

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

A. J. BREDBERG,

OPINION AND ORDER

11-cv-780-bbc

Plaintiff,

v.

SOIL SCIENCE SOCIETY OF
AMERICA,

Defendant.

Plaintiff A. J. Bredberg is suing defendant Soil Science Society of America for acts it took (or failed to take) in response to plaintiff's complaint against a fellow member of the society, Kathy Verble. Plaintiff contends that defendant's failure to handle the complaint within the time limits set out in its procedures for investigating complaints and its handling of Verble's counterclaim against him give rise to a number of causes of action against defendant: breach of the contract between them created by his membership (counts one and three); breach of the parties' covenant of good faith and fair dealing (counts two and four); negligent false representations by defendant that it would conduct an independent

investigation of complaints, causing plaintiff humiliation and significant damage to his reputation (count five) and tortious interference with plaintiff's business relationships (count six); invasion of his privacy by publicizing him in a false light (count seven) and intentional infliction of emotional distress (count eight). The case is before the court on defendant's motion to dismiss. Dkt. #4.

In an order entered on April 11, 2012, I noted that plaintiff had not established that diversity jurisdiction existed in this case and gave him until April 22, 2012 to do so. Plaintiff filed a timely response, together with a motion to file supplemental materials on this issue, dkt. #11, showing that he was a citizen of the state of Washington and that defendant was a citizen of the state of Wisconsin. Plaintiff motion alleged damages in excess of \$2,000,000 and I cannot say that he could not obtain damages in excess of \$75,000 if he were to prevail on any of the claims in his complaint. Therefore, jurisdiction is secure.

However, I conclude that plaintiff cannot proceed on any of his claims. He has not alleged facts sufficient to show that defendant was obligated by any contractual agreement to handle plaintiff's complaint or Verble's counterclaim in a certain way; the lack of any contractual relationship between the parties means that plaintiff has no claim for breach of the covenant of good faith and fair dealing; he has not supported his claims of negligent misrepresentations and tortious interference with business relationships with any factual allegations; he cannot pursue a claim of false light under Wisconsin law; and he has no

factual allegations to support his claim of intentional infliction of emotional distress. Therefore, his complaint will be dismissed.

I find from the complaint that plaintiff has fairly alleged the following material facts.

ALLEGATIONS OF FACT

Plaintiff A.J. Bredberg is a certified soil scientist, certified soil classifier, professional wetland scientist and a United States Department of Agriculture technical service provider. He is domiciled in the state of Washington and has been a member of defendant Soil Science Society of America for more than 30 years. Defendant Soil Science Society is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. It is an international society founded in 1936 as a professional home for more than 6000 members dedicated to advancing the field of soil science. It assists in the development of the licensing and certification examinations for the Council of Soil Science Examiners and provides matching funds for states to start and run their licensing programs.

To become a member of defendant, candidates must have completed a bachelor's, master's or doctor of philosophy degree and meet the professional standards set by defendant. They must also pay annual dues of \$95.00 and agree to be bound by the code of ethics of the American Society of Certified Professionals in Agronomy, Crops, and Soils, which is defendant's regulating body. The American Society's code of ethics requires

registrants to “aid in exclusion from certification those who have not followed” the code of ethics or who lack the necessary credentials for membership.

Plaintiff filed a complaint for ethics violation against Kathy Verble on March 28, 2009, based upon Verble’s involvement in analyzing hydric soil conditions at a property located in Lebanon, Oregon. Verble filed a counter-complaint against plaintiff on May 29, 2009, alleging that he had lied and misrepresented the facts in his March 28 ethics complaint. She supported her complaint with the affidavit of a fellow certified professional, Janet Morlan. The counter-complaint and affidavit were made available to the worldwide membership of defendant, to plaintiff’s current and potential clients and customers and city, state and federal officials. The effect of these documents was to portray him as a fraud and a liar who had fabricated his past experiences and achievements and misrepresented the facts relating to the hydric soil determination at the Lebanon, Oregon property. The documents communicated defamatory statements to the effect that plaintiff had distorted facts in his complaint, misled defendant and lied.

Defendant’s Complaint Investigation Procedure provides for filing complaints for ethics violations with defendant and with the American Society of Agronomy to be delegated to the respective board’s Standards and Ethics Committee. Under the Procedure, the committee has 14 days in which to decide whether the filed complaint has enough merit to warrant an investigation; once the subject of the complaint has been provided a copy of the

complaint, she will have 21 days in which to respond and provide rebuttal information in writing. Upon review of the rebuttal information (and a review of the subject's certificate maintenance program), the committee has 30 days in which to exonerate the subject, write a letter of warning, suspend the subject, revoke certification or extend the investigation. The Procedure does not allow an extension of the investigation to give additional time for submission of rebuttal information or the audit of the subject's certification maintenance program.

In violation of its procedures, defendant failed to determine the need for an investigation of plaintiff's complaint within ten days, failed to require Verble to respond within 21 days, granted her an extension of more than a month of her rebuttal response date and granted her a second extension of two weeks. Defendant failed to conduct a timely audit of Verble's certification maintenance program, improperly considered Verble's untimely rebuttal information, failed to determine that Verble had violated the Code of Ethics despite the uncontradicted evidence before it, consolidated three wholly separate complaints about Verble into plaintiff's complaint instead of undertaking separate investigations and failed to issue a final determination on or before June 9, 2009. These actions and omissions caused plaintiff humiliation, embarrassment and damage to his reputation. In addition, his business has been damaged and he has a reasonable fear that he will continue to lose business in the future.

OPINION

A. Choice of Law

The initial issue is what law applies to plaintiff's claims. Defendant contends that Wisconsin law applies to all of the claims; plaintiff agrees that Wisconsin law applies to his breach of contract claims but argues that Oregon law should apply to his tort claims.

The law of the forum state (Wisconsin) determines which state's law should apply to plaintiff's tort claims. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496-97 (1941). The first rule in the choice of law analysis is that “the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of greater significance.” Drinkwater v. American Family Mutual Ins. Co., 2006 WI 56, ¶ 40, 290 Wis. 2d 642, 658, 714 N.W.2d 568, 576 (quoting State Farm Mutual Auto Ins. Co. v Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 587, 641 N.W.2d 662, 676)).

In this case, the contacts within the forum are significant: this is defendant's headquarters and it is the place where plaintiff filed his complaint against Verble and where Verble and Morlan filed their allegedly defamatory responses. Plaintiff argues that the ethics complaint he filed concerned events that took place in Oregon, concerned property in Oregon and was filed against an Oregon resident and employee of the state of Oregon. Plaintiff did not allege in his complaint that Verble is an Oregon resident and an Oregon

employee, so I will consider only the two allegations that the events leading to the ethics complaint took place in Oregon and that the dispute between plaintiff and Verble arose over Oregon property. (Plaintiff does not contend that Washington law should govern any of his claims.)

Where the events leading to plaintiff's complaint against Verble took place and what that dispute was about are irrelevant to the parties' dispute and therefore irrelevant in determining the proper forum for resolution of plaintiff's claims. The issues to be decided are whether defendant owes any contractual duty to plaintiff to handle his ethics complaint in a certain way and whether defendant's alleged failure to follow its own dispute handling procedures caused damages to plaintiff. These questions can be decided without evaluating the truthfulness of plaintiff's initial complaint and Verble's and Marlan's responses and without knowing where the dispute between plaintiff and Verble took place or what it involved. I conclude that plaintiff has failed to overcome the presumption that the forum law should govern his tort claims against defendant. Oregon has no stake in the outcome of this lawsuit; Wisconsin does. Therefore, I will apply Wisconsin law.

B. Contract Claims

Plaintiff has asserted two claims of breach of contract and two of breach of the covenant of good faith and fair dealing, all growing out of the handling of his ethics

complaint. The crux of his claims is that his membership in defendant Soil Science Society and his payment of dues created a contractual relationship between him and defendant that encompasses all of defendant's rules and regulations and that defendant's failure to follow all of those rules caused him damages. This is an unusual claim, for which plaintiff cites no legal support.

Plaintiff says that he has alleged enough facts to state a claim for breach of contract: first, he had a contract with defendant, as shown by his allegations of the three prerequisites of a contract, offer, acceptance and consideration. He alleged that defendant made him an offer of membership if he paid a yearly fee, agreed to be bound by the code of ethics and met certain professional standards. He alleged his acceptance of defendant's offer of membership and he alleged consideration in the form of the yearly dues payments he made to defendant. He then asserts that he has alleged facts establishing a breach of that contract by showing how defendant failed to follow its own rules and how that failure caused him damages.

Plaintiff's allegations are sufficient to show that he had a contract of membership with defendant, but he is not alleging that defendant denied him membership or tried to oust him from the organization. Cf., Attoe v. Madison Professional Policement's Ass'n, 79 Wis. 2d 199, 255 N.W.2d 489 (1977) (in case involving officer and director of association relieved of position on board for submitting written statement critical of police chief at official public hearings, Wisconsin Supreme Court held that plaintiff stated claim for breach of his contract

of membership). Rather, he is alleging that under his contract of membership defendant had a duty to him to follow each and every rule of procedure or bylaw precisely as it was written, but he has not explained where this is spelled out in the contract or what grounds he would have for thinking that this duty followed from his membership. Under Wisconsin law, “[t]he formation of a valid contract requires a meeting of the minds on all essential points.” Ziolkowski Patent Solutions Group, S.C. v. Great Lakes Dart Mfg., Inc., 2011 WI App 11, ¶ 13, 331 Wis. 2d 230, 237, 794 N.W.2d 253, 257. Nothing that plaintiff alleges suggests that he and defendant came to a meeting of the minds on the manner in which defendant’s Standards and Ethics Committee would carry out its duties of investigating ethics complaints filed by members—or that plaintiff even considered the matter as a reason for joining the society and remaining in it.

Even if plaintiff had alleged enough facts to state a claim of breach of contract, he has not alleged how the breach damaged him. He alleges that Verble and Morlan falsely portrayed him as a fraud and a liar but neither of them is a defendant in this case. He says that defendant made a “knowing and improper confirmation of those statements and implications in November 2009,” but he does not say how defendant confirmed them. He may be arguing that if the committee had observed the deadlines in its procedures, Verble would not have had a chance to submit her allegedly false response to his complaint, but he cannot hold defendant responsible for Verble’s response because nothing that defendant did

or failed to do was the “cause” of the response or its allegedly defamatory contents. Plaintiff has to show that “he suffered the sort of injury that would be the expected consequence of the defendant’s wrongful conduct,” BCS Services, Inc. v. Heartwood 88, LLC, 637 F.3d 750 (7th Cir. 2011), and he has not made this showing.

Because plaintiff has not made out a claim of breach of contract, he has no claim for violation of the covenant of good faith and fair dealing, which is not a free standing covenant, but one that arises out of contract. Defendant’s motion to dismiss will be granted as to plaintiff’s first four claims.

C. Tort Claims

1. Misrepresentation/negligence

In his fifth claim for relief, plaintiff alleges only that defendant was negligent in making false representations that it would conduct an independent investigation of code of ethics violations. Plaintiff does not identify any acts or omissions by defendant that were negligent and he does not say that defendant made a material misrepresentation of fact. If he means to allege that defendant was negligent in not following its procedures for handling complaints, he has not explained how any such negligence caused him damages, but merely asserted that it did. His allegations do not state a cause of action and will be dismissed.

2. Tortious interference with economic relations

This claim rests on plaintiff's allegation that defendant's failure to comply with the Complaint Investigation Procedure constitutes a tortious interference with the economic relationship existing between him and his fellows in the society, his current and future clients and customers and local, state and federal officials. He alleges that this interference grows out of the defamatory statements that were published improperly as a result of defendant's failure to comply with the procedure, but he does not explain his allegation.

Under Wisconsin law, a claim for tortious interference with business or economic relations requires a showing that an actual or prospective contract existed between the plaintiff and a third party, the defendant interfered with that contract or prospective contract, the interference was intentional, it caused plaintiff to sustain damages and the defendant was not justified or privileged to interfere. Shank v. William R. Hague, Inc., 192 F.3d 675, 681 (7th Cir. 1999). Plaintiff has made none of these showings. His relationship with his fellows in the society would not qualify as an actual or prospective contract and he has not identified any other contract that would qualify. The mere possibility that he may have trouble winning contracts in the future is not sufficient to allow him to proceed on this claim.

Even if plaintiff could make this first showing simply by alleging that his chances for future contracts have been jeopardized, he has not alleged anything to suggest that he would

be able to show that defendant interfered intentionally with plaintiff's future job prospects. If, as I noted previously, his theory is that Verble would not have had a chance to file her allegedly false and defamatory counter-complaint had defendant followed its procedure more assiduously, he has failed to show that defendant had anything to do with that counter-complaint, other than giving her an extension of time in which to file it. To repeat, it is not enough to say that one thing followed another; one thing must be the cause of something else. In other words, it must be the expected consequence of the defendant's wrongful conduct if it is to be actionable. Defendant would have had no way of knowing that if it allowed Verble an extension of time to file a response to plaintiff's complaint about her she would file what plaintiff calls a false and defamatory statement about him. This claim will be dismissed.

3. False light

Plaintiff cannot proceed on this claim because Wisconsin does not recognize a tort of false light, that is, publicity that unreasonably places another in a "false light" before the public. Ladd v. Uecker, 2010 WI App 28, ¶ 5, 323 Wis. 2d 798, 804, 780 N.W.2d 216, 218; Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 928-29, 440 N.W.2d 548, 555 (1989). Plaintiff sought to avoid this result with his unsuccessful effort to persuade the court to apply Oregon law to his claim. This claim must be dismissed.

4. Intentional infliction of emotional distress

In his last claim, plaintiff alleges that defendant's actions were intentional and caused him severe emotional distress. Under Wisconsin law, a plaintiff must allege that the defendant's conduct was intended to cause emotional distress, that the conduct was extreme and outrageous, that it was the cause of plaintiff's emotional distress and that plaintiff suffered an extreme disabling emotional response to the defendant's conduct. Rabideau v. City of Racine, 2001 WI 57, ¶ 33, 243 Wis. 2d 486, 501, 627 N.W.2d 795, 803.

Plaintiff has not alleged facts that state a claim of intentional infliction of emotional distress. He has alleged nothing to suggest that defendant failed to follow its procedures with the intention of causing distress to plaintiff, that defendant's failure to follow its review procedures for the ethics complaint that plaintiff filed was "extreme and outrageous" conduct, that this failure and not the statements in Verble's counter-complaint or Morlan's affidavit was the cause of his emotional distress or that he suffered an "extreme disabling response" to the conduct.

As with his contract claims, plaintiff has failed to state viable tort claims against defendant. They will be dismissed.

ORDER

IT IS ORDERED that plaintiff A. J. Bredberg's motion to file supplemental materials

on the issue of citizenship is GRANTED. FURTHER, IT IS ORDERED that the motion to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6) filed by defendant The Soil Science Society of America is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 17th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge