NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

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February 11, 2019

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Re: *AV Automotive, LLC, et al.* v. *Brandon Preske, et al.*, CL 2018-7749

Dear Mr. Hudgins and Mr. Kim:

This matter is before the court on Plaintiffs' motion for reconsideration of that part of the court's order of December 14, 2018 sustaining Defendants' demurrer to Counts I, II, IV, VII, and IX. For the reasons that follow, the motion is denied in part and granted in part.

Count I (Fraud) (Gebreyessus)

Plaintiffs contend that Count I states a cause of action pursuant to *Allen Realty Corp. v. Holbert*, 227 Va. 441, 450 (1984) ("Concealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud"). The material fact allegedly concealed from Plaintiffs was that the positive customer surveys were not legitimate (because they were not completed by actual customers).

Thus, to state a cause of action pursuant to *Allen Realty Corp.*, the complaint would need to allege, *inter alia*, that Gebreyessus knew that AV Automotive was acting upon the assumption that the customer surveys were legitimate, *i.e.*, they were completed by actual customers. There is no such allegation in the Complaint. As a result, the court denies the motion to reconsider its order sustaining the demurrer to Count I. The court will, however, grant the motion to reconsider to the extent that it will give Plaintiffs 14 days to file an amended complaint as to Count I.

OPINION LETTER

Count II (Fraud) (Preske)

Plaintiffs contend that Count II states a cause of action for fraud because it alleges: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.

The alleged false representation by Preske was that he "was an employee of AV when he completed an AV employee survey . . . ." ¶ 62. Further, that fact was material because the "survey was to have been completed by employees only" (¶ 62), and the misrepresentation was made "intentionally and knowingly" (¶ 62) and with intent to mislead (¶ 62). Plaintiffs also contend that they alleged that AV "reasonably relied on Preske's misrepresentations" (¶ 62) and that, "[d]ue to the false survey by Preske," AV was damaged because "Mr. Egnew was demoted and sent to a less desirable job at a different dealership" (¶ 63) so that "AV lost its producer Mr. Egnew." ¶ 64.

While AV Automotive argues that it alleged that the false representation by Preske was the present fact that he was an employee, AV Automotive also asserts that the false representation was not merely that Preske was an employee, but that the employee survey he completed was false because it "suggested that his livelihood and ability to pay bills was being negatively impacted by Mr. Egnew when in fact those things were not true." ¶ 35.

Turning first to the allegation that Preske's false representation was that he was an employee, the court denies the motion for reconsideration as the mere fact that Preske falsely represented himself to be an employee did not result in damages to Plaintiffs.

Apparently recognizing that the mere fact that Preske falsely represented himself to be an employee did not result in damages to Plaintiffs, Plaintiffs allege that it was the false survey by Preske that resulted in damages to AV because that survey caused Mr. Egnew to be "sent to a less desirable job at a different dealership" (¶ 63) so that "AV lost its producer Mr. Egnew." ¶ 64. Thus, Plaintiffs essentially argue that they alleged that the false survey by Preske was the misrepresentation of a present or a pre-existing material fact. See *SuperValu, Inc. v. Johnson,* 276 Va. 356, 367 (2008) ("fraud must involve a misrepresentation of a present or a pre-existing fact").

On this shoal, Plaintiffs founder as the survey response was not a representation of a present or a pre-existing material fact; it is the expression of a series of opinions concerning the operation of the dealership, in particular the "sales staff's pay plan . . . ." The survey response does not "suggest[] that [the employee's] livelihood and ability to pay bills was being negatively impacted *by Mr. Egnew*" (emphasis added) (¶ 35) since it only discusses the "sales staff's pay plan" but does not state (or even suggest) that Mr. Egnew was responsible for that plan.[1] The court thus denies the motion for reconsideration of its order sustaining the demurrer to Count II.

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[1] The court will ignore the allegation in ¶ 35 and consider only the actual text of the survey. See *Schaecher v. Bouffault*, 290 Va. 83, 107 (2015) ("A court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings.").

Count IV (Defamation & Conspiracy To Commit Defamation) (Gebreyessus)

Plaintiff contends that Count IV states a cause of action for defamation against Gebreyessus because Bavely completed false customer surveys (¶ 75) and "transmi[tted] . . . false customer surveys to Audi USA . . . ." ¶ 76. It must, however, be alleged that it was *the defendant* who made the false factual statement and who "published" the statement. See *Lewis v. Kei,* 281 Va. 715, 725 (2011) ("In order to assert a claim of defamation, the plaintiff must first show that a *defendant* has published a false factual statement that concerns and harms the plaintiff or the plaintiff's reputation.") (emphasis added). Here, the complaint alleges neither that Gebreyessus made nor "published" the alleged false factual statement. Accordingly, the motion for reconsideration of the order sustaining the demurrer to the defamation aspect of Count IV is denied.

With respect to the conspiracy to commit defamation, the Amended Complaint alleges that "Gebreyessus and Bavely conspired together to falsify customer surveys." ¶ 23. Even in the light most favorable to Plaintiffs, the only reasonable reading of ¶ 23 is that it is referring to "false positive customer surveys." ¶ 25. See also ¶ 26: "false positive reviews" and Gebreyessus and Bavely "worked in concert to achieve false positive results . . . ." The false *negative* surveys were created by Bavely when she "was angry because she had learned that her father had been terminated . . . ." ¶ 75. There is no allegation that Gebreyessus had any knowledge that the object of the conspiracy had changed.

In *Owens v. Commonwealth,* 54 Va. App. 99 (2009), the court explained that a co-conspirator:

> may be criminally liable for an act of another member of the conspiracy if the act is "done in the furtherance of the conspiracy" and can "be reasonably foreseen as a necessary or natural consequence of the" conspiracy. (Citation omitted).

54 Va. App. 99, 103.

Because the conspiracy alleged here was "to achieve false positive results" (¶ 26), Bavely's submission of false *negative* surveys was not an act done in the furtherance of the conspiracy with Gebreyessus and could not be reasonably foreseen as a necessary or natural consequence of the conspiracy. Consequently, Count IV does not state a claim upon which relief can be granted and the motion for reconsideration of the order sustaining the demurrer to the conspiracy aspect of Count IV is denied.

Count VII (Business Conspiracy) (Gebreyessus/Preske)

Code § 18.2-499(A) provides in pertinent part:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . . shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Code § 18.2-500(A) provides:

> Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term, "damages" shall include loss of profits.

To state a claim pursuant to Code § 18.2-500(A), Plaintiffs must thus allege that they have been injured in their reputation, trade, business or profession by reason of two or more persons combining, associating, agreeing, mutually undertaking or concerting together for the purpose of willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever.

While the Amended Complaint alleges that Plaintiffs were injured in their business (see ¶ 95) as a result of two or more persons associating or mutually undertaking or concerting together, they have not alleged that such associating or mutually undertaking or concerting together was done for the purpose of willfully and maliciously injuring Plaintiffs. Consequently, Count VII does not state a claim upon which relief can be granted and the motion for reconsideration of the order sustaining the demurrer to that count is denied. The court will, however, grant the motion to reconsider to the extent that it will give Plaintiffs 14 days to file an amended complaint as to Count VII.

Count IX (Conspiracy - Common Law) (Gebreyessus and Preske)

A common law civil conspiracy is:

> a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. . . . Thus, to survive demurrer, an allegation of conspiracy, whether criminal or civil, must at least allege an unlawful act or an unlawful purpose.

Hechler Chevrolet v. General Motors Corp., 230 Va. 396, 402 (1985).

More recently, the Court has explained that a civil conspiracy:

> is not actionable in its own right. (Citation omitted). Instead, civil conspiracy is a mechanism for spreading liability among coconspirators for damages sustained "as a result of an [underlying] act that is itself wrongful or tortious." (Citations omitted). Consequently, an action for civil conspiracy will not lie unless the predicate unlawful act independently imposes liability upon the primary wrongdoer. Only then can that liability be spread to the remaining coconspirators.

La Bella Dona v. Belle Femme Enterprises, 294 Va. 243, 256 (2017).

In *Gelber v. Glock*, 293 Va. 497 (2017), the Court quoted *Beck v. Prupis*, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998), *aff'd*, 529 U.S. 494, 501-03 (2000), for the proposition that the purpose of a civil conspiracy claim is to:

> impute liability – to make X jointly liable with D for what D did to

> P. (citation omitted). Thus, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury.

293 Va. 497, 534.

As the acts of which Plaintiffs complain in Count IX relate to the creation of false employee surveys, to survive demurrer, the complaint must allege that either Gebreyessus or Preske "committed a tortious act" related to the employee surveys "that proximately caused [Plaintiffs'] injury . . . ."

The only count which concerns a tortious act by Gebreyessus or Preske related to the employee surveys is Count II, which alleges fraud by Preske. As the court has already concluded that Count II does not state a claim for fraud against Preske, there is no tortious act committed by either Gebreyessus or Preske which could support a civil conspiracy claim. Accordingly, Count IX does not state a claim upon which relief can be granted and the motion for reconsideration of the order sustaining the demurrer to that count is denied.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AV AUTOMOTIVE, *et al.*	)	
	)	
Plaintiff	)	
	)	
v.	)	CL-2018-7749
	)	
BRANDON PRESKE, *et al.*	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Plaintiffs' motion for partial reconsideration of the court's December 14, 2018 order sustaining Defendants' demurrers to Counts I, II, IV, VII, and IX.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiff's motion to reconsider in part and GRANTS Plaintiff's motion to reconsider in part, and grants Defendants leave to file an amended complaint as to Counts I and VII.

ENTERED this 11th day of February, 2019.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

David D. Hudgins
Counsel for Plaintiffs

Michael K. Kim
Counsel for Defendants