

STATE OF MAINE

Cumberland, ss.

SUPERIOR COURT
STATE OF MAINE
Cumberland ss Clerk's Office

APR 29 2016

RECEIVED

WILLIAM TEMM and DALE TEMM

Plaintiffs

v.

Docket No.: PORSC-CV-16-0014

LPL FINANCIAL LLC, TRSS WEALTH MANAGEMENT LLC,
MICHAEL A. REED, BRUCE SAWYER, ANDREW C. STICKNEY
and THOMAS M. BRUNELLE,

Defendants

**ORDER ON MOTION TO DISMISS and
MOTION TO STRIKE OR IN THE ALTERNATIVE TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT**

Defendants TRSS Wealth Management LLC, Michael Reed, Bruce Sawyer, Andrew Stickney and Thomas Brunelle [collectively "the TRSS Defendants"] have filed a Motion to Dismiss all counts of the Complaint filed by William and Dale Temm. Instead of responding to the Motion with an opposition, the Plaintiffs filed an Amended Complaint, but did not file a motion for leave to amend. Based on the absence of a motion to amend, the TRSS Defendants have filed a Motion to Strike or In the Alternative, to Dismiss Plaintiffs' Amended Complaint. Plaintiffs have filed a timely opposition to the latter motion, and the TRSS Defendants have filed a reply memorandum. The court elects to decide both the Motion to Dismiss and the Motion to Strike or In the Alternative, to Dismiss Plaintiffs' Amended Complaint without oral argument, *see* M.R. Civ. P. 7(b)(7).

Motion to Strike

The premise of the TRSS Defendants' Motion to Strike is that the Plaintiffs were required to file a motion for leave to amend their Complaint pursuant to Rule 15(a) of the Maine Rules of Civil Procedure, because the TRSS Defendants had responded to the Complaint with their Rule 12(b)(6) motion to dismiss. Rule 15(a), in pertinent part, provides that "[a]

party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party . . ."

The question raised by the TRSS Defendants' Motion to Strike is whether their motion to dismiss is a "responsive pleading" for purposes of Rule 15(a). The Law Court has not addressed this issue. This court concludes that a motion is not a pleading for purposes of Rule 15(a) of the Maine civil rules. The Maine civil rules themselves differentiate between motions and pleadings. Rule 7(a) enumerates the pleadings allowed, without including any motions in the list. Separately, Rule 7(b) prescribes the form and procedure for motions. Rule 11(a) requires "every pleading and motion" of a represented party to be signed by an attorney of record, thereby confirming that motions are not pleadings. The counterpart federal rule to Rule 15(a) makes the distinction explicit by referring to both pleadings and Rule 12 motions. *See* Fed. R. Civ. P. 15(a).

Because Plaintiffs have not previously amended their complaint, and because the TRSS Defendants have not filed a "responsive pleading" for purposes of Rule 15(a), Plaintiffs were entitled to amend their Complaint as a matter of course, and the TRSS Defendants' Motion to Strike must be denied. Moreover, because the Amended Complaint has superseded the original Complaint, the TRSS Defendants' Motion to Dismiss will be dismissed as moot.

Motion to Dismiss Amended Complaint

The TRSS Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is brought under Rule 12(b)(6). It seeks dismissal of all counts of the Amended Complaint pertaining to them. On its face, the Amended Complaint asserts claims against one or all of the TRSS Defendants in Count II (breach of contract); Count IV (breach of fiduciary duty); Count VI (intentional infliction of emotional distress); Count VIII (interference with contractual or other advantageous economic relations); Count IX (invasion of privacy); Count X (misappropriation

of trade secrets); Count XI (loss of consortium), and Count XII (breach of contract against Thomas Brunelle). The other counts assert claims against Defendant LPL Financial, LLC only and have been addressed in a separate order.

The standard of review applicable to a Rule 12(b)(6) motion to dismiss calls for the court to determine whether the pleading to which the motion is directed, viewed in a light most favorable to the non-moving party, states any cognizable claim for relief. *See Town of Eddington v. University of Maine Foundation*, 2007 ME 74, ¶ 5, 926 A.2d 183, 184; *Heber v. Lucerne-in-Me. Vill. Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066. Under this standard, most of the TRSS Defendants' arguments fail, because they assume a certain view of the facts and therefore would be better deferred to the summary judgment phase.

The court's rulings on the motion, in terms of specific counts of the Amended Complaint is as follows:

Count II (breach of contract): Plaintiff William Temm's breach of contract claim against all TRSS Defendants other than Thomas Brunelle asserts that those Defendants have breached their obligations under the Operating Agreement of TRSS Wealth Management, LLC attached as Exhibit 1 to the Amended Complaint.¹ Defendants respond by noting that the attached exhibit is unsigned and therefore assert a statute of frauds defense. To this defense, Plaintiffs respond that a signed original of the Operating Agreement exists and they will seek to obtain it in discovery. Plaintiffs have the better part of the argument for a variety of reasons:

- Plaintiffs are entitled to take discovery on the existence of a signed contract
- part performance, which Plaintiffs are clearly alleging, is a well-recognized exception to the Statute of Frauds

¹ The Operating Agreement is integral to the Amended Complaint and therefore may be considered in connection with a Rule 12(b)(6) motion without converting the motion into one for summary judgment, *see Moody v. State Liquor and Lottery Commission*, 2004 ME 20, ¶ 10, 843 A.2d 43, 48.

Defendants also go on to argue that Plaintiff does not allege any actual breach of contract, but this depends on their view of the underlying facts, namely that they made a valid offer to buy his interest and he turned it down.

The Motion to Dismiss is denied as to Count II (breach of contract).

Count IV (breach of fiduciary duty): Count IV is also asserted against all TRSS Defendants other than Mr. Brunelle. Defendants argue that the Amended Complaint fails to allege a cognizable breach of fiduciary duty claim, based on much the same reasoning as in their objection to Count II (breach of contract). However, article 6.7 of the Operating Agreement attached to the Amended Complaint, titled *Fiduciary Duty; Devotion of Time; Compensation*, seems clearly intended to impose fiduciary duties on each Member toward the others.

The Motion to Dismiss will be denied as to Count IV.

Count VI (intentional infliction of emotional distress): Count VI asserts a claim for intentional infliction of emotional distress (IIED) against the TRSS Defendants other than Mr. Brunelle. To prevail on an IIED claim, a plaintiff must prove the following elements:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [the defendant's] conduct;
- (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;
- (3) the actions of the defendant caused the plaintiffs emotional distress; and
- (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Lyman v. Huber, 2010 ME 139, ¶ 15, 10 A.3d 707, citing *Curtis v. Porter*, 2001 ME 158, ¶ 10, 784 A.2d 18.). Specifically, the Plaintiffs claim that those Defendants failed to provide him with a buy-out offer in a reasonable time; locked him out of the office and limited his access to his client files; disclosed confidential medical information to other TRSS employees, clients and

others; used his password to access computerized client data files; misrepresented his health situation to clients.

Recent Law Court decisions have endorsed the trial court's role as gatekeeper regarding IIED claims, meaning to evaluate an IIED claim to determine whether the facts alleged could reasonably justify a verdict for the plaintiff.

In the context of an IIED claim, it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so. Thus, while the jury must determine whether the elements of the tort were in fact satisfied, the court must first determine whether, as a matter of law, the facts alleged are sufficient to satisfy the elements.

Champagne v. Mid-Maine Medical Center, 1998 ME 87, P16, 711 A.2d 842, 847 (internal citations and quotations omitted).

The facts alleged in Plaintiffs' Amended Complaint cannot reasonably be interpreted to justify a finding that the TRSS Defendants' actions were "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community." Read liberally in the Plaintiffs' favor as it must be for purposes of Rule 12(b)(6), the Amended Complaint alleges that the TRSS Defendants engaged in bad and distressing behavior in connection with Mr. Temm's effort to take his clients to a competing firm—by locking him out, trying to prevent him from taking clients with him, spreading misinformation about him to clients and others, and accessing his client files with his password. But lockouts and competing over clients, and more nefarious tactics like accessing private data and spreading rumors and misinformation about competitors are by no means unheard of in the context of the breakup of businesses, reprehensible though some of the tactics may be.

Viewing the allegations of the Amended Complaint in a light most favorable to Plaintiffs, the court concludes that no reasonable fact finder could find that the TRSS Defendants' alleged acts and omissions were so utterly intolerable, extreme, outrageous and

atrocious, and beyond the bounds of civilized behavior as to be sufficient to establish an IIED claim. The Motion to Dismiss will be granted as to Count VI of the Amended Complaint.

Count VIII (interference with contractual or other advantageous economic relations): The Amended Complaint alleges that the TRSS Defendants other than Mr. Brunelle committed tortious interference by preventing Mr. Temm from accessing client information and data and also by giving his clients false information about his health and future prospects. These allegations are sufficiently specific to allege tortious interference through fraud, at least.

Count IX (invasion of privacy) and Count X (misappropriation of trade secrets); Count XI (loss of consortium), and Count XII (breach of contract against Thomas Brunelle). The allegations in the Amended Complaint are sufficient to state cognizable claims for relief on the remaining four counts. The Defendants' arguments against the sufficiency of Counts IX, X and XI all presuppose a certain view of the underlying facts and thus should be reserved for summary judgment or trial. Defendants' argument as to Count XII is lacking in any merit.

For the reasons stated, it is ORDERED AS FOLLOWS:

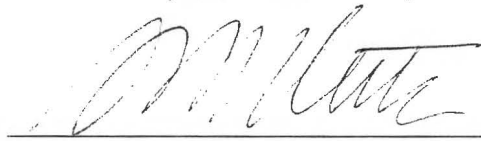
1. The Motion to Dismiss filed by Defendants TRSS Wealth Management LLC, Michael Reed, Bruce Sawyer, Andrew Stickney and Thomas Brunelle as to the Complaint is dismissed as moot.

2. The Motion to Strike or In the Alternative To Dismiss Plaintiffs' Amended Complaint filed by Defendants TRSS Wealth Management LLC, Michael Reed, Bruce Sawyer, Andrew Stickney and Thomas Brunelle is granted with respect to Count VI of the Amended Complaint, and is otherwise denied. Count VI of the Amended Complaint is dismissed.

3. Defendants TRSS Wealth Management LLC, Michael Reed, Bruce Sawyer, Andrew Stickney and Thomas Brunelle will file a responsive pleading within the time prescribed by M.R. Civ. P. 12(a).

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order in the docket by reference.

Dated April 29, 2016

A handwritten signature in black ink, appearing to read "A. M. Horton", written over a horizontal line.

A. M. Horton
Justice, Business and Consumer Court