

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 0737

2019 CW 0496

CAMSOFT DATA SYSTEMS, INC.

VERSUS

**SOUTHERN ELECTRONICS SUPPLY, INC.
AND ACTIVE SOLUTIONS, LLC**

Judgment Rendered: JUL 02 2019.

**Appealed from the Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana**

Case No. 582,741

The Honorable Janice Clark, Judge Presiding

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BEFORE: CRAIN, THERIOT, and HOLDRIDGE, JJ.

THERIOT, J.

In this appeal, Dell, Inc. and Dell Marketing, L.P. (sometimes referred to collectively as “Dell”) seek review of the trial court’s judgment denying their Motion for Partial Summary Judgment on CamSoft’s Tort Claims. For the following reasons, we affirm the portion of the trial court’s judgment that denied Dell’s motion as it relates to CamSoft Data Systems, Inc.’s (“CamSoft”) claim for conspiracy to commit fraud and dismiss the remainder of Dell’s appeal as moot. We deny the companion writ application, referred to this panel, as moot.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history are laid out in more detail in this court’s opinion in **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2019-0730 (La. App. 1st Cir. 7/2/19) (unpublished), which is also being issued this date.

Relevant hereto, CamSoft filed a Master Petition for Declaratory Judgment, Supplemental Relief, Damages, and Attorney’s Fees, asserting the following tort causes of action against Dell: (1) conspiracy to commit fraud, (2) conspiracy to tortiously interfere with contract, and (3) conspiracy to convert business information.

In response, Dell filed a motion for partial summary judgment to dismiss these claims on. After a hearing, the trial court signed a judgment on April 2, 2019, denying Dell’s Motion for Partial Summary Judgment on CamSoft’s Tort Claims. From this judgment, Dell appeals pursuant to La. R.S. 51:135.¹

¹ As set forth in La. R.S. 51:135, all interlocutory judgments in cases involving antitrust claims shall be appealable within five days and shall be heard and determined within twenty days after the appeal is lodged.

SUMMARY JUDGMENT AND THE STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **M/V Resources LLC v. Louisiana Hardwood Products LLC**, 2016-0758, p. 8 (La. App. 1st Cir. 7/26/17), 225 So.3d 1104, 1109, writ denied, 2017-1748 (La. 12/5/17), 231 So.3d 624. A motion for summary judgment is properly granted if, after an opportunity for adequate discovery, the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3). The burden of proof rests with the mover. La. Code Civ. P. art. 966(D)(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **M/V Resources LLC**, 2016-0758 at p. 9, 225 So.3d at 1109.

A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue of material fact is one to which reasonable persons could disagree. If reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Doyle v. Lonesome**

Development, Limited Liability Company, 2017-0787, p. 6 (La. App. 1st Cir. 7/18/18), 254 So.3d 714, 718-19, writ denied, 2018-1369 (La. 11/14/18), 256 So.3d 291, quoting Jackson v. City of New Orleans, 2012-2742, pp. 5-6 (La. 1/28/14), 144 So.3d 876, 882, cert. denied, — U.S. —, 135 S.Ct. 197, 190 L.Ed.2d 130 (2014). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Succession of Hickman v. State Through Board of Supervisors of Louisiana State University Agricultural and Mechanical College**, 2016-1069, p. 5 (La. App. 1st Cir. 4/12/17), 217 So.3d 1240, 1244.

Although summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. See Quality Environmental Processes, Inc. v. Energy Development Corporation, 2016-0171, p. 14 (La. App. 1st Cir. 4/12/17), 218 So.3d 1045, 1059.

DISCUSSION

I. CONSPIRACY TO COMMIT FRAUD

Pursuant to Louisiana Civil Code art. 1953, “Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.” The elements of the tort of fraud are a misrepresentation of material fact made with the intent to deceive where there was reasonable and justifiable reliance by the plaintiff and resulting injury. **Riedel v. Fenasci**, 2018-0539, p. 9 (La. App. 1st Cir. 12/28/18), 270 So.3d 795, citing Prejean v. Estate of Monteiro, 2015-0197, p. 6 (La. App. 1st Cir. 9/18/15), 2015 WL 5515763, at *3 (unpublished).

Fraud need only be proven by a preponderance of the evidence and may be established by circumstantial evidence. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1st Cir. 9/17/04), 884 So.2d 665, 671-72, citing La. Civ. Code art. 1957; **McDonough Marine Service, a Div. of Marmac Corp. v. Doucet**, 95-2087, p. 6 (La. App. 1st Cir. 6/28/96), 694 So.2d 305, 309. Circumstantial evidence, including highly suspicious facts and circumstances surrounding a transaction, may be considered in determining whether a fraud has been committed. **Terrebonne Concrete, LLC v. CEC Enterprises, LLC**, 2011-0072, p. 11 (La. App. 1st Cir. 8/17/11), 76 So.3d 502, 510, writ denied, 2011-2021 (La. 11/18/11), 75 So.3d 464, citing **Williamson v. Haynes Best Western of Alexandria**, 95-1725, p. 85 (La. App. 4th Cir. 1/29/97), 688 So.2d 1201, 1239, writ denied, 97-1145 (La. 6/20/97), 695 So.2d 1355.

Louisiana Civil Code article 2324(A) provides that “[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.” The Louisiana Supreme Court has held that conspiracy by itself is not an actionable claim under Louisiana law. The actionable element of a conspiracy claim is not the conspiracy itself but rather the tort that the conspirators agree to perpetrate and actually commit in whole or in part. **Quality Environmental Processes, Inc. v. IP Petroleum Company, Inc.**, 2016-0230, p. 16 (La. App. 1st Cir. 4/12/17), 219 So.3d 349, 370, writ denied, 2017-00915 (La. 10/9/17), 227 So.3d 833, citing **Ross v. Conoco, Inc.**, 2002-0299, pp. 7-8 (La. 10/15/02), 828 So.2d 546, 552.

To establish a conspiracy, a plaintiff is required to provide evidence of the requisite agreement between the parties; that is, a meeting of the minds or collusion between the parties for the purpose of committing wrongdoing. **Quality Environmental Processes**, 2016-0230 at p. 16, 219 So.3d at 370, citing **Prime Ins. Co. v. Imperial Fire and Cas. Ins. Co.**, 2014-0323, p. 9 (La. App. 4th Cir.

10/1/14), 151 So.3d 670, 677, writ denied, 2014-2241 (La. 1/9/15), 157 So.3d 1110. Evidence of a conspiracy can be actual knowledge of both parties or overt actions with another; a conspiracy may also be inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator. **Boudreaux**, 2003-1932 at p. 11, 884 So.2d at 672-73, citing **Stephens v. Bail Enforcement of Louisiana**, 96-0809, p. 10 (La. App. 1st Cir. 2/14/97), 690 So.2d 124, 131, writ denied, 97-0585 (La. 4/18/97), 692 So.2d 454.

In Louisiana, if a conspiracy to do an unlawful act is entered into by two or more persons, and *one of them does an act in furtherance thereof*, all of the conspirators may be held civilly liable for damages to a third party resulting therefrom. **Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau of Baton Rouge, Inc.**, 333 So.2d 765, 768 (La. App. 1st Cir.), writ denied, 334 So.2d 428 (La. 1976). When a tort is perpetrated through the instrumentality of a combination or conspiracy, the party wronged or injured may look beyond the actual participants in committing the injury and join with them, as defendants, all who cooperated in, advised, or assisted in the accomplishment of the common design. **Strahan v. State Through Department of Agriculture and Forestry**, 93-0374, p. 7 (La. App. 1st Cir. 8/25/94), 645 So.2d 1162, 1165, writ denied, 95-0040 (La. 2/17/95), 650 So.2d 256, citing **Rush v. Town of Farmerville**, 101 So. 243, 247 (La. 1924). See also **Boudreaux**, 2003-1932 at p. 11, 884 So.2d at 673.

Dell argues that CamSoft cannot establish that it committed the intentional tort of fraud because CamSoft admits that it did not communicate with Dell. Dell reasons that, absent direct communication, it could not have made any misrepresentation to CamSoft – a necessary element of fraud. This argument is unpersuasive. As noted above, the law does not require the plaintiff to prove that every defendant who allegedly engaged in a conspiracy took an affirmative step

toward accomplishing the conspirators' goal. It is enough if one of the co-conspirators acts in furtherance of the conspiracy. See Economy Carpets, 333 So.2d at 768; see also Curole v. Delcambre, 2016-550, pp. 14-15 (La. App. 3d Cir. 8/2/17), 224 So.3d 1074, 1083, writs denied, 2017-1506, 2017-1491 (La. 1/9/18), 231 So.3d 652, 653, citing Rush, 101 So. at 247 ("The conspiracy having been sufficiently established, the act done by one in furtherance of the unlawful design is, in law, the act of all.")

Similar arguments made by one defendant in an effort to exculpate itself from an alleged conspiracy have been rejected. For instance, in **Boudreaux**, 884 So.2d 665, the plaintiff, Boudreaux, alleged that the defendants, Authement and Jeff, conspired to fraudulently deprive him of the full sale price for his property. It was established at trial that Boudreaux and Jeff negotiated the terms of the sale, and Authement had no communication with Boudreaux. **Boudreaux**, 2003-1932 at p. 8-11, 884 So.2d at 671-73. Nevertheless, this court affirmed the trial court's finding that Authement was solidarily liable with Jeff, pursuant to La. Civ. Code art. 2324, for the fraud perpetrated against Boudreaux. **Boudreaux**, 2003-1932 at pp. 12-13, 88 So.2d at 674.

Also, in **Miller v. Keating**, 339 So.2d 40 (La. App. 3d Cir. 1976), amended in part on other grounds, 349 So.2d 265 (La. 1977), the defendants were found liable in solido for conspiring to commit a battery upon the plaintiff. One of the defendants did not directly participate in the beating of the plaintiff but merely waited in the vehicle while it occurred. **Miller**, 339 So.2d at 42-43. That defendant appealed the jury verdict that found him liable as a co-conspirator, arguing that he was not liable in damages since he did not actually participate in the battery and did not intend to harm the plaintiff. The Third Circuit rejected this argument, finding that the defendant at least tacitly entered into a conspiracy to injure the plaintiff and assisted or encouraged in the commission of the battery. **Id.** at 43.

Similarly, in **Curole**, 2016-550, 224 So.3d 1074, the defendants were held liable in solido for physical injuries sustained by the plaintiff, Mr. Curole, after they conspired to break into the Curoles' home. "Clearly, it was foreseeable that a physical altercation could result as a consequence of the defendants' decision to illegally break into the Curoles' home in the middle of the night. Thus, any of the co-conspirators are liable for the injuries caused to the Curoles, *even if they did not actually participate in the beating of Mr. Curole.*" **Curole**, 2016-550 at p. 24, 224 So.3d at 1089 [emphasis added].

Therefore, the fact that Dell did not directly communicate with CamSoft or personally make a misrepresentation in furtherance of the alleged conspiracy to commit fraud does not prevent a finding that Dell is liable in solido for fraud committed upon CamSoft.

Next, Dell asserts that CamSoft cannot prove that it conspired with the other defendants to commit fraud. As the sole basis for this assertion, Dell focuses on a single allegation in CamSoft's Master Petition wherein it contends that Christopher Drake ("Drake") made a fraudulent misrepresentation to Carlo MacDonald ("MacDonald") in the fall of 2004. The Master Petition states that MacDonald learned that Drake gave a presentation promoting the Crime Camera System and listed Active Solutions, LLC, Southern Electronics Supply Company, Inc., and Imagine Software, LLC as the three companies that worked on the project. When MacDonald confronted Drake about the omission, CamSoft contends that Drake fraudulently responded, via email in November 2004, by assuring MacDonald that the omission was an oversight and that CamSoft's logo was included in the presentation given at the conference. Dell asserts that it did not make this alleged misrepresentation to CamSoft, did not know anything about this alleged misrepresentation, was not at the conference where the presentation was made, did not speak to Drake about the meeting or the presentation, and was unaware of

Drake's communication with MacDonald. Dell argues that there is no evidence that it agreed to misrepresent anything to CamSoft; thus, "CamSoft's claim fails as a matter of law."

This argument likewise lacks merit. First, it is clear from CamSoft's opposition and the evidence before this court that CamSoft's claim of conspiracy to commit fraud encompasses far more than this 2004 email exchange between Drake and MacDonald. In its discovery requests, attached to Dell's motion, Dell asked CamSoft to identify the "misappropriation" that forms the basis of its conspiracy claims. In response, CamSoft meticulously identified what it believed to be the defendants' numerous "acts of silence" and "active misrepresentations." The November 2004 email is one of many acts identified in CamSoft's response to this interrogatory, which spans eight pages. The affidavits of Drake, Gregory Meffert, and Mark St. Pierre, also contained in the record, confirm many of the statements set forth in CamSoft's response to Dell's interrogatory. CamSoft's claim of conspiracy to commit fraud simply cannot be condensed into a single email, as Dell suggests.

Second, whether a party engaged in a conspiracy and whether it committed the intentional tort of fraud are both questions of fact generally not appropriate for resolution via summary judgment. **Quality Environmental Processes**, 2016-0230 at p. 16, 219 So.3d at 370. See also **Terrebonne Concrete**, 2011-0072 at p. 11, 76 So.3d at 510, citing **Whitehead v. American Coachworks, Inc.**, 2002-0027, p. 6 (La. App. 1st Cir. 12/20/02), 837 So.2d 678, 682. A party's agreement to participate in a conspiracy requires a determination of subjective facts. Participation in a conspiracy may be tacit, may be inferred from the defendant's knowledge of the impropriety of the actions taken by a co-conspirator, and may be proven by circumstantial evidence, "including highly suspicious facts and circumstances surrounding a transaction." **Terrebonne Concrete**, 2011-0072 at p.

11, 76 So.3d at 510; **Boudreaux**, 2003-1932 at pp. 10-11, 884 So.2d at 672-73. Summary judgment is seldom appropriate for determinations based on subjective facts, such as intent and knowledge. If the evidence presented on a motion for summary judgment is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper. It is only where reasonable minds must inevitably conclude that the mover is entitled to judgment on the undisputed material facts before the court that the motion for summary judgment should be granted. **Rager v. Bourgeois**, 2006-0322, p. 6 (La. App. 1st Cir. 12/28/06), 951 So.2d 330, 333-34, writ denied, 2007-0189 (La. 3/23/07), 951 So.2d 1105, citing **Jackson v. State, Teachers' Retirement System of Louisiana**, 407 So.2d 416, 418 (La. App. 1st Cir. 1981), and **Johnson v. Edmonston**, 383 So.2d 1277, 1281 (La. App. 1st Cir. 1980).

Upon our *de novo* review of the summary judgment evidence and considering Dell's failure to address the majority of CamSoft's allegations and supporting evidence concerning the alleged conspiracy to commit fraud, we find that reasonable minds could differ regarding whether the defendants entered a conspiracy to commit fraud against CamSoft, whether Dell tacitly or knowingly entered the conspiracy, and whether fraud occurred. These questions of fact must be answered by the trier of fact, after weighing evidence and evaluating credibility. Therefore, we find that Dell is not entitled to partial summary dismissal of CamSoft's cause of action for conspiracy to commit fraud and affirm this portion of the trial court's judgment.

II. CONSPIRACY TO TORTIOUSLY INTERFERE WITH CONTRACT AND CONSPIRACY TO CONVERT BUSINESS INFORMATION

In **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2019-0730 (La. App. 1st Cir. 7/2/19) (unpublished), this court dismissed CamSoft's claims for conspiracy to tortiously interfere with contract and

conspiracy to convert business information as prescribed. In light of this decision, we pretermitt discussion of Dell's assignments of error and requests for relief concerning these claims, which we find are moot.

CONCLUSION

For the above and foregoing reasons, the April 2, 2019 judgment denying Dell, Inc. and Dell Marketing, L.P.'s Motion for Partial Summary Judgment on CamSoft's Tort Claims is affirmed to the extent that the motion sought to dismiss CamSoft Data System, Inc.'s claim for conspiracy to commit fraud. The remainder of the appeal as it relates to CamSoft Data System, Inc.'s claims for tortious interference with contract and conversion is dismissed as moot pursuant to this court's decision in **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2019-0730 (La. App. 1st Cir. 7/2/19) (unpublished). We deny the companion writ application, referred to this panel, as moot. Costs of this appeal are to be assessed equally to appellants, Dell, Inc. and Dell Marketing, L.P, and appellee, CamSoft Data Systems, Inc.

AFFIRMED IN PART, DISMISSED AS MOOT IN PART; WRIT DENIED AS MOOT.

CAMSOFT DATA SYSTEMS, INC.

STATE OF LOUISIANA

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

SOUTHERN ELECTRONICS
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NOS. 2019 CA 0737
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HOLDRIDGE, J., agreeing in part and concurring in part.

I agree with the majority as to the conspiracy to commit fraud claim. I concur with the result reached by the majority as to the other claims. As a matter of procedure, I find that after Dell's antitrust claims were dismissed in cases 2019 CA 0730 and 2019 CA 0740, La. R.S. 51:135 is no longer applicable to any appeals involving Dell. The cases involving Camsoft and Dell are no longer affected by the Louisiana Antitrust statutes relating to monopolies and restraints of trade or commerce (La. R.S. 51:121, *et seq.*) If necessary, this court should hear this matter en banc to determine the proper procedures to follow in cases involving antitrust claims and other non-related tort claims.

I also write separately to further note that I would grant Dell's Motion for Partial Summary Judgment on CamSoft's Tort Claims to dismiss its claims for tortious interference with contract and conversion of business information.

For the reasons stated in **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2019-0731 (La. App. 1st Cir. 7/2/19) (unpublished), which is also being issued this date, I find that CamSoft cannot succeed on a claim for conversion of confidential business information.

With regard to CamSoft's claim for tortious interference with contract, where there is no privity of contract between the plaintiff and the corporate officer's employer, the plaintiff has no claim for tortious interference with contract. In its Master Petition, CamSoft identified the July 19, 2004 Contract between the

City of New Orleans and Southern as the basis of its cause of action for tortious interference with contract. It is undisputed that CamSoft was not a party to this contract.

Louisiana Civil Code article 2324(A) provides that “[h]e who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.” The Louisiana Supreme Court has held that conspiracy by itself is not an actionable claim under Louisiana law. The actionable element of a conspiracy claim is not the conspiracy itself but rather the tort that the conspirators agree to perpetrate and actually commit in whole or in part. **Crutcher-Tufts Resources, Inc. v. Tufts**, 2007-1556, p. 3 (La. App. 4th Cir. 9/17/08), 992 So.2d 1091, 1094, writ denied, 2008-2677 (La. 1/16/09), 998 So.2d 105, citing **Ross v. Conoco, Inc.**, 2002-0299, pp. 7-8 (La. 10/15/02), 828 So.2d 546, 552.

In **9 to 5 Fashions, Inc. v. Spurney**, 538 So.2d 228, 234 (La. 1989), the seminal case regarding Louisiana’s cause of action for tortious interference with contract, the Louisiana Supreme Court was called upon to decide whether an officer of a corporation owes a duty to *a person having a contract with the corporation* to refrain from unjustified, intentional interference with the contractual relationship. *Id.* at 229. The Supreme Court recognized a very limited application of the common law doctrine of tortious interference with contract to be available under Louisiana law. Pursuant to the holding in **9 to 5 Fashion, Inc.**, a cause of action for tortious interference with contract arises from a corporate officer’s duty to refrain from intentionally, and without justification, interfering with the contractual relationship between his employer and a third person. See **Hawkins v. Decuir, Clark, & Adams, LLP**, 2016-1338 (La. App. 1st Cir. 8/16/17) 2017 WL 3528872, *7 (unpublished), discussing **9 to 5 Fashions, Inc.** 538 So.2d at 234. “Where officers knowingly and intentionally act against the best

interest of the corporation or outside the scope of their authority, *they can be held liable by the party whose contract right has been damaged.*” **9 to 5 Fashions, Inc.**, 538 So.2d at 231. (Emphasis added.)

Louisiana courts have consistently limited the application of **9 to 5 Fashions, Inc.** to its facts and have held that, to succeed at trial on a claim of tortious interference with contract, the plaintiff must prove, among other things, the existence of a contract or a legally protected interest between the plaintiff and the corporation that employs the corporate officer. **Hawkins** 2017 WL 3528872 at *7, citing **9 to 5 Fashions, Inc.**, 538 So.2d at 234. Where the interference alleged is beyond the cause of action created in **9 to 5 Fashions, Inc.**, the trial court is correct in denying the claim. **Hawkins**, 2017 WL 3528872 at *7, citing **Healthcare Management Services, Inc. v. Vantage Healthplan, Inc.**, 32,523, p. 5 (La. App. 2d Cir. 12/8/99), 748 So.2d 580, 582-83.

Thus, under a strict application of **9 to 5 Fashions, Inc.** to its facts, one who is not a party to the contract at issue, but who merely claims to have a pecuniary interest in the contract, has no right to assert a claim for tortious interference with contract. See **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 618 So.2d 1076, 1080 (La. App. 1st Cir.), writ denied, 626 So.2d 1172 (La. 1993) (finding no cause of action existed for tortious interference with contract where no privity of contract existed between the defendants and the contracts at issue), citing **Tallo v. Stroh Brewery Co.**, 544 So.2d 452, 454 (La. App. 4th Cir.), writ denied, 547 So.2d 355 (La. 1989).

Therefore, considering the evidence in the record and the parties’ arguments, I find that CamSoft has no claim against Dell for tortious interference with contract. I would grant this portion of Dell’s motion for partial summary judgment and dismiss this cause of action.