IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL GRAY, Custodian of
MID ATLANTIC LUMBER COMPANY, INC.

Plaintiff,

v.

SPLIT ROCK HARDWOODS, INC. and
PAUL OSTLUND,

Defendants,

v.

MICHAEL GRAY, individually,

Third Party Defendant.

OPINION AND
ORDER

01-C-0043-C

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This is a civil action for declaratory, injunctive and monetary relief in which plaintiff Michael Gray, custodian of Mid Atlantic Lumber Company, Inc., alleges several causes of action against defendants Split Rock Hardwoods, Inc. and Paul Ostlund. Plaintiff alleges theft of corporate opportunity (Count I), conflict of interest (Count II), breach of fiduciary duty (Count III), unlawful distribution (Count IV), violation of the Uniform Trade Secrets

Act (Count V), unjust enrichment (Count VI), accounting (Count VII), fraud (count VIII), conversion and embezzlement (Count IX), constructive trust (Count X but mislabeled in the complaint as Count IX) and intentional interference with contract (Count XI). Defendants filed a third party complaint against plaintiff in his individual capacity, alleging that he does not have standing to act as custodian for Mid Atlantic Lumber. Jurisdiction is present under 28 U.S.C. § 1332.

Presently before the court is defendants' motion to dismiss Counts I, VI, VII, VIII, IX, X and XI pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiff withdrew the fraud claim (Count VIII) voluntarily. The claims for theft of corporate opportunity, unjust enrichment, conversion and embezzlement and constructive trust will be dismissed to the extent that they are based upon the misappropriation of a trade secret. As to the remaining aspects of these claims and all other claims, defendants' motion to dismiss will be denied. The Virginia Stock Corporation Act does not preclude plaintiff from bringing common law claims against defendants, when defendant Ostlund is related to plaintiff in capacities other than that of corporate officer and the Virginia Uniform Trade Secrets Act does not preempt common law claims that are not premised solely on the alleged misappropriation of a trade secret.

For the purpose of deciding this motion, the allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

Plaintiff Michael Gray is a resident of Virginia. Plaintiff is the custodian of Mid Atlantic Lumber Company, Inc., a Virginia corporation with its principal place of business in Virginia. Defendant Paul Ostlund is a resident of Wisconsin. Defendant Split Rock Hardwoods, Inc. is a Wisconsin corporation with its principal place of business in Wisconsin.

Mid Atlantic Lumber procures wood flooring products and markets them to the general public. Defendant Ostlund is a 50% officer, director and shareholder of Mid Atlantic Lumber.

Defendant Ostlund used his office at Mid Atlantic Lumber to form Split Rock Hardwoods, a competing business that also markets wood flooring products to the general public. Defendant Ostlund is an officer, director and 50% shareholder of defendant Split Rock Hardwoods. Defendant Ostlund embezzled Mid Atlantic Lumber's funds and assets and diverted them to defendant Split Rock Hardwoods to purchase inventory and equipment and to pay for the construction of defendant Split Rock Hardwoods' place of business. The proceeds from the sale of Mid Atlantic Lumber's inventory were directed to defendant Split Rock Hardwoods.

In addition to forming a competing business, defendant Ostlund managed the affairs of Mid Atlantic Lumber exclusively to his benefit and to the detriment of Mid Atlantic

Lumber and its shareholders by allowing corporate opportunities for sales of product to be diverted to defendant Split Rock Hardwoods and by permitting Mid Atlantic Lumber's property, property rights, business methods, contractual rights, customer lists, customers and business opportunities to be converted to defendant Split Rock Hardwoods. Defendant Ostlund misappropriated trade secrets, including business methods, business techniques and customer lists. Defendant Ostlund used threats, misrepresentations and deceit and misused confidential information to destroy the goodwill of Mid Atlantic Lumber. He siphoned off accounts receivable, causing Mid Atlantic Lumber to breach contracts.

Defendant Ostlund did not disclose to Mid Atlantic Lumber's Board of Directors, its voting shareholders or plaintiff that he had diverted clients or corporate opportunities or that he had converted corporate funds. The shareholders of Mid Atlantic Lumber did not authorize any of these transactions.

OPINION

A. Standard of Review

A motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)); Gossmeyer v. McDonald, 128

F.3d 481, 489 (7th Cir. 1997).

B. Virginia Stock Corporation Act

Defendants contend that plaintiff's claims for conflict of interest, breach of fiduciary duty and unlawful distribution under the Virginia Stock Corporation Act (Counts II - IV) preempt his common law claims of unjust enrichment, accounting, conversion and constructive trust (Counts VI - X) against defendant Ostlund because Ostlund was acting in his capacity as an officer of Mid Atlantic at all relevant times. Defendants also contend that the Corporation Act preempts the claims against defendant Split Rock Hardwoods because holding the company liable would enable shareholders to circumvent the limitations of the Act by naming the company rather than the individual.

The Virginia Corporation Act sets forth a variety of potential sanctions for conduct undertaken by corporate officers within the scope of their employment; it also limits the amount of damages that can be assessed to corporate officers and directors for actions brought by shareholders. Va. Code § 13.1-692.1(A)(1)-(2) (liability limited to "the monetary amount . . . specified in the articles of incorporation . . . or bylaws or the greater of $100,000 or the amount of cash compensation received by the officer or director from the corporation during the twelve months preceding the act or omission for which the liability was imposed."). The Corporation Act provides an exception to the liability limitation for

officers or directors who engage in willful misconduct. Va. Code § 13.1-692.1(B).

The Corporation Act does not preempt overlapping common law claims explicitly, Va. Code Title 13.1 Chapter 9, and Virginia state courts have not addressed the specific question whether the Corporation Act preempts other common law theories of recovery. But see Jordan v. Bowman Apple Products Co. Inc., 728 F.Supp. 409, 415 (E.D. Va. 1990) (in claim for oppression, Virginia Code § 13.1-747 limits remedy to those under Act or other state corporation laws when corporation dissolves). Defendants argue that plaintiff's common law claims (Counts VI - X) are analogous to suing in tort to recover for breach of contract, relying on two cases in support of their argument that common law claims that are duplicative of contract claims must be dismissed. In Acorn Structures, Inc. v. Swantz, 846 F.2d 923 (4th Cir. 1988), an architectural firm sued a customer who allegedly built a house based on the firm's plans in violation of a contract. The court affirmed the dismissal of plaintiff's claim for conversion because a judgment on the breach of contract claim would have been dispositive of its conversion claim. Id. at 926. In JPS Elastomerics Corp. v. Industrial Tools, Inc., 65 F. Supp. 2d 376 (W.D. Va. 1998), a buyer of slitter knives brought suit against the seller, alleging that the knives failed to meet the requirements of the sales contract. The court granted the defendant's motion for summary judgment on a fraud claim, finding that the defendant's duty resulted from a contract and, therefore, the plaintiff's claims were governed by contract law. Id. at 383. Defendants' argument is unpersuasive.

In both Acorn and JPS, the relationships between the parties were based solely on an underlying contract; the defendants were not agents of the plaintiffs. In this case, defendant Ostlund was an officer of Mid Atlantic Lumber, for which plaintiff is custodian, but he was also a shareholder of Mid Atlantic Lumber and an officer of Split Rock Hardwoods. Because defendant Ostlund has a relationship to plaintiff and Mid Atlantic Lumber in several capacities and not just as a corporate officer of Mid Atlantic Lumber or merely as a party to a contract, the reasoning in Acorn and JPS is inapplicable to this case.

Defendants argue also that the Corporation Act provides the exclusive remedy for actions between officers and shareholders in Virginia corporations. Byelick v. Vivadelli, 79 F. Supp. 2d 610 (E.D. Va. 1999). According to defendants, any other construction would nullify the liability limitations of the Act. In making this argument, defendants assert that defendant Ostlund was acting solely in his capacity as an officer of Mid Atlantic because the complaint states that he was an officer of Mid Atlantic "at all relevant times." Plt.'s Compl., dkt. #1, at 3. However, defendants ignore the plain language of the complaint, which states in full that defendant Ostlund "at all relevant times herein was an officer and director of both Mid Atlantic Lumber Company, Inc. and Split Rock Hardwoods, Inc." Id. Defendants Ostlund was not solely an officer of Mid Atlantic Lumber; he was also an officer of Split Rock. In addition, defendant Ostlund was a shareholder of Mid Atlantic Lumber at all relevant times. Even though the factual allegations of the corporate and non-corporate law

claims may overlap, plaintiff is not precluded from bringing common law claims in addition to his claims under the Corporation Act, which governs relationships between corporate officers and their shareholders.

Defendants also assert that a judgment in plaintiff's favor on the corporate law claims would duplicate the relief he seeks in his common law claims (Counts VI-XI), resulting in double recovery. However, the Federal Rules of Civil Procedure allow parties to set forth two or more statements of a claim, in either one count or separate counts. Fed. R. Civ. P. 8(e)(2). Although the issue of duplicative damages may arise at a later date, it is not relevant at this stage of the proceedings. Defendants' motion to dismiss Counts VI through XI as preempted by the Corporation Act will be denied as to defendant Ostlund.

According to defendants, the fact that the Corporation Act limits the remedies available in actions against corporate officers leads to the conclusion that duplicative claims against defendant Split Rock Hardwoods must be dismissed. Otherwise, defendants argue, shareholders could circumvent the Act by bringing suit against a shareholder's company in order to reach the shareholder. Because I find that the Corporation Act does not preempt duplicative claims against defendant Ostlund, defendants' argument as to his principal, defendant Split Rock Hardwoods, is unpersuasive. Therefore, defendants' motion to dismiss Counts VI through XI as preempted by the Corporation Act will also be denied as to defendant Split Rock Hardwoods.

C. Uniform Trade Secrets Act

Defendants contend that plaintiff's claims of theft of corporate opportunity, unjust enrichment, accounting, conversion, constructive trust and intentional interference with contract (Counts I and VI - XI) should be dismissed because they are preempted by plaintiff's claim under the Virginia Uniform Trade Secrets Act (Count V). Va. Code § 59.1-341. The Virginia Uniform Trade Secrets Act preempts "conflicting tort, restitutionary and other law" that provides civil remedies for the misappropriation of a trade secret. Va. Code § 59.1-341(A). The statute does not "affect contractual remedies whether or not based upon misappropriation of a trade secret or other civil remedies that are not based upon misappropriation of a trade secret." Va. Code §§ 59.1-341(B)(1) and (2). "The plain language of the preemption provision indicates that the law was intended to prevent inconsistent theories of relief for the same underlying harm by eliminating alternative theories of common law recovery which are premised on the misappropriation of a trade secret." Smithfield Ham and Products Co., Inc. v. Portion Pac, Inc., 905 F. Supp. 346, 348 (E.D. Va. 1995). The preemption provision precludes only common law claims that are based strictly on a trade secret misappropriation claim. Id. "The issue becomes whether allegations of trade secret misappropriation *alone* comprise the underlying wrong." Id. (citation omitted) (emphasis in original). In order to prevail on their motion for dismissal, defendants must demonstrate that the common law claims are premised entirely on those

facts underlying the misappropriation of the trade secret. Id.

Plaintiff's claims will proceed to the extent that they have as their factual basis something other than trade secret misappropriation. In his claim for misappropriation of trade secrets (Count V), plaintiff alleges that defendants took trade secrets, "including business methods, techniques and customer lists,"from Mid Atlantic Lumber by improper means. Plt.'s Compl., dkt. #1, at 13. Upon examination of the complaint, it appears that certain aspects of plaintiff's claims for theft of corporate opportunity, unjust enrichment, conversion and embezzlement and constructive trust rest on trade secret misappropriation. Those aspects of the claims will be dismissed.

In his claim for theft of corporate opportunity (Count I), plaintiff alleges that defendant Ostlund failed to perform his duties as officer of Mid Atlantic Lumber with the result that "funds and assets . . . were mismanaged, wasted, diverted, siphoned off and embezzled." Id. at 5. Plaintiff alleges that the corporate opportunities at issue include the sale of products, property, property rights, business methods, contractual rights, customer lists, customers and business opportunities. Id. To the extent the theft of business opportunity claim concerns business methods and customer lists, it is based on the same facts as the trade secrets claim and is thus preempted by the Virginia Uniform Trade Secrets Act. The portion of plaintiff's theft of corporate opportunity claim that is based on allegations involving business methods and customer lists will be dismissed.

In his claim for unjust enrichment (Count VI), plaintiff alleges that "by means of the wrongful acts of defendants, they were unjustly enriched." Id. at 15. To the extent "wrongful acts" refers to the misappropriation of trade secrets, the claim is preempted by the Virginia Uniform Trade Secrets Act and will be dismissed. As to any allegations not based on the misappropriation of trade secrets, defendants' motion to dismiss the claim will be denied.

In his claim for accounting (Count VII), plaintiff alleges that defendants "have combined together to misapply the funds of equipment and corporate opportunities" of Mid Atlantic. Id. at 17. Because this claim is not based upon the misappropriation of trade secrets, defendants' motion to dismiss the accounting claim will be denied.

In his claim for conversion and embezzlement (Count IX), plaintiff alleges that defendants conspired to "waste, dissipate and improperly use the funds, property, assets, corporate opportunities of Mid Atlantic." Id. at 22. To the extent that wasting Mid Atlantic's corporate opportunities implicates the misappropriation of trade secrets, the claim is preempted by the Virginia Uniform Trade Secrets Act and will be dismissed. As to any allegations not based on the misappropriation of trade secrets, plaintiff's claim for conversion and embezzlement will not be dismissed.

In his claim for constructive trust (Count X), plaintiff alleges that defendants "systematically embezzled funds, equipment, customer lists, method of business and

corporate opportunity" belonging to Mid Atlantic. Id. at 25. To the extent that plaintiff alleges defendants stole business methods and customer lists, this claim is based on the same allegations as the misappropriation of trade secrets and will be dismissed. However, plaintiff also alleges that defendants stole funds and corporate opportunities. As to the remaining allegations, this claim is not based on trade secret misappropriation and will not be dismissed.

In his claim for intentional interference with contract (Count XI), plaintiff alleges that defendants "intentionally and maliciously interfered, inducing and causing a breach or termination of the relationship or expectancy by improper methods, including threats and intimidation, fraud, misrepresentation, deceit, misuse of inside or confidential information and breach of fiduciary relationship." Id. at 26. Further, defendants "destroyed the goodwill of Mid Atlantic by siphoning off the accounts receivable, causing Mid Atlantic to breach contracts." Id. Because these allegations are not based upon the misappropriation of trade secrets, the claim for intentional interference with contract will not be dismissed on the ground that it is preempted by the Virginia Uniform Trade Secrets Act.

D. Failure to Allege Specific Property

Defendants contend that plaintiff's claims for unjust enrichment, accounting, conversion and constructive trust (Counts VI, VII, IX and X) should be dismissed because

plaintiff failed to allege the specific property or funds that defendants allegedly misappropriated or converted. Defendants also contend that the accounting and constructive trust claims should be dismissed because plaintiff failed to allege that defendants are currently in possession of the assets or property allegedly taken from plaintiff.

Fed R. Civ. P. 8(a)(2) requires that every complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." To comply with Rule 8, a plaintiff is not required to plead facts supporting each element of a cause of action. Sanjuan v. American Board of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994). The pleading need only set out a claim for relief. Hrubec v. National Railroad Passenger Corp., 981 F.2d 962, 963 (7th Cir. 1992). The complaint will survive a motion to dismiss unless it appears beyond a doubt that a plaintiff can prove no set of facts that would entitle him to relief. Vickery v. Jones, 100 F.3d 1334, 1341 (7th Cir. 1996).

Plaintiff alleges that defendants stole Mid Atlantic Lumber's funds, equipment, accounts receivable and customer base. Plt.'s Compl., dkt. #1, at 15, 17, 22, 25, 26. In addition, defendant Ostlund is an officer of Mid Atlantic Lumber; in this capacity, he is aware of Mid Atlantic Lumber's assets and customer base. Construing plaintiff's allegations liberally as I must at this stage, I find that plaintiff has sufficiently stated claims for unjust enrichment, accounting, conversion, constructive trust and intentional interference with contract. Therefore, defendants' motion to dismiss these claims on the ground that plaintiff

failed to specify the property at issue will be denied.

E. Intentional Interference with Contract

In order to state a claim for intentional interference with contract, plaintiff must demonstrate that: (1) plaintiff had a contract or a prospective contract with a third party; (2) defendants interfered with that contractual relationship; (3) the interference was intentional; (4) the interference caused damages; and (5) defendants' conduct was improper. Shank v. William R. Hague, Inc., 192 F.3d. 675, 681 (7th Cir. 1999). Defendants contend that plaintiff did not allege the essential elements for intentional interference with contract by not identifying specific customers or contracts with which defendants allegedly interfered. For the reasons discussed above, I am not persuaded that plaintiff's pleadings fail to notify defendants of the nature of his claims under the liberal pleading requirements of Fed. R. Civ. P. 8. I find that plaintiff has sufficiently pleaded the elements of his claim for intentional interference with contract.

Defendants also contend that because plaintiff alleges that defendant Ostlund was Mid Atlantic Lumber's chief executive officer, defendant Ostlund was acting on behalf of Mid Atlantic Lumber and, absent a third party, could not have interfered with his own business relationships. Levine v. McLeskey, 881 F. Supp. 1030, 1055 (E.D. Va. 1995); Joseph P. Caulfield & Assoc., Inc. v. Litho Productions, Inc., 155 F.3d 883, 890 (7th Cir.

1998). As discussed above, plaintiff's pleadings do not indicate that defendant Ostlund was acting solely on behalf of Mid Atlantic Lumber. Instead, plaintiff alleges that defendant Ostlund "at all relevant times herein was an officer and director of both Mid Atlantic Lumber Company, Inc. and Split Rock Hardwoods, Inc." Plt.'s Compl., dkt. #1, at 3. Because the allegations do not limit defendant Ostlund to his role as officer of Mid Atlantic Lumber, defendants' argument fails. Therefore, defendants' motion to dismiss the claim for intentional interference with contract will be denied.

ORDER

IT IS ORDERED that the motion of defendants Split Rock Hardwoods, Inc. and Paul Ostlund to dismiss the claims for theft of corporate opportunity, unjust enrichment, conversion and embezzlement and constructive trust is GRANTED to the extent that these claims rely upon facts underlying the misappropriation of a trade secret. As to all other aspects of these claims and all other claims, defendants' motion to dismiss is DENIED.

Entered this 20th day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge