

STATE OF NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 85

GATEWAY MANAGEMENT SERVICES, LTD.,)
)
 Plaintiff,)
)
 v.)
)
 ADVANCED LUBRICATION TECHNOLOGY,)
 INC.,)
)
 Defendant.)

REPLY BRIEF
IN SUPPORT OF DEFENDANT’S
PARTIAL MOTION TO DISMISS

Pursuant to BCR 15.7 and 15.8, defendant Advanced Lubrication Technology, Inc. (“ALT”) respectfully submits this reply brief in support of its partial motion to dismiss the complaint of plaintiff Gateway Management Services, Ltd. (“Gateway”).

I. GATEWAY’S BRIEF FAILS TO CITE ANY ALLEGATIONS IN THE COMPLAINT THAT WOULD SUPPORT A CLAIM FOR VIOLATION OF SECTION 75-1.1.

Gateway’s brief points to three allegations in the complaint that purport to plead the “substantial aggravating circumstances” needed to convert its breach-of-warranty claim into a section 75-1.1 violation (Count I). Each allegation, however, actually reinforces that Gateway’s claim is based in contract and, at bottom, alleges that ALT did not deliver suitable lubricant.

- First, Gateway’s brief contends that aggravating circumstances are shown by ALT’s alleged failure to warn Gateway about a “shelf life” for the lubricant. (Pl.’s Br. at 5 (citing and quoting Compl. ¶ 32).) According to the brief, this alleged failure to warn demonstrates “deception in the formation of the contract.” (Id.) However, neither Gateway’s chapter 75 claim nor any other section of the complaint contains any allegations about the contract’s formation, let alone deceptive acts in connection with the

formation. (See Compl. ¶¶ 26-39.) More accurately, Gateway’s allegation that the lubricant had a “shelf life” undisclosed to Gateway is another effort by Gateway to repackage its contract claim that ALT did not deliver suitable lubricant.

- Second, Gateway cites the complaint’s allegation that ALT “related to Gateway that all previously provided product was unfit for its intended use.” (Pl.’s Br. at 5 (citing Compl. ¶ 79).) Rather than show aggravating circumstances, this allegation simply re-asks whether or not ALT delivered suitable lubricant.

- Finally, Gateway’s brief refers to the complaint’s allegation that ALT “deliberately” changed the lubricant to make it “hazardous” without so informing Gateway. (Id. (citing Compl. ¶ 32).) It is axiomatic, however, that an intentional breach of contract “is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.” Burrell v. Sparkkles Reconstr. Co., 657 S.E.2d 712, 717 (N.C. Ct. App. 2008). In addition, a deliberate misrepresentation about a product’s qualities does not alone state a section 75-1.1 claim. See Terry’s Floor Fashions, Inc. v. Ga.-Pac. Corp., No. 5:97-CV-683-BR(2), 1998 WL 1107771, at *10 (E.D.N.C. July 23, 1998) (cited in Pl.’s Br. at 5).

In sum, Gateway fails to identify any allegation in the complaint that changes the nature of its claim — a claim that ALT allegedly delivered lubricant under their contract that was not fit for its purposes, and that Gateway suffered economic loss as a consequence.

II. THE ECONOMIC LOSS RULE BARS GATEWAY’S NEGLIGENT MISREPRESENTATION CLAIM BECAUSE GATEWAY SUFFERED ECONOMIC LOSS, AND NOT PROPERTY DAMAGE.

Gateway’s brief argues that the economic loss rule applies only “when the injury resulting from the breach is damage to the subject matter of the contract.” (Pl.’s Br. at 7.) Thus, because the complaint alleges that ALT’s allegedly faulty lubricant caused damage to used

trucks (not the subject matter of the parties' contract), Gateway contends that the economic loss rule is inapplicable (id.) — even though the complaint itself shows that the allegedly damaged trucks are not and were not Gateway's property. (See Compl. ¶ 15.)

This very argument was rejected in Terry's Floor Fashions, a case cited by Gateway. In Terry's Floor Fashions, a retailer of vinyl flooring sued the manufacturer of plywood subflooring in tort. The retailer alleged that the manufacturer's defective subflooring caused damage to the vinyl flooring of the retailer's customers and that, as a result, the retailer suffered economic damages. According to the retailer, the economic loss rule did not bar its tort remedies because the defective subflooring damaged the customers' vinyl flooring, which was not the subject matter of the parties' contract. The court disagreed, explaining that this exception to the economic loss rule applies only where the damage was to property of the promisee of the contract between the parties. Terry's Floor Fashions, 1998 WL 1107771, at *5.

Here, like the retailer in Terry's Floor Fashions, Gateway has not pleaded that Gateway itself (the promisee of the parties' contract) suffered any property damage. Rather, Gateway alleges that it suffered economic harm because ALT delivered defective lubricant, the subject matter of the contract. Therefore, its claim for negligent misrepresentation fits squarely within the economic loss rule.

III. GATEWAY’S BRIEF DOES NOT IDENTIFY ALLEGATIONS IN THE COMPLAINT SUFFICIENT TO SATISFY THE ELEMENTS OF CLAIMS FOR NEGLIGENT MISREPRESENTATION (COUNT II), TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE (COUNT III), MISAPPROPRIATION OF TRADE SECRETS (COUNT IV), SLANDER PER SE (COUNT V), OR CONSTRUCTIVE FRAUD (COUNT VI).

A. Negligent misrepresentation (Count II)

Gateway’s brief fails to identify a duty of care that ALT owed Gateway distinct from any contractual duty. At best, the brief contends that ALT told Gateway that ALT would inform Gateway of any product changes (Pl.’s Br. at 7), but the complaint clarifies that ALT allegedly made this statement “[i]n the course of [] ALT’s contractual relationship with Gateway.”

(Compl. ¶ 41.)

Even if Gateway adequately pleaded a duty of care, Gateway’s brief did not identify the malice or recklessness that Gateway conceded is required. (Pl.’s Br. at 8.) The only allegations that Gateway’s brief identified to show “reckless conduct” are those stating that ALT failed to “exercise reasonable care or competence” and that ALT failed to communicate the potential for curdled lubricant. (*Id.* (quoting Compl. ¶¶ 49, 46).) These allegations do not reflect malice or recklessness.¹

B. Tortious interference with prospective advantage (Count III)

Gateway’s brief does not disagree that Count III requires the complaint to allege that Gateway would have entered into a contract with a third person but for ALT’s allegedly malicious acts. (*Id.* at 9.) Yet Gateway’s brief cites only one allegation in the complaint that bears on this required element — that, “[a]s a result of ALT’s actions, vis-à-vis its interference

¹ Without citation to the complaint, Gateway’s brief states that “[r]eckless conduct certainly includes the failure to warn of known dangers involved with an engine additive which could foreseeably cause loss of life.” (Pl.’s Br. at 8.) The complaint does not raise any allegations about personal injury, let alone wrongful death.

with Gateway’s contracts, Gateway has, in fact, suffered a decline in the establishment of new contracts.” (Id. (citing Compl. ¶ 61).) The general statement that Gateway has “suffered a decline in the establishment of new contracts,” even if accepted as true, does not allege that Gateway would have entered into a contract with a third person but for ALT’s conduct.

C. Misappropriation of trade secrets (Count IV)

To state a claim, Gateway’s complaint must have pleaded that Gateway’s customer list derives independent or actual potential commercial value from not being generally known or readily ascertainable. To satisfy this element, Gateway relies only on the bare allegation that its client list is “confidential,” (id. at 11 (citing Compl. ¶ 63)), but the Court need not accept this legal conclusion as true for the purpose of deciding ALT’s Rule 12(b)(6) motion. E.g., Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

In addition, even if the allegation in paragraph 63 were adequate, Gateway’s brief still does not identify any statement in the complaint that reflects the second element of this claim — any reasonable efforts to maintain the secrecy of Gateway’s client list. (See Pl.’s Br. at 11.)

D. Slander per se (Count V)

Gateway’s brief does not attempt to identify any statements in the complaint that satisfy the heightened pleading standard for slander claims. (Id. at 12.)

E. Constructive fraud (Count VI)

In its efforts to show that the complaint pleaded a fiduciary relationship with ALT, Gateway’s brief cites only one statement in the complaint — that “prior to the events described in this complaint Gateway reposed complete trust in ALT and its formula.” (Id. at 13 (quoting Compl. ¶ 78).) Here again, this legal conclusion, unlike an allegation of fact, need not be

accepted as true by the Court at the pleadings stage. E.g., Sutton, 277 N.C. at 98, 176 S.E.2d at 163. Moreover, this allegation does not contain, as it must, a “particular representation” made by ALT that created any relationship of trust and confidence. (See Def.’s Br. at 11.)

IV. GATEWAY’S BRIEF DOES NOT CONTEST ALT’S MOTION TO DISMISS GATEWAY’S CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT (COUNT III), NEGLIGENCE (COUNT VIII), AND COMMON LAW BREACH OF CONTRACT (COUNT IX).

ALT moved to dismiss Gateway’s claim for “Wrongful Interference with Contract Right, existing” (Count III), negligence (Count VIII), and common law breach-of-contract (Count IX). (Id. at 7.) Gateway’s brief does not argue that the complaint states any of these claims. (See Pl.’s Br. at 14.) Accordingly, ALT respectfully submits that its motion with respect to these three claims is uncontested. See BCR 15.11.

CONCLUSION

For the reasons stated herein, in ALT’s partial motion to dismiss, and in ALT’s brief in support of its partial motion to dismiss, ALT respectfully requests that the Court grant ALT’s partial motion to dismiss and grant all other relief that it deems necessary.

This 30th day of May, 2008.

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CERTIFICATE OF SERVICE

In accordance with BCR 6, I hereby certify that on May 30, 2008, I electronically filed the foregoing with the Clerk of Court through the Court's electronic filing system, which will send notification of such filing to the following and that employees of Ellis & Winters LLP acting at my direction deposit a copy in the United States mail, postage prepaid and addressed as follows:

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This 30th day of May, 2008.

/s/ Stephen D. Feldman
Stephen D. Feldman

CERTIFICATE OF COUNSEL REGARDING RULE 15.8

Undersigned counsel for defendant Advanced Lubrication Technology, Inc., hereby certifies that the foregoing Brief in Support of Defendant's Partial Motion to Dismiss complies with the requirements of Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court. The basis for this certification is the word count of the word-processing system used to prepare this memorandum.

This the 30th day of May, 2008.

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