Vermont Superior Court
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Washington Unit

STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 295-5-19 Wncv
AARON LEWIS, Plaintiff, v. NORTHFIELD SAVINGS BANK et al., Defendants.	

RULING ON RENDITION'S MOTION TO DISMISS NSB'S CROSS-CLAIM, NSB'S MOTION TO AMEND ITS ANSWER, NSB'S MOTION TO COMPEL DISCOVERY, AND MR. LEWIS'S MOTION FOR EXTENSION OF TIME

Plaintiff Aaron Lewis's employment as an IT system administrator at Defendant Northfield Savings Bank (NSB) was terminated following an investigation and a report by Rendition Infosec, LLC, (a contractor hired for that purpose) which included conclusions to the effect that Mr. Lewis had pursued his own interests in crypto-mining using NSB's computers while at work. Following termination, Mr. Lewis initiated this action claiming wrongful termination, defamation, intentional infliction of emotional distress, and tortious interference with contract against NSB and several of its employees. The tort claims also were asserted against Rendition and its principal.[1] Following a round of dismissal motions, Mr. Lewis settled with the Rendition defendants. NSB then asserted a cross-claim against Rendition (not including its principal), Rendition filed a motion to dismiss the cross-claim, NSB filed a motion to amend its answer to assert the affirmative defense of setoff, and NSB filed a motion to compel discovery responses from Mr. Lewis. Mr. Lewis objected to the motion to compel in part, and otherwise has sought additional time to respond in substance. These are the motions pending at this time.

Rendition's motion to dismiss NSB's cross-claim

Following Rendition's settlement with Mr. Lewis, NSB asserted a cross-claim against Rendition. The claim is confusingly pleaded. It appears, however, to assert that Rendition negligently produced its report and any liability that may be established against NSB by Mr. Lewis should be shifted entirely to Rendition as a result. Rendition, in seeking dismissal, characterizes this as a claim for implied indemnity, which appears correct to the court, and NSB has assented to that characterization insofar as it has not objected otherwise.

The Vermont Supreme Court has explained:

[1] The reader is referred to the court's January 16, 2020 dismissal decision for a thorough description and analysis of most of the claims asserted in the complaint.

> The right to indemnity, *which is an exception to our longstanding rule barring contribution among joint tortfeasors*, exists only when one party has expressly agreed to indemnify another, or when the circumstances are such that the law will imply such an undertaking. Because of the rule against contribution among joint tortfeasors and the fact that indemnification shifts the entire loss from one party to another, one who has taken an active part *in negligently injuring* another is not entitled to indemnification from a second tortfeasor who also negligently caused the injury. Rather, indemnification accrues "to a party who, without active fault, has been compelled by some legal obligation, such as a finding of vicarious liability, to pay damages occasioned by the negligence of another." Generally, indemnity will be imputed only when equitable considerations concerning the nature of the parties' obligations to one another or the significant difference in the kind or quality of their conduct demonstrate that it is fair to shift the entire loss occasioned by the injury from one party to another.
>
> While it is difficult to state a general rule that will cover all cases, implied indemnification is usually appropriate *only when the indemnitee is vicariously or secondarily liable to a third person because of some legal relationship with that person* or because of the indemnitee's failure to discover a dangerous condition caused by the act of the indemnitor, who is primarily responsible for the condition.

White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28–29 (1999) (emphasis added; citations and footnotes omitted).

The court fails to see any viable path to implied indemnity in this case. The tort claims asserted against NSB and its agents all plainly include allegations that they participated in the tortious conduct, and there is no apparent way that they might not have but yet still would become liable for Rendition's torts.

Assuming without deciding that an implied indemnity claim could be appropriate in the context of liability for wrongful termination, this is not such a case. Some of the wrongful termination claims asserted in this case have virtually nothing to do with Rendition, such as the claim that NSB terminated Mr. Lewis's employment to avoid paying an annual bonus. NSB argues, however, that a jury could find that, in terminating Mr. Lewis's employment due to his crypto-mining activity, it "reasonably relied" on Rendition's negligent report. That would not be sufficient, however. Rendition's report did not terminate Mr. Lewis's employment or require NSB to do anything. NSB chose to terminate his employment for its own reasons. NSB is responsible for its own conduct. There simply is no allegation that Rendition somehow terminated Mr. Lewis's employment, and NSB is being saddled with liability for Rendition having done so. This is not a case of vicarious or secondary liability or anything akin to it.

The cross-claim is dismissed.

NSB's motion to amend the answer

NSB has filed a motion to amend its answer to assert the affirmative defense of "setoff." Its concern appears to be to preserve an ability to deduct from any liability of its own to Mr. Lewis the amount of the settlement between Mr. Lewis and Rendition. The only apparent viable path towards doing so would be in the event of some determination that NSB and Rendition were jointly liable in tort to Mr. Lewis.[2] The complaint, as to the tort claims, is pleaded in so conclusory a manner that it is difficult to see how that could come to pass. Nevertheless, the tort claims against NSB and its agents remain in the case, and the tort claims against Rendition were dismissed solely due to its settlement with Mr. Lewis. While NSB's delay in asserting this affirmative defense goes largely unexplained (other than the settlement), the court sees no prejudice to Mr. Lewis. To the extent that Mr. Lewis claims that the prejudice is that he settled with Rendition believing no defense of setoff was being asserted, that essentially amounts to a claim of some right to a double recovery, which would be patently inequitable in a case such as this.

The motion to amend is granted.

NSB's motion to compel and Mr. Lewis's motion for extension of time

NSB has filed a motion to compel certain discovery responses that it contends Mr. Lewis has refused to comply with. The requests date to May 29, 2020. The record shows that Attorney Rattigan has attempted to negotiate the matter with Attorney Brierre extensively over this protracted time. In response to NSB's motion, Mr. Lewis argues that it should be denied because counsel have not sufficiently conferred for Rule 26(h) purposes. The parties have not sufficiently conferred, Mr. Lewis argues, because the last time counsel spoke on the phone about discovery issues, in November 2021, Attorney Rattigan did not announce a specific date by which to comply with the requests to avoid a motion to compel.

Attorney Brierre did not respond in substance to the motion to compel otherwise. Instead, he filed a separate motion seeking additional time (February 14) for such a response in the event the court does not deny NSB's motion.

The record shows that the parties have conferred extensively about this long simmering discovery dispute. While more specifically discussing the details of an anticipated motion to compel with opposing counsel before filing it may well be a best practice, it was not necessitated by the circumstances of this nearly 3-year-old case. NSB's motion will not be denied on this basis.

NSB assents to the extension of time for Mr. Lewis's substantive response to the motion to compel, which is granted for that reason. The parties again shall confer in earnest as to any remaining disputes prior to February 14.

[2] The mere fact of settlement does not automatically entitle NSB to a setoff.

Order

For the foregoing reasons:

(1) Rendition's motion to dismiss NSB's cross-claim is granted.

(2) NSB's motion to amend its answer is granted.

(3) Mr. Lewis's motion for an extension of time to respond to NSB's motion to compel is granted. Mr. Lewis's substantive response shall be filed no later than February 14, 2022.

(4) The parties again shall confer as to any remaining discovery disputes prior to Mr. Lewis's substantive response to the motion to compel.

(5) After February 14, the court will take NSB's motion to compel under advisement.

(6) Otherwise, any other motions pending at this time are denied as moot.

SO ORDERED this 3rd day of February, 2022

Robert A. Mello
Superior Judge