VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 444-12-17 Wmcv

Fitz-Rose, Incorporated vs. CLP Stratton, LP

DECISION ON DEFENDANT MONTUORO'S MOTION
FOR SUMMARY JUDGMENT

In their amended complaint, filed on April 1, 2019, the plaintiffs, Thomas Rose, Robert Berube, Patricia Christy and Fitz-Rose, Inc., have made claims against defendants Amy Aubin, Robert Montuoro, CNL Lifestyle Properties, Inc., (CNL) and Intrawest Resorts Holdings, Inc. (Intrawest). They allege in Count 1, that Intrawest breached a covenant of good faith and fair dealing by not renewing a lease for a commercial space to plaintiffs Rose and Christy; in Count 2 that CNL Lifestyle Properties breached an agreement to renew a lease to TEP, Inc., a former Vermont corporation of which Rose and Christy were shareholders; in Count 3 that CNL through an agent, Intrawest, interfered with the relationship between TEP and CNL, related to lease renewals, causing them damage; in Count 4 that Montuoro converted to his own use recipes and business practices of TEP and its related businesses, which were confidential information and trade secrets; in Count 5 (named as a second Count 4) that Aubin assisted Montuoro in interfering with TEP's economic relationships by helping him to get the leases that TEP had sought to renew; in Count 6 (named as Count 5) that Montuoro used trade secrets of TEP to obtain leases that TEP's businesses sought to renew, and intentionally interfered with TEP's efforts to renew the leases; in Count 7 (labeled Count 6), that Intrawest and CNL engaged in unfair trade practices in violation of the Vermont Consumer Protection Act. by not renewing the TEP leases; in Count 8 (labeled Count 7) that TEP relied on promises made by CNL and Intrawest to renew the leases, to their detriment, and suffered economic damages as a result; in Count 9 (labeled Count 8) that CNL, Intrawest, Aubin and Montuoro conspired to deny TEP economic opportunities through the renewal of the leases.

On June 4, 2020, Defendant Robert Montuoro filed a motion for summary judgment, seeking judgment in his favor on the three counts in the plaintiffs' complaint against him; Counts 4, 5 (named as second Count 4), 6 (named as Count 5), and 9 (named as Count 8). The plaintiffs filed their opposition on July 6, 2020. On July 30, 2020, Defendant Montuoro filed his reply memorandum.

CNL Lifestyles has also filed a motion for summary judgment, opposed by the plaintiffs, which will be addressed in a separate order.

Undisputed Material Facts

Based on the parties' filings, the undisputed material facts connected with this dispute are as follows. Plaintiff's Rose and Christy are former shareholders of TEP, Inc. (TEP). TEP was a Vermont corporation, whose corporate status ended in June 2014. For some period before June 2013, TEP

leased commercial space in the Stratton Mountain Village at the base of the Stratton Mountain ski resort. TEP operated two businesses, Stratton Mountain Provisions and Partridge in a Pantry, in these leased spaces. These businesses sold groceries and deli food.

Defendant Montuoro worked for TEP from 2006 to 2012 in both businesses. While Defendant Montuoro worked for TEP, their deli had a menu board on display that included the items that were for sale, listing major ingredients in those menu items. They also had printed menus with the same information available for customers to use to order take-out.

Whether Defendant Montuoro had access to the detailed recipes for items at the TEP businesses, and whether he played any role in devising such recipes during the period he worked for them, are contested issues. Whether the TEP menu items were something more than "standard deli fare" is also disputed. Defendant Montuoro disputes that he was ever told that the menus/recipes of the TEP businesses were confidential. He also disputes the plaintiffs' claims that he took a copy of the menu/recipe book when he left his employment with TEP.

TEP had no written employment contract or any other written agreement of any kind with Defendant Montuoro during the time that he worked for them. He did not sign any non-disclosure agreements regarding recipes of the businesses.

TEP leased its space in the Village from CLP Stratton, LP, a limited partnership majority owned by CNL Lifestyle Properties, Inc. (CNL).

In 2013, Andrew Lacey was a director working for Intrawest, responsible for management of the Village. The terms of TEP's leases for space in the Village ended in July 2013. In February 2013, Intrawest on behalf of CNL informed TEP in writing that its lease for the space in which it operated the grocery and deli businesses would not be continued beyond the end of the term in July 2013.

In March 2013, Plaintiff Patricia Christy and her brother Peter and possibly also Plaintiff Thomas Rose made a proposal to CNL and Intrawest to lease the space that was occupied by TEP after the TEP lease expired. Whether this was a proposal to extend the lease to TEP, or a proposal for a new lease to Patricia and Peter Christy and Thomas Rose, through a new corporation is disputed. In any case, they submitted a business plan with their proposal, either for TEP or for this new business, which they intended to be confidential.

Defendant Montuoro was working as a brand manager for Stratton Corporation in the early part of 2013, when he learned that there might be an opportunity to lease the space occupied by TEP. At the request of the landlord, he submitted a proposal to lease and renovate that space and to reopen it as a gourmet deli and market. His business plan included financial projections he prepared based on his experience, including his former work as general manager for TEP.

CNL Lifestyle Properties leased the space that TEP occupied to the Stratton Corporation on or about August 1, 2013. Stratton then subleased the property to an entity formed by Defendant Montuoro and others in mid-September 2013.

At the time this action was filed Defendant Montuoro and companies that he manages owned and operated several food or restaurant businesses in the Stratton Mountain Village (the Village).

The plaintiffs also allege the following as undisputed material facts, to which no objection has been filed by Defendant Montuoro, and which are not inconsistent with allegations made by Defendant Montuoro in his own proposed undisputed material facts.

Plaintiffs Thomas Rose and Patricia Christy were owners of TEP, which ran a business in Stratton Village under the names Partridge in a Pantry and Stratton Mountain Provisions, which included a delicatessen operation. During the period when Defendant Montuoro was employed by TEP, he did not have authorized access to the menus (recipes) of items produced at the delicatessen. Menus (recipes) of items produced at the delicatessen were kept in a separate book and Defendant Montuoro did not have authorized access to that book.

On TEP's termination, its creditors were paid, and it was terminated by its owners, and all rights to any claims, actions or assets of the corporation were assigned to its major shareholders, plaintiffs Rose and Christy.

Montuoro knew that TEP wanted to renew its lease of the premises in the Village in 2013.

Legal Conclusions

Under V.R.C.P. 56, the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. "Summary judgment is appropriate when, construing the facts as alleged by the nonmoving party and resolving reasonable doubts and inferences in favor of the nonmoving party, there are no genuine issues of material fact and judgment is appropriate as a matter of law." *Newton v. Preseau*, 2020 VT 50, ¶ 4.

Legal Standing of Plaintiffs Christy and Rose

Defendant Montuoro first argues that the plaintiffs, Ms. Christy and Mr. Rose, are without standing to assert the rights of TEP, the terminated corporation. TEP was the leaseholder at the time of the allegedly wrongful acts of Defendant Montuoro, and therefore, he argues, only TEP could have been injured by any such acts. It is undisputed that plaintiffs Christy and Rose were TEP's principal shareholders. They argue that they were assigned the rights of TEP at the time of its dissolution, including the right to pursue any of its claims, and that they therefore do have standing.

Standing requires injury in fact, causation, and redressability; plaintiff's injury must be attributable to the defendant; and "standing is to be determined as of the commencement of suit." *U.S. Bank Nat. Ass'n v. Kimball*, 2011 VT 81, ¶ 12 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 (1992)). However, the court concludes that the correct question here is not whether the plaintiffs have standing, but whether they are the real parties in interest. See 13A Wright & Miller, Federal Practice & Procedure: Juris. § 3531 (3d ed.) ("Confusions of standing with real-party-in-interest doctrine occur with some frequency.").

> Rule 17 provides in relevant part:
>
> Every action shall be prosecuted in the name of the real party in interest…. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest;

> and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

V.R.C.P. 17(a).

Under Rule 17, plaintiffs need not show they had the right to sue before commencement of this action. *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 267 (E.D. Cal. 1987) ("it has been held that even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest and can maintain the action") (quoting 6 Wright & Miller, Federal Practice & Procedure § 1545 (1971) (current version at 6A Wright & Miller, Federal Practice & Procedure: Civil § 1545 (3d ed.). There is no basis to dismiss this action based on plaintiffs' failure to show they took an assignment prior to commencing the action. To pursue any claims on behalf of TEP, plaintiffs Christy and Rose would of course need to prove at trial that they were assigned the right to sue.

The issue of standing or whether Plaintiffs Christy and Rose are real parties in interest is not a basis for the dismissal of their claims on behalf of TEP at this time; and the motion for summary judgment on this ground is denied.

Trade Secrets

The plaintiffs claim that while he worked as the general manager for TEP's deli and grocery business, Defendant Montuoro misappropriated sandwich recipes and TEP's business plan. Defendant Montuoro argues that the plaintiffs do not have sufficient evidence to support a claim of violation of the Vermont Trade Secrets Act, 9 V.S.A. §§ 4601–4609. The Trade Secrets Act provides damages and injunctive relief for misappropriation of trade secrets; a trade secret is information that derives independent economic value from not being generally known to others and that is subject to reasonable efforts to maintain its secrecy. *Synventive Molding Sols., Inc. v. Injection Molding Sys., Inc.*, No. 2:08-CV-136, 2009 WL 10678880, at *1 (D. Vt. Dec. 7, 2009).

The defendant argues that the plaintiffs' alleged trade secrets, i.e., the recipes used by TEP during the operation of its restaurants and deli, and any TEP business plan, do not have independent economic value from not being known and not readily ascertainable, and were also not subject to reasonable efforts to keep them secret. The plaintiffs argue that whether the recipes are trade secrets is a question of fact for the jury to decide, and that they were kept properly secured in a private book, to which the defendant was denied access.

The plaintiffs also argue that the TEP business plan is a trade secret. However, the only business plan alleged with specificity is one that was made by the individual plaintiffs just before the expiration of TEP as an active corporation, and on behalf of themselves and a new corporation that they intended to form to replace TEP. The defendant argues that this business plan, presented to the landlords for the restaurant/deli property by the plaintiffs for themselves, well after the defendant was no longer employed by TEP, is not a proper subject of a claim on behalf of TEP. There also does not appear to be any colorable claim that Defendant Montuoro had access to this business plan, as he had left TEP and the individual plaintiffs' employment a year earlier.

The defendant argues that in order for recipes to be trade secrets, they must be original and highly unusual, something more than what defendant Montuoro describes as "standard fare."

Under the Vermont Trade Secrets Act, a trade secret is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that

> (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

9 V.S.A. § 4601 (3).

Whether any particular piece of information is a trade secret is fact-specific, and in general the decision should be left to the fact finder. "[I]n a trade secret case no general and invariable rule can be laid down, but rather we must look to the conduct of each party and the particular information at issue." *Dicks v. Jensen*, 172 Vt. 43, 49 (2001). In this case, although this is a very close question, taking the facts as alleged in the light most favorable to the non-moving parties, the plaintiffs, the court concludes that whether the recipes in the TEP recipe book were in fact unique and not readily ascertainable is a disputed material fact.

Similarly, the court concludes that whether TEP took reasonable steps to maintain the secrecy of its recipes is a disputed material fact.

> To determine whether a duty of confidentiality arises, courts examine whether the information was acquired under circumstances that would indicate to an individual that the information is confidential, while courts look to the time of use to determine whether the individual knows that the information being used is subject to a duty of confidentiality such that the use constitutes a breach of that duty and, thus, misappropriation.

Omega Optical, Inc. v. Chroma Technology Corp., 174 Vt. 10, 17 (2002).

The plaintiffs assert that TEP's recipes were kept in a separate book to which only some staff had access, and that all staff who did have access to it, including Defendant Montuoro, were told that this book was confidential. Defendant disputes these allegations. Whether the plaintiffs' steps to keep this information confidential were sufficient is a factual question for the jury to decide.

Accordingly, the court declines to grant summary judgment for Defendant Montuoro on this claim.

Interference with Contractual Relationship

A cause of action for tortious interference can be based on interference with an existing contract or a prospective contract. It is not entirely clear which claim plaintiffs assert. In their brief, plaintiffs maintain they "had a reasonable expectancy of a continuance of a business relationship with the landlord, as they had been advised in late 2012/early 2013 that the landlord would be renewing their lease."

To establish tortious interference with a contract, a plaintiff must show defendant intentionally and improperly induced another party not to perform on its contract. *Gifford v. Sun Data, Inc.*, 165 Vt. 611, 612 (1996). There is no evidence that Defendant Montuoro improperly interfered with TEP's contract ending July 2013, just bare allegations. Competing for a contract, and seeking to persuade a customer, supplier, or, as here, landlord, to lease property to one's own business rather than to another,

is not improper or unlawful in itself. The fact that the person who is competing was employed by his competitor earlier does not change this fact. Implied agreements not to compete are frowned upon and are not generally consistent with public interests. *Dicks*, 172 Vt. at 51.

A claim for interference with a prospective contract also requires plaintiffs to establish that Defendant Montuoro committed an intentional act of interference.

> To prevail on a claim for interference with prospective business relationships, a plaintiff must show: (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional act of interference on the part of the interferer; (4) damage to the party whose relationship or expectancy was disrupted; and (5) proof that the interference caused the harm sustained.

J.A. Morrissey, Inc. v. Smejkal, 2010 VT 66, ¶ 21, 188 Vt. 245. The primary difference between the claims of interfering with a contract and interfering with a prospective contract is that a "broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." *Gifford*, 165 Vt. at 613 (quoting Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 590 (Cal. 1990). Indeed, a successful claimant must show that defendant's methods were criminal or fraudulent. *Gifford*, 165 Vt. at 613. Plaintiffs have no evidence that Defendant Montuoro intentionally acted to interfere with a prospective contract for either TEP or Patricia and Peter Christy and Thomas Rose, let alone that his methods were criminal or fraudulent.

Also, to the extent that the plaintiffs' allegations of interference with a contractual relationship are based on Defendant Montuoro's alleged theft or misuse of trade secrets, those claims are preempted by the Trade Secrets Act. *Dicks*, 172 Vt. at 51; 9 V.S.A. § 4607. The plaintiffs' sole remedy for any such alleged conduct is through that Act.

Accordingly, summary judgment is granted to Defendant Montuoro as to the plaintiffs' claims of tortious interference with a business or contractual relationship.

Unfair Trade Practices

Plaintiffs also assert a claim for "unfair trade practices by conspiracy," alleging Montuoro acted with CNL Lifestyle, Intrawest, and Aubin to deny TEP, Christy, and Rose economic opportunities in connection with the non-renewal of the lease previously held by TEP. It is undisputed that TEP leased from CLP Stratton, LP, which is majority owned by CNL Lifestyle. The statute cited is the Vermont Consumer Protection Act, whose purpose "is to complement the enforcement of federal statutes and decisions governing unfair methods of competition, unfair or deceptive acts or practices, and anti-competitive practices in order to protect the public and to encourage fair and honest competition." 9 V.S.A. § 2451. Defendant Montuoro moves for summary judgment as to this claim, averring (1) plaintiffs have not established that a wrongdoing occurred "in commerce," and (2) plaintiffs are not "consumers" within the meaning of the Act.

The Vermont Consumer Protection Act declares unlawful "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). It provides a private right of action for aggrieved "consumers" as follows:

> Any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 of this title, or who sustains damages or

> injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, or prohibited by any rule or regulation made pursuant to section 2453 of this title may sue for appropriate equitable relief and may sue and recover from the seller, solicitor, or other violator the amount of his or her damages, or the consideration or the value of the consideration given by the consumer, reasonable attorney's fees, and exemplary damages not exceeding three times the value of the consideration given by the consumer. Any language, written or oral, used by a seller or solicitor, which attempts to exclude or modify recovery of the penalty or reasonable attorney's fees shall be unenforceable.

9 V.S.A. § 2461(b). The Act's definition of "consumer" includes a person who leases:

> "Consumer" means any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household, or in connection with the operation of his or her household or a farm whether or not the farm is conducted as a trade or business, or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business.

9 V.S.A. § 2451a(a). Businesses can qualify for protection under the Act. *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2008 VT 99, ¶ 21, 184 Vt. 355. A VCPA plaintiff "must be a consumer who was harmed by the unfair or deceptive act or practice." *Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 17, 195 Vt. 524.

The Vermont Supreme Court's interpretation of the statute's provision, that banned acts and practices must be "in commerce," has limited the scope of the VCPA. *Foti Fuels, Inc.,* 2013 VT 111, involved an agreement for the sale of a fuel business and for the seller to continue supplying the purchaser with gasoline. The court held the parties' transaction did not occur in the "consumer marketplace" for several reasons. First, plaintiff's offer to sell his business was not held out to the public at large. *Foti Fuels, Inc.*, 2013 VT 111, ¶ 25. Second, the sale of the business "did not involve any products, goods or services purchased or sold for general consumption." *Id*. Third, the transaction involved a high level of customization achieved through the negotiation of particular contract terms rather than boilerplate language. *Id*.

> To be considered "in commerce," the transaction must take place "in the context of [an] ongoing business in which the defendant holds himself out to the public." Further, the practice must have a potential harmful effect on the consuming public, and thus constitute a breach of a duty owed to consumers in general. By contrast, transactions resulting not from "the conduct of any trade or business" but rather from "private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort and property law" remain beyond the purview of the statute.

Foti Fuels, Inc., 2013 VT 111, ¶ 21 (quoting *Zeeman v. Black*, 273 S.E.2d 910, 915 (Ga. Ct. App. 1980)). See also *MyWebGrocer, Inc. v. Adlife Mktg. & Commc'ns Co.*, 383 F. Supp. 3d 307, 311 (D. Vt. 2019) (denying motion to dismiss when plaintiff alleged defendant engaged in a scheme sending false and deceptive copyright infringement notices and invoices to multiple users of photographs obtained by license).

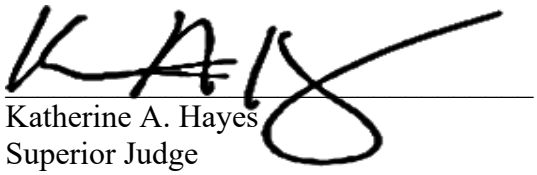
The gravamen of plaintiffs' VCPA claim concerns defendants' failure to renew TEP's lease. The amended complaint alleges TEP is covered by the VCPA as a lessee under its grocery and deli leases, and that Rose and Christy can enforce TEP's rights as TEP's representatives. Amended Complaint ¶ 129. Under *Foti Fuels*, defendants' failure to renew TEP's lease for a grocery and deli in the Village cannot be considered a transaction occurring "in commerce." The leasing of premises for a grocery and deli did not involve the public at large, or goods or services for public consumption.

Based on the principles enunciated in *Foti Fuels*, the court concludes that defendant Montuoro's motion for summary judgment on plaintiffs' unfair trade practices claim under the Consumer Protection Act must be granted.

Summary

In sum, the court concludes that Defendant Montuoro's motions for summary judgment in his favor as to the intentional interference with contractual or business relations and for unfair trade practices under the Consumer Protection Act must be granted, and Defendant Montuoro's motions for summary judgment based on alleged lack of standing, and under the Trade Secrets Act should be denied, and the plaintiffs left to their proof.

It is so ordered.



Katherine A. Hayes
Superior Judge
Signed electronically February 10, 2021