major alteration in their theory of the case nor have Plaintiffs made BCBS a defendant in this action. Defendant has again responded claiming that Plaintiffs have not properly pled the third element of the tort. Plaintiffs subsequently waited until oral argument to state that they would like to revise their claim a second time to allege that BCBS "breached" the contract. Due to the futility of the proposed amendment, Plaintiffs' previous failure to cure deficiencies, and the contradictory nature of the proposed amendment as compared to the previous complaint, the Court will not allow Plaintiffs to amend their complaint again.[16]

V. CONCLUSION

For the above reasons, the Defendant's motion to dismiss the complaint is **GRANTED**.

IT IS SO ORDERED.

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oc: Prothonotary

[15] Pls. Am. Compl., at ¶16.

[16] *See Kraus v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889, at *7 (Del. Super.) (denying a plaintiff's request to amend its complaint to aver contradictory facts, as opposed to averring a newly discovered fact or an alternative theory of the case). *See also Gould v. Am. Hawaiian S. S. Co.*, 55 F.R.D. 475, 477 (D. Del. 1972) (stating that Rule 15(a) "cannot be utilized to sanction a defendant's taking diverse and, in fact, conflicting postures on the facts"); *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del. 1946) (denying the plaintiff's motion to amend where the "present motion to amend was not filed until after the date was fixed for argument on defendant's motion to dismiss the complaint and after briefs had been exchanged and filed").