NO. COA05-1274

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

THORTEX, INC. and JUANITA THORNBURG POPE,
Plaintiffs,

v.

Stanly County
No. 05 CVS 395

STANDARD DYES, INC., JACK HUMBLE, DAVID W. PICHA, AMANDA L. PICHA, and DAVE ELLER,
Defendants.

Appeal by plaintiffs from an order entered 12 August 2005 by Judge W. David Lee in Stanly County Superior Court. Heard in the Court of Appeals 30 March 2006.

Dougherty, Clements, Hofer, Bernard & Walker, by Ronald L. Hofer and Russell M. Racine for plaintiff appellants.

McNair Law Firm, P.A., by Allan W. Singer and Marna M. Albanese, for Dave Eller, defendant appellee.

Stiles Byrum & Horne, L.L.P., by Ned A. Stiles and Sarah B. Spisich; and Wyatt Early Harris Wheeler, L.L.P. by Scott F. Wyatt for Standard Dyes, Inc., Jack Humble, David W. Picha, and Amanda L. Picha, defendant appellees.

McCULLOUGH, Judge.

Plaintiff appeals from the entry of an order granting defendants' motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. We affirm.

On 15 March 2005 Thortex, Inc., ("Thortex") and Juanita Thornburg Pope ("Pope") filed suit against Standard Dyes, Inc. ("Standard Dyes"), Jack Humble ("Humble"), David Picha, Amanda Picha, and Dave Eller ("Eller") for damages from the wrongful interference with a prospective contract, misappropriation of a trade secret, unfair competition in violation of N.C. Gen. Stat. § 75-1.1, and civil conspiracy. The allegations set forth in the complaint are as follows:

Plaintiff Thortex is a chemical dye and sales company owned by plaintiff Pope who developed a formulation and method of manufacturing black dye named Thortex Black SFB/NB with the help of a dye manufacturer, Fabricolor, for use by KM Fabrics. At some point, Fabricolor went out of business as a manufacturer; however, certain persons who were aware of the formula for Thortex Black SFB/NB became employed with ADI who then became the manufacturer for the product. Calvin Alvarez, a salesperson who knew the formula for the dye, became employed with Rite Industries who subsequently became the manufacturer of the dye. Calvin Alvarez decided to form his own manufacturing company, IDC, which became the alternate manufacturer for the dye. Rite Industries was purchased by Blackman Uhler who continued to manufacture the dye until KM Fabrics informed Thortex that they were unhappy with the product and would not accept any more batches produced by this manufacturer. Plaintiffs had manufactured KM Fabrics' black dye for approximately 18 years.

Susan Tobin was employed by Rite Industries as a quality control analyst during the period when Rite Industries was acting as the manufacturer of the dye for Thortex. While working at Rite Industries, she knew the formula and manufacturing method for Thortex Black SFB/NB. Susan Tobin was then hired by defendant Standard Dyes, who decided to contact Thortex in an effort to become the manufacturer for the dye. Thortex agreed to allow Standard Dyes to manufacture a 60-pound test sample of the dye which was in turn delivered to KM Fabrics by Thortex and received their approval. Standard Dyes became the manufacturer for Thortex.

Around the same time defendant Eller was in the process of soliciting the business of KM Fabrics with the offer that he could sell the exact same dye purchased from Thortex at a substantial discount. In turn, KM Fabrics began purchasing all dye from defendant Eller, discontinuing their business with Thortex. The pertinent allegations of the complaint are as follows:

Wrongful interference with a prospective contract

Plaintiffs' complaint alleges that defendant Eller had made several unsuccessful attempts to solicit the business of KM Fabrics. In soliciting the business of KM Fabrics, Eller stated that plaintiffs were selling KM Fabrics a product of inferior quality and concentration at a higher price than he would and that he could provide the same chemicals at a higher concentration and quality for a lower price. Defendants offered to sell Thortex Black SFB/NB at a price substantially lower than plaintiffs' price in order to force KM Fabrics to purchase the dye from defendants.

Plaintiffs also allege that defendants acted maliciously and without justification.

Misappropriation of trade secrets

Plaintiffs alleged that Thortex and Pope developed the formulation and manufacturing method for Thortex Black SFB/NB dye and that this formulation and manufacturing method was unknown in the dye manufacturing industry. They further allege that the formulation and methods derive independent commercial value from not being generally known or readily ascertainable through independent development or reverse engineering constituting a trade secret and that plaintiffs used reasonable methods under the circumstances to safeguard and maintain the confidentiality of their trade secret.

Unfair Competition in violation of N.C. Gen. Stat. § 75-1.1

Plaintiffs allege that defendants engaged in a scheme to induce plaintiffs to enable defendants to produce the dye product; that defendants never intended to be a manufacturer for plaintiffs; and that defendants disparaged and tarnished plaintiffs' reputations by representing to KM Fabrics that plaintiffs were selling inferior, overpriced chemicals.

Civil conspiracy

Plaintiffs state that, because defendants were unable to successfully solicit the business of KM Fabrics through legitimate and lawful means, they entered into an agreement to take the

business away from plaintiffs through unlawful means. The allegations state that defendants formed an agreement to unlawfully discredit, disparage, and tarnish plaintiffs' reputation and good will in the industry as a whole, and specifically with KM Fabrics. It is also alleged that, in furtherance of the conspiracy, defendants formed an agreement to: (1) interfere with plaintiffs' prospective contracts with KM Fabrics, (2) destroy plaintiffs' business, and (3) obtain plaintiffs' trade secrets by unlawful means.

On 19 May 2005 defendants filed their answers to the claims and allegations set forth by plaintiffs and further asserted as a defense Rule (12)(b)(6) praying that plaintiffs' claims be dismissed for failure to state a claim upon which relief could be granted. Defendant Eller made a motion to dismiss under Rule 12(b)(6) which was granted by the lower court as to all claims and all defendants.

Plaintiffs now appeal.

Plaintiffs contend that the lower court erred in granting defendants' motion to dismiss under Rule 12(b)(6) where the allegations in plaintiffs' claim state a claim upon which relief may be granted. We disagree.

"A motion to dismiss under N.C.R. Civ. P. 12(b)(6) 'is the usual and proper method of testing the legal sufficiency of the complaint.'" *Newberne v. Department of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation omitted). Dismissal is proper "when one of the following three conditions is

satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). In reviewing a trial court's decision to grant a dismissal under Rule 12(b)(6), the appellate court must determine "'"whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory."'" *Newberne*, 359 N.C. at 784, 618 S.E.2d at 203 (citations omitted). While the well-pleaded material allegations are treated as true, "conclusions of law or unwarranted deductions of fact are not." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

Wrongful interference with a prospective contract

An action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiffs from entering into a contract with a third party. *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992). To state a claim for wrongful interference with a prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in "'inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.'" *Walker v. Sloan*, 137 N.C. App. 387, 393, 529 S.E.2d 236, 242 (2000) (citation omitted). Where it is claimed that the interference with

business relations was rendered by a competing business entity, the court must determine whether that defendant was acting for a "legitimate business purpose" and not merely motivated by a "malicious wish to injure the plaintiff." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). "Numerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful." *Id*.

The allegations in plaintiffs' complaint fail to show any action on the part of defendants which does not comport with the regular competitive practices of businesses. Without more, plaintiffs have failed to meet their burden in alleging facts sufficient to state grounds for a claim upon which any relief may be granted.

Misappropriation of a trade secret

A trade secret is business or technical information that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development ... [and] [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66-152(3)(a)-(b) (2005). This Court has set forth certain factors which are to be considered in determining whether an item is a trade secret:

> (1) the extent to which information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
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> (3) the extent of measures taken to guard secrecy of the information;
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> (4) the value of information to business and its competitors;
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> (5) the amount of effort or money expended in developing the information; and
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> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

State EX REL. Utilities Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999).

In the instant case, there were neither allegations of facts tending to show that the formulation and method for producing the dye was not generally known nor that any reasonable efforts were made to maintain the secrecy of the formulation and methods. Plaintiffs appear to find themselves in the unfortunate situation of failing to require the manufacturers and their employees to enter into a confidentiality agreement. The allegations do tend to show that over the course of time, numerous manufacturers gained knowledge of the dye formulation and production methods and that in fact two employees with this knowledge formed their own manufacturing companies who subsequently became manufacturers for Thortex as well. Without any allegation of reasonable efforts to maintain secrecy, the mere assertion that the dye formulation and

manufacturing methods were kept confidential is not enough to withstand a 12(b)(6) motion to dismiss.

Unfair Competition in violation of N.C. Gen. Stat. § 75-1.1

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2005). In order to establish a claim for unfair trade practices, a plaintiff must allege sufficient facts tending to show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). Moreover, "'[s]ome type of *egregious* or *aggravating* circumstances must be alleged and proved before the [Act's] provisions may [take effect].'" *Id.* at 657, 548 S.E.2d at 711 (citation omitted). Further, the Court must consider whether there was a fiduciary duty between the parties. *Id.*

In the instant case, there were no fiduciary duties as between plaintiffs and defendants. Further, the facts alleged do not rise to the level of egregious or aggravating circumstances; instead, they appear to be nothing more than the normal ambit of competitive business activities.

Civil conspiracy

In order to state a claim for civil conspiracy, there must be proof of an agreement between two or more persons to do an unlawful act or a lawful act in an unlawful manner. *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800-01 (2005). "'Although civil

liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.'" *Id.* at 690-91, 608 S.E.2d at 801 (citation omitted). "'In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts.'" *Id.* at 690, 680 S.E.2d at 800 (citation omitted). "The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Shope v. Boyer,* 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966).

In the instant case, the complaint states: "Defendants formed an agreement between two or more individuals to[] unlawfully discredit, disparage, and tarnish Plaintiffs' reputation and good will in the industry as a whole, and specifically with KM Fabrics." The complaint goes on to state certain actions which plaintiffs believed to be in furtherance of the conspiracy. However, the blanket and generic assertion that two or more individuals entered into an agreement does not present enough specific facts to withstand a 12(b)(6) motion. Further, the unlawful acts alleged to have been the basis of the conspiracy are the same acts for which this Court has previously found, *supra*, insufficient. The allegation of an agreement to enter into a conspiracy, standing alone, is not sufficient to state a claim upon which relief may be granted. *Dove*, 168 N.C. App. at 690, 608 S.E.2d at 800. ("[T]here

is not a separate civil action for civil conspiracy in North Carolina.").

Therefore, the corresponding assignments of error are overruled.

Accordingly, for the reasons previously stated, the lower court properly granted defendants' motion to dismiss under Rule 12(b)(6) where the allegations of plaintiffs' complaint failed to state a claim upon which relief could be granted.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).