

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BULLET EXPEDITING, LLC,
Plaintiff,

vs.

Case No. 18-53-CB

EDMUND RUSSELL, INNOVATIVE
MANAGEMENT SOLUTIONS, LLC,
Defendants,

and

EDMUND RUSSELL & INNOVATIVE
MANAGEMENT SOLUTIONS, INC.,
Counter-Plaintiffs

v

BULLET EXPEDITING, LLC,
Counter-Defendant.

_____ /

OPINION AND ORDER

The parties filed competing motions for summary disposition. Plaintiff/Counter-Defendant Bullet Expediting, LLC ("Bullet") moves for summary disposition on Defendant/Counter-Plaintiffs Edmund Russell and Innovative Management Solutions, LLC's ("Innovative" or together as "Defendants" or "Counter-Plaintiffs") Counter-Complaint under MCR 2.116(C)(8) and (10). Defendants move for partial summary disposition under MCR 2.116(C)(10) on Count I of Bullet's Complaint.

I. Background

Bullet states that it is a trucking delivery company operating in Warren, Michigan and has three employees dedicated to answering its 16 telephone lines. Bullet alleges that it contracted with Mr. Russell to set up its phone system and thereafter made monthly payments to Innovative for phone services. At some point, Mr. Russell worked

as an employee for Bullet but was terminated, though the parties dispute the dates and circumstances. The parties also dispute whether in late 2017, Bullet owed Innovative for services provided.

In December 2017, Innovative “processed” Bullet’s American Express card for \$3,349.00. Bullet contested the charge, which the credit card company subsequently reversed. Mr. Russell pled no-contest to embezzlement in connection with the allegedly unauthorized charge. In late December 2017, either Mr. Russell or Innovative suspended Bullet’s phone service—as a result of non-payment according to Mr. Russell but for retaliation according to Bullet. Bullet claims that Defendants tortiously interfered with its expectancy of business by causing it to lose the ability to service customers as a result of inoperable phone lines. Innovative claims Bullet owned its phone number and had the ability to “port” the number at any time to a new service provider. According to Innovative, Bullet had operational phone service through a new provider by Monday, January 12, 2018.

On January 5, 2018, Bullet filed a Complaint alleging: count I, tortious interference with a business relationship; and count II, fraudulent use of a financial device. The Court issued an *Opinion and Order* on November 28, 2018 dismissing Count II of the Complaint because Bullet could not show damages after American Express reversed the charges. On January 25, 2018 Defendants filed a Counterclaim alleging: count I, breach of express and/or implied contract; count II, open account; count III, quantum meruit; and count IV, defamation.

Plaintiff Bullet filed its motion for summary disposition on February 4, 2019. Defendants filed a Response on February 19, 2019. Defendants filed a motion for

partial summary disposition on January 28, 2019. Bullet filed a Response on February 19, 2019. Defendants filed a Reply on February 21, 2019. The Court heard oral argument on the parties' present motions for summary disposition and took them under advisement.

II. Standards of Review

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess

credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

III. Arguments, Law and Analysis

A. Defendants Motion for Partial Summary Disposition

Defendants seek summary disposition of Count I for tortious interference with a business expectancy, the sole remaining count in Bullet's Complaint. To succeed on a claim of tortious interference with a business expectancy, a plaintiff must establish: 1) the existence of a valid business relationship or expectancy, 2) that defendant knew of the expectancy, 3) that defendant intentionally interfered with the expectancy, causing a breach or termination of the expectancy, 4) resulting in damage to the plaintiff. *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 78; 919 NW2d 439 (2018) citation omitted.

To satisfy the existence a valid business expectancy for element one, plaintiff must establish "something more than a mere hope or the innate optimism of the salesman." *Schipani v Ford Motor Co*, 102 Mich App 606, 622; 302 NW2d 307 (1981). "The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984); see also, *Cedroni Assn, Inc v Tomblinson, Harburn Assoc, Architects & Planners Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012)(The lowest bid did not create a reasonable probability that a school district would award a contract).

In the case at hand, Bullet relies on three affidavits to support its alleged lost expectancy, including the Affidavit of Vincent Stanczak, stating that Bullet depends on its telephone lines for customers to place trucking orders, that from December 29, 2017

to January 10, 2018 the telephone lines were out of service so customers could not contact Bullet to place work orders, and that Bullet lost \$1500 in business from Ryder Logistics. Bullet's Exhibit 1. Bullet also cites to the Affidavits of Christopher McKibben and Melissa Warren who corroborate that Bullet lost an order for \$1500 because of the phone system. Bullet's Exhibits 4 and 5.

To the extent Bullet bases its claim on unidentified customers who may have called during the time of the phone disconnection, Bullet has not established facts showing any reasonable likelihood or probability of a business expectancy regarding those customers. Unidentified customers who may place orders would amount to nothing more than wishful thinking or optimism.

Although Bullet specifically identifies Ryder Integrated Logistics as an expectancy, Bullet has not shown that Defendants were aware of that business relationship or expectancy. The only evidence presented by Bullet is the Deposition of Mr. Russell, who testified that he understood Bullet relied on its phones. Yet Mr. Russell also testified that he could not say that suspending the telephone service would cause a disruption because Bullet requires customers to send requests via email. Bullet's Exhibit 7, Russell Deposition at 79. Bullet has not shown that Mr. Russell knew of the expectancy. Therefore, Bullet has not produced evidence sufficient to establish elements one and two of a claim for tortious interference with a business expectancy.

Moreover, Bullet also has not shown facts establishing element three of its claim: that Defendants intentionally interfered that expectancy. "To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either

improperly or without justification.” *Dalley v Dykema Gossett*, 287 Mich App 296, 323–24; 788 NW2d 679 (2010) citation omitted. “To establish that a defendant’s conduct lacked justification and showed malice, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.” *Id.* citation omitted. “Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Id.* The interference with a business relationship “must be improper in addition to being intentional. Improper means “illegal, unethical, or fraudulent”. *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 374; 354 NW2d 341 (1984).

Here, Bullet argues that “there is a question of fact whether or not Defendant Russell was entitled to suspend or terminate Plaintiff’s telephone line.” However, a party opposing a motion for summary disposition “may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). Therefore, under the standard for summary disposition, Bullet must show affirmative acts of an improper motive to create a question of material fact. Bullet has not done so,

Bullet has shown no basis for Defendants’ obligation to continue providing telephone service in the first place or that it lacked a proper business purpose in discontinuing service. Without such an obligation, Bullet also fails to establish that the alleged interference was illegal, unethical or fraudulent. *Trepel*, 135 Mich App at 374. Further, even assuming *arguendo*, that Defendants had a contractual obligation to provide such service, Bullet has not shown how its claim would sound in tort rather than

in breach of contract. For these reasons, Defendants are entitled to summary disposition on Bullet's claim for intentional interference with a business expectancy.

B. Bullet's Motion for Summary Disposition of the Counter-Complaint

1. Counter-Claim, Counts I-III

Innovative and Mr. Russell's Counter-Complaint alleges: count I, breach of contract; count II, account stated; count III, quantum meruit; and count IV, defamation. Bullet argues for dismissal of counts I-III of the Counter-Complaint because it paid Innovative for services rendered leaving nothing due and owing. Defendants respond that the parties had an oral agreement for IT work. Defendants dispute the amount they are owed and deny receiving payment in full.

The Court ruled, for the reasons stated on the record, that questions of material fact exist regarding Counts I-III of the Counter-Complaint. Accordingly, Bullet's motion for summary disposition is denied on those counts.

2. Counter-Claim Count IV, Defamation

As to count IV of the Counter-Complaint, Bullet argues that Counter-Plaintiffs fail to state a claim for defamation. Additionally, Bullet claims there is no genuine issue of material fact that the statements were true and that Counter-Plaintiffs show no damages.

The elements of a defamation claim are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Ghanam v Does*, 303 Mich App 522, 544; 845

NW2d 128 (2014) citation omitted. "Accusations of criminal activity are considered 'defamation per se' under the law and so do not require proof of damage to the plaintiff's reputation." *Id.* at 545, citation omitted. Substantial truth is an absolute defense to a defamation claim. *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001) citation omitted.

Here, Counter-Plaintiffs only allege in their Counter-Complaint that Bullet made to third parties "false material statements" "that have a tendency to harm Edmund Russell and Innovative Management Solutions, LLC's reputation." Counter-Complaint ¶17. Defendants/counter-plaintiffs do not allege the specific statements made to third parties. Therefore, the Counter-complaint is facially deficient and cannot survive a motion for summary disposition under MCR 2.116(C)(8). See, *Ghanam v Does*, 303 Mich App 522, 525; 845 NW2d 128 (2014)(Complaint insufficient where merely alleged that statements caused harm to plaintiff's reputation.) "A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Id.* at 543.

Defendants/Counter-Plaintiff also allege that "Bullet . . . accused Defendants/Counter-Plaintiffs of thievery by filing a police report stating that Edmund Russell and Innovative Management Solutions, LLC stole from Bullet." Counter-complaint ¶18. However, Defendants/counter-plaintiffs may not base their Counter-Complaint on the filing of a police report or statements made to the police.

People who assist the police or who make statements to the police when reporting crimes enjoy a privilege in those statements. *Eddington v Torrez*, 311 Mich App 198, 201; 874 NW2d 394 (2015). "Accordingly, those statements may not be used

to sustain a defamation claim.” *Id.* see also, *Shinglemeyer v. Wright*, 124 Mich 230, 82 NW 887 (1900). The privilege attaches even if the reporting party makes the report maliciously. *Eddington*, 311 Mich App at 202, citation omitted. The *Eddington* Court reasoned “we could not reliably have practical law enforcement if crime victims, or those with knowledge of crimes, were forced to risk a lawsuit upon reporting what they know or what they suffered.” *Id.* The Court further explained that other provisions in the criminal law address the concern of a party filing a fictitious police report. *Id.* Consequently, Defendants’ Counter-Complaint fails to state a claim to the extent it relies on statements made to the police.¹ Therefore, the Counter/complaint fails to state a claim for defamation and must be dismissed.

For these reasons, the Court will grant Bullet’s motion for summary disposition on Count IV of the Counter-Complaint for defamation.

IV. Conclusion

For the reasons set forth above, Defendants’ motion for summary disposition on the claim for tortious interference with a business expectancy is GRANTED. Additionally, Bullet’s motion for summary disposition on the Counter-Complaint is DENIED in part and GRANTED in part. Specifically, Bullet’s motion is denied on counts I-III. Bullet’s motion is GRANTED on Count IV for defamation. Pursuant to MCR

¹ Bullet additionally argued that Mr. Russell’s no-contest plea on the charge of embezzlement, establishes the truth of the alleged defamatory statements, which would be a complete defense to defamation. However, Bullet overlooks the distinction between a guilty plea and a no-contest plea. A no-contest plea “is not tantamount to a conclusive factual finding for civil purposes.” *Akyan v Auto Club Ins Ass’n*, 208 Mich App 271, 274; 527 NW2d 63 (1994). “Rather, evidence of the plea is to be weighed by the jury in conjunction with all other evidence presented.” *Id.* see also MRE 410(2). Consequently, Bullet could not rely only on Mr. Russell’s no-contest plea as conclusive evidence of the truth of alleged embezzlement.

2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: APR 12 2019

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge