IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SEAN MORRISON ENTERTAINMENT, LLC,

Plaintiff,

v.

O'FLAHERTY HEIM EGAN & BIRNBAUM, LTD.,
NICHOLAS D. THOMPSON, HEATHER CLARK,
ANGELA HAYES, MICHELLE OULD,
PATRICIA VIDONIC and KAITLAN YOUNG,

Defendants.

OPINION and ORDER

13-cv-753-bbc

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In this case brought under Wisconsin law, plaintiff Sean Morrison Entertainment, LLC alleges that it was the principal financier of a "reality" television series called "Ultimate Women's Challenge," which featured mixed martial arts competitions between women. Plaintiff wants to sue some of the competitors from the series as well as their lawyers (defendants Nicholas Thompson and the law firm O'Flaherty Heim Egan & Birnbaum, Ltd) for allegedly revealing the results of the competition before it aired on television. In particular, plaintiff says that defendants included the results in a complaint filed in March 2011 in the Circuit Court for La Crosse County, Wisconsin. (Plaintiff does not discuss any details about the scope of the state court lawsuit.)

Plaintiff asserts legal theories under Wisconsin's trade secrets law, Wis. Stat. § 134.90, and the tort of interference with a contract. In addition, plaintiff seeks a declaration

that it is entitled to "commercially exploit" the competitor defendants' "names, voices, likenesses, statements and appearances." Jurisdiction is present under 28 U.S.C. § 1332 because plaintiff alleges that there is complete diversity of citizenship between plaintiff and defendants and the amount in controversy is greater than $75,000.

In an order dated March 6, 2014, dkt. #36, I granted the motion filed by defendant Thompson and the law firm to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. With respect to plaintiff's trade secrets claim, I concluded that plaintiff had failed to state a claim upon which relief may be granted because it had not included allegations that defendants had disclosed information that was not known to "other persons who can obtain economic value from its disclosure or use," which is one of the elements of a claim under § 134.90. With respect to the claim for interference with a contract, I concluded that plaintiff had failed to include allegations about two elements of that claim. In particular, plaintiff did not allege any facts that defendants knew about a contract that plaintiff had with a third party or, if they did know, that they had engaged in conduct that disrupted the contractual relationship. Burbank Grease Services, LLC v. Sokolowski, 2006 WI 103, ¶ 44, 294 Wis. 2d 274, 717 N.W.2d 781; Anderson v. Regents of the University of California, 203 Wis. 2d 469, 490, 554 N.W.2d 509 (Ct. App. 1996).

Now plaintiff has filed a motion for leave to amend its complaint under Fed. R. Civ. P. 15 to include new allegations that it believes are sufficient to revive the dismissed claims. However, plaintiff did not accompany its motion with a brief in which it explained how the

proposed amended complaint cures the deficiencies of the original complaint. In fact, plaintiff did not even identify what the new allegations were. It was only after defendants objected to the proposed amended complaint that plaintiff filed a short reply brief in which it attempted to defend the proposed amendments.

By failing to make any attempt to justify its proposed amendment until its reply brief, plaintiff forfeited any right it may have had under Fed. R. Civ. P. 15 to amend its complaint. Casna v. City of Loves Park, 574 F.3d 420, 427 (7th Cir. 2009). However, even if I consider plaintiff's arguments in its reply brief, plaintiff has not shown that its new allegations could save its claims against defendant Thompson or the law firm.

With respect to its trade secrets claim, plaintiff says that it now has alleged facts that "if proven, would demonstrate that prior to the time the trade secret was misappropriated, third-parties, such as television producers or distributors, could have obtained independent economic value from the trade secret because as long as the outcome of the television series remained unknown, it had value and could be commercially exploited." Plt.'s Reply Br., dkt. #49, at 2. Plaintiff still does not cite particular allegations in its proposed amended complaint to support its argument, but, regardless, the argument is a nonstarter because it is inconsistent with the way that Wisconsin defines a "trade secret."

Under § 134.90(2), information does not qualify as a trade secret unless "other persons . . . can obtain economic value *from its disclosure or use*." In this case, plaintiff says that third parties could have profited from the secret information, not by disclosing or using the information, but by keeping it secret. Thus, plaintiff is attempting to turn Wisconsin's

definition of a trade secret on its head.

Plaintiff ignores the language in the statute, arguing instead that "once a trade secret is no longer secret, it no longer has value." Plt.'s Reply Br., dkt. #49, at 2. That is simply incorrect. Although the disclosure or use of a trade secret by a third party may diminish the value of the secret *to the owner* of the secret, it can benefit the person or persons who obtained the secret. For example, if a third party learned the secret formula for Coca-Cola, it could use that formula to make and sell its own soft drinks. It may be that *plaintiff's* secret lost all its value once it was disclosed, but this shows only that it is not a true trade secret. (Plaintiff does not argue that the results of the show qualify as a trade secret because a third party could have profited from disclosing the results at the planned time, so plaintiff has forfeited that argument.)

With respect to the tortious interference claim, plaintiff alleges that defendants Thompson and the law firm interfered with an agreement plaintiff had with Tuff TV to market the television series. However, plaintiff still does not point to any allegations showing that it has pleaded the elements for a tortious interference claim.

As it did in its previous complaint, plaintiff alleges in its proposed amended complaint that Tuff TV ended its relationship with plaintiff because of a series of threatening letters by someone named Barry Rose, who plaintiff says was the lawyer for one of the competitors in the show. Plt.'s Prop. Am. Cpt., dkt. ¶¶ 67, 72-75. Because plaintiff does not allege that Rose was acting on behalf of Thompson or the law firm or that Rose had any relationship with these two defendants, allegations against Rose do not show that defendants disrupted

any contractual relationship that plaintiff had with Tuff TV.

In its reply brief, plaintiff says that "it is too early to tell the exact nature of the relationship between attorney Barry Rose and the Law Firm Defendants since both attorney Rose and the Law Firm Defendants contacted Tuff TV and Plaintiff on behalf of the Participant Defendants." Plt.'s Reply Br., dkt. #49, at 3. However, this argument has two problems. First, plaintiff does not point to any allegations in its proposed amended complaint that defendant Thompson or the law firm ever contacted Tuff, so I cannot consider that argument. Second, plaintiff does not provide any basis for inferring that Thompson and the law firm were acting collectively. Although federal pleading rules are generous, district courts may not accept conclusory allegations of a conspiracy. Cooney v. Rossiter, 583 F.3d 967, 970-71 (7th Cir. 2009). Under Fed. R. Civ. P. 11, plaintiff is required to have a good faith basis for suing a defendant at the time the complaint is filed.

To the extent that plaintiff means to allege that defendant Thompson and the law firm interfered with the contract by disclosing the results of the show in the state court complaint defendants filed, that claim fails as well because plaintiff has not alleged that defendants knew about plaintiff's agreement with Tuff TV when defendants made the disclosure. Rather, plaintiff alleges that defendant Thompson and the law firm learned about the agreement when plaintiff announced the agreement on its website, which was *after* defendants filed their complaint that allegedly disclosed the results of the series. Prop. Am. Cpt. ¶¶ 47, 61, 65, dkt. #46-1. Thus, defendants' alleged disclosure may have had the incidental effect of disrupting plaintiff's relationship with Tuff TV, but plaintiff's allegations

do not suggest that defendants disclosed that information with any knowledge of the relationship with Tuff TV or the effect that the disclosure could have on that relationship. (Plaintiff does not argue that defendants committed tortious interference by later amending their state court complaint to include Tuff TV as a party, so I do not consider that issue.)

In sum, I am denying plaintiff's motion for leave to amend its complaint because the proposed amendment does not cure the problems with the original complaint. Johnson v. Dossey, 515 F.3d 778, 780 (7th Cir. 2008) (court may deny motion for leave to amend "if it is clear that the proposed amended complaint is deficient and would not survive a motion to dismiss"). Further, because plaintiff has had multiple chances to support these claims, I decline to give plaintiff leave to try again. United States ex rel. Fowler v. Caremark RX, L.L.C., 496 F.3d 730, 740 (7th Cir. 2007).

One final matter requires attention. In an order dated March 11, 2014, dkt. #37, Magistrate Judge Stephen Crocker noted that plaintiff had exceeded the 120-day deadline in Fed. R. Civ. P. 4 for serving the complaint on many of the defendants. He gave plaintiff a new deadline of March 28, 2014 and noted that a "failure to [meet the deadline] likely will be deemed a failure to prosecute which will result in dismissal with prejudice as to the unserved defendants." That deadline has long since passed, but plaintiff still has not served two of the defendants, Heather Clark and Michelle Ould, or requested an extension of time. Accordingly, I am dismissing the complaint as to these two defendants without prejudice for plaintiff's failure to serve them.

ORDER

IT IS ORDERED that

1. Plaintiff Sean Morrison Entertainment LLC's motion for leave to amend its complaint, dkt. #46, is DENIED.

2. Plaintiff's complaint is DISMISSED WITHOUT PREJUDICE as to defendants Michelle Ould and Heather Clark for plaintiff's failure to serve those defendants.

3. The clerk of court is directed to schedule a preliminary pretrial conference for the remaining parties.

Entered this 24th day of June, 2014.

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