

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CARESCIENCE, INC.	:	SEPTEMBER TERM
	:	
Plaintiff,	:	No. 04583
	:	
v.	:	Commerce Program
	:	
JAMES PANTO,	:	Control No. 052457
	:	
Defendant.	:	

ORDER

AND NOW this __23rd_ day of September, 2003, upon consideration of defendant's Preliminary Objections to plaintiff's Complaint, plaintiff's response thereto, the memoranda in support and opposition, and all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is hereby

ORDERED that said Preliminary Objections as **SUSTAINED** in part and **OVERRULED** in part, and Counts II and III and Requests for Relief "(q)" and "(s)" of the Complaint are **DISMISSED**. It is further

ORDERED that if plaintiff chooses to re-plead its claim for defamation, it shall do so by filing an Amended Complaint within twenty (20) days from the date of this Order.

BY THE COURT:

C. DARNELL JONES, II, J.

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OPINION

The court hereby considers the Preliminary Objections of defendant to plaintiff’s Complaint. Plaintiff brought this action against defendant, who is its former employee, because plaintiff alleges that after termination of his employment defendant communicated via e-mail and telephone with plaintiff’s customers and, in those communications, defendant defamed plaintiff. In addition, plaintiff claims that defendant has wrongfully retained certain confidential and proprietary materials of plaintiff’s. Defendant objects to all of plaintiff’s claims against it.

I. Plaintiff’s Claim For Breach of Contract

Defendant objects that plaintiff has not set forth a valid breach of contract claim. To make out a claim for breach of contract, a plaintiff must allege a contract, its breach, and resulting damages. *See CoreStates Bank Nat’l Assoc. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999). In this case, plaintiff has alleged the existence of a non-competition agreement between the parties, a copy of which is attached to the Complaint. That contract states that defendant may not “request” or “solicit” plaintiff’s customers not to do business with plaintiff. Plaintiff further alleges that defendant did request or solicit plaintiff’s customers in contravention of the parties’ contract and that plaintiff’s reputation and future business opportunities were

damaged by defendant's breach. The court finds plaintiff's claim for damages to be rather tenuous, but declines at this juncture to dismiss the breach of contract claim on that basis.¹

II. Plaintiff's Claim For Tortious Interference With Contract

Defendant correctly objects to plaintiff's claim for tortious interference with contract on the grounds that no contract was actually interfered with. Where, as here, it is not alleged that defendant was successful in his interference, no pecuniary loss is claimed, and the tortious interference count is merely duplicative of the plaintiff's defamation count, the tortious interference count must be dismissed as premature and redundant. *See Pelagetti v. Cohen*, 370 Pa. Super. 422, 435-6, 536 A.2d 1337, 1343-4 (1988).

III. Plaintiff's Claim For Defamation

¹ Given the type of harm claimed, plaintiff may have a stronger case for claiming injunctive relief based on defendant's alleged breach of the contract, rather than damages. "In the commercial context, the impending loss of business opportunities or market advantages may aptly be characterized as irreparable injury . . . [because it constitutes] damage which can be estimated only by conjecture and not by an accurate pecuniary standard." *Sheridan Broadcasting Networks, Inc. v. NBN Broadcasting, Inc.*, 693 A.2d 989, 995 (Pa. Super. 1997)

Defendant properly objects that plaintiff has not set forth in sufficient detail the statements which plaintiff alleges were defamatory. “A complaint for defamation must, on its face, identify specifically what allegedly defamatory statements were made. Furthermore, the Complaint should specify the precise words that [plaintiff] deem[s] defamatory. . . . Thus, the complaint is defective because it does not identify any particular statement in the letter which is false or conveys the impression of unethical or illegal behavior.” Sedwick v. Perrine, 1993 WL 602581 * 2 (Pa.C.C.P. June 3, 1993), *citing*, Moses v. McWilliams, 379 Pa. Super. 150, 170, 549 A.2d 950, 960 (1988). Therefore, plaintiff must re-plead its defamation claim to specify which of the statements that defendant allegedly made are defamatory.²

IV. Plaintiff’s Claim For Misappropriation of Proprietary Information

Defendant objects that plaintiff has not alleged a confidentiality agreement that defendant breached by retaining plaintiff’s allegedly confidential information after the termination of defendant’s employment with plaintiff. However, no agreement is required because there is a common law cause of action for misappropriation of trade secrets, which is apparently what plaintiff is trying to plead. *See* Restatement (First) Torts § 757 (1939); Restatement (Second) Agency § 396((1958); Christopher M.’s Hand Poured Fudge, Inc. v. Hennon, 699 A.2d 1272, 1276 (Pa. Super. 1997) (“when an employee learns an employer’s trade secrets in the course of a confidential employment relationship, a court may enjoin the employee’s use or disclosure of

² Plaintiff’s defamation claim is also defective because plaintiff failed to attach to its Complaint copies of the e-mails containing the allegedly libelous statements or to state that it was unable to do so for some valid reason. *See* Pa. R. Civ. P. 1019 (i); Gross v. United Engineers and Contractors, Inc., 224 Pa. Super. 233, 302 A.2d 370 (1973) (“if plaintiff had in his possession a letter by defendant . . . upon which the charge of libel was based, such letter should have been alleged in the Complaint and a copy attached and made a part thereof.”)

those secrets, regardless of whether the employee entered into a covenant restricting his use of such information.”) Therefore, plaintiff has set forth a valid cause of action for misappropriation.

Whether the materials that defendant has allegedly improperly retained contain trade secrets or otherwise protected confidential information is a determination of fact to be made at a later stage in this litigation. Defendant correctly notes, however, that plaintiff has failed to allege any particular damage caused to it by defendant’s wrongful retention of said allegedly confidential materials. Therefore, plaintiff’s request for damages in Count IV of the Complaint will be dismissed.³

V. Plaintiff’s Request For Attorneys Fees

Defendant objects to plaintiff’s requests for attorneys’ fees and costs. Under the “American Rule,” a party may not recover attorneys’ fees from its adversary absent an express statutory or contractual provision allowing for the recovery of such attorneys’ fees. *See Mosaica Academy Charter School v. Commonwealth Dept. of Education*, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002). In this case, the non-competition agreement expressly provides for the recovery of attorneys’ fees by plaintiff in the event of a breach by defendant of that agreement, so plaintiff may request them under its breach of contract claim. *See* Exhibit A to Complaint, ¶ 2(a). However, plaintiff may not recover attorneys’ fees on its other claims. In addition, plaintiff is entitled to request its costs under each Count of the Complaint, since it may be entitled to receive

³ If plaintiff is truly concerned that defendant may use the materials in his possession to plaintiff’s detriment, then plaintiff may move for intermediate equitable relief and request the court to restrain defendant from doing so.

them if it prevails. *See* 42 Pa. C. S. § 1726(2).

VI. Plaintiff's Request For Punitive Damages

Defendant objects to plaintiff's request for punitive damages. Plaintiff claims it can recover punitive damages on its claim for defamation, but it did not request them under that Count. Instead, plaintiff requests punitive damages under its claim for misappropriation of trade secrets. In order to recover punitive damages, plaintiff must allege "conduct that was malicious, wanton, reckless, willful, or oppressive." Arbor Assoc., Inc. v. Aetna U.S. Healthcare, 2003 WL 1847497 *2 (Phila. Co. Feb. 23, 2003). Plaintiff has failed to allege any such conduct by defendant with respect to its misappropriation claim, so its request for punitive damages will be stricken.

CONCLUSION

For all the foregoing reasons, defendant's Preliminary Objections to plaintiff's Complaint are sustained in part and overruled in part.

BY THE COURT:

C. DARNELL JONES, II, J.

Dated: 9/23/03