

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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|--|---|--------------------------|
| BLAKE EQUIPMENT CO., INC., |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | Civil No. 98-69-B |
| |) | |
| MOODY PUMP SUPPLY, INC., LEO C. |) | |
| MOODY, PHILIP J. GAUTHIER and |) | |
| DONALD E. HOLLEY, |) | |
| Defendants |) | |

RECOMMENDED DECISION

Plaintiff, Blake Equipment [hereinafter “Plaintiff” or “Blake”], brings this action against Defendants and, through its Complaint, raises the following claims: Interference with Contractual and Advantageous Business Relationships (Count I), Conversion (Count II), Defamation (Count III), violation of the Trade Secrets Act, 10 M.R.S.A. sections 1541-1548 (Count IV), violation of the Uniform Deceptive Trade Practices Act [hereinafter “DTPA”], 10 M.R.S.A. sections 1210-1216 (Count V), Unfair Competition (Count VI) and Punitive Damages (Count VII). Defendants maintain that the Court does not have jurisdiction over this matter because Plaintiff’s claims fail to meet the jurisdictional amount required for diversity jurisdiction. Federal Rules of Civil Procedure 12(b)(1). If the Court determines that it does have jurisdiction over this matter, Defendants move that Count V and IV of plaintiff’s Complaint be dismissed for failing to state a claim for which relief can be granted. Fed. Rule of Civ. Proc. 12(b)(6). For the reasons delineated below, I recommend that the Court DENY Defendants’ 12(b)(1) motion. I also recommend that the Court DENY Defendants’ motion to dismiss as to Count V and GRANT Defendants’ motion to dismiss as to Count VI.

Background

Plaintiff is a Connecticut corporation that sells sewage and water supplies and maintains sales offices in Maine. Defendants worked for the plaintiff for approximately five years; Moody as its Branch Manager, Gauthier as its inside salesman and Holley as its outside and inside salesman. Plaintiff terminated Moody in November 1997 and Gauthier and Holley terminated their employment in December 1997. Approximately a week before Moody's termination, Moody formed the Moody Pump Corporation [hereinafter "Moody Pump"]. Like the plaintiff, Moody Pump markets water and sewage supplies. Defendants Gauthier and Holley joined the Moody Pump soon after leaving Blake.

Plaintiff claims that before Defendants stopped working for Plaintiff, Defendants conspired to appropriate confidential, proprietary and trade secret information. Shortly after Gauthier and Holley resigned from Blake, Blake discovered that catalogs, job notebooks, vendor books, job quotes and previous specifications that were within the control of Defendants were missing. Plaintiff asserts that Defendants used the missing information to solicit its customers. Plaintiff also alleges that Defendants intentionally interrupted its business by: erasing a job board at the Winthrop sales office that is used to track progress of pending quotes; contacting Blake's customers and telling them that Blake is no longer in business; and telling Blake's customers that Blake no longer services the area.

Subject Matter Jurisdiction

Defendants argue that Plaintiff cannot assert diversity jurisdiction because Plaintiff failed to establish damages in excess of seventy-five thousand dollars. The general rule is that damages claimed by a plaintiff are used to determine the amount in controversy if the damages claimed are made in "good faith". *Coventry Sewage Assoc. v. Dworkin Realty Co.*, 71 F.3d 1,6 (1st Cir. 1995).

A claim is not made in “good faith” if the Court determines, to a legal certainty, that the claim is for less than the amount alleged. *Id.*; Also see *Chase Manhattan v. American Nat’l Bank*, 93 F.3d 1064, 1070 (2nd Cir. 1996) (for court to determine to a legal certainty that a claim is less than the jurisdictional amount recovery for that amount must be legally impossible.) Once the defendant challenges the amount alleged “the party seeking to invoke jurisdiction has the burden of alleging with sufficient particularity of facts indicating that it is not a legal certainty that the claim involves less than the jurisdictional amount.” *Department of Recreation and Sports v. World Boxing Ass’n*, 942 F.2d 84, 88 (1st Cir. 1991). A plaintiff may meet this burden by submitting affidavits or amending its pleadings. *Id.*

Defendants maintain that the Complaint contains only conclusory allegations that do not support the jurisdictional amount required for diversity jurisdiction. The Court disagrees. The Complaint delineates the following alleged facts: while employed by plaintiff Defendant Moody formed Moody Pump; Moody Pump is a direct competitor of the plaintiff ; Defendant Gauthier and Holley resigned from Blake to work for Moody Pump; Defendants removed confidential and other information from Blake and used the information to solicit plaintiff’s customers; Defendants knowingly made false and misleading statements to plaintiff’s customers that the plaintiff was no longer in business.

The fact that plaintiff is unable, at this early point of litigation, to identify the competitors lost by the Defendants’ actions or to positively place the missing confidential information in the Defendants’ possession does not foreclose this Court’s jurisdiction.¹ While it is true that the right

¹ Plaintiff argues that punitive damages should be included in any assessment of damages Plaintiff may receive. The Court agrees. The law is clear that punitive damages may be included in determining the jurisdictional amount. *See generally*, 14A Wright & Miller, *Federal Practice &*

and the amount of recovery are uncertain, that does not foreclose this Court's jurisdiction. "If the right of recovery is uncertain, the doubt should be resolved. . .in favor of the subjective good faith of the plaintiff." *Chase Manhattan*, 93 F.3d at 1071. (quoting *Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2nd Cir. 1994). The Court cannot find to a legal certainty that the plaintiff's claims for actual damages, punitive damages and attorneys' fees amount to less than seventy-five thousand dollars. Accordingly, I recommend that the Court deny Defendants' motion to dismiss for lack of subject matter jurisdiction.

Motion to Dismiss - Standard

MOTION TO DISMISS - STANDARD

The Court examines a Motion to Dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6) by taking all of Plaintiff's factual averments as true and drawing all inferences in Plaintiff's favor. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The Court may grant the Defendant's Motion to Dismiss "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990).

a. Count V - Deceptive Trade Practices Act Violation

Plaintiff alleges that Defendants disparaged Plaintiff in violation of the Uniform Deceptive Trade Practices Act. 10 M.R.S.A. section 1212(H) states that:

"A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

Procedure §3702 at 44 (1985). Additionally, attorney's fees may be included in the jurisdictional amount when permitted under statute. *World Boxing*, 942 F.2d at 89. In Maine, attorney fees are permitted if the court finds a defendant willfully engaged in a deceptive trade practice. 10 M.R.S.A. §1213. Because attorneys fees are permitted under the statute, the Court may include them when determining the jurisdictional amount.

"(H) Disparages the goods, services or business of another by false or misleading representation of fact[.]"

The Complaint alleges that:

14 . Defendants have disparaged the services and business of Blake Equipment by making false or misleading information representations of fact, or, on information and belief, have engaged in other conduct which has created a likelihood of confusion of misunderstanding as to the ability of Blake Equipment to continue servicing and selling to customers solicited by Defendants.

Defendants argue that the plaintiff cannot bring suit under the act because the act was only designed to apply to consumer transactions. Defendants' argument is misplaced in that it relies on Florida's version of DTPA which the Florida legislature designed to apply only to consumer transactions. *M.G.B. Homes v. Ameron Homes, Inc.*, 903 F.2d 1486, 1494 (11th Cir. 1990) (explaining that the Florida Deceptive Trade Practices Act applies only to consumer transactions); *M.G.B. Homes, Inc. v. Concepts, Inc.*, 972 F. Supp. 662, 663 (S.D. Fla. 1997); *Byrant Heating & Air Conditioning v. Carrier Corp.*, 597 F. Supp. 1053-54 (S.D. Fla. 1984). The Maine legislature adopted no such limitation. Maine like many other states adopted the Uniform Deceptive Trade Practices Act with little change. Few courts have interpreted the scope of section 1212(H), but those that have did not limit the subsection's scope to consumer transactions. *Mitsubishi Elec. Corp. v. IMS Technology*, No 96-C-499, 1997 WL 630187, at *6 (N.D. Ill. Sept. 30, 1997); *Akron-Canton Waste Oil. Inc. v. Safety-Kleen Oil Services*, 611 N.E.2d 955, 961 (Ohio 1992); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, No. 5.83-96, 1987 WL 14101, at *4 (D. Minn. Aug. 18,

1987). The basic test applied is whether the alleged statement “touches upon the rival's goods, services, or business” and was “false and misleading”. See *Mitsubishi* 1997 WL 630187, at *6. A statement is “false and misleading” if one knows one was speaking an untruth at the time one made the statement. *Id.*

Plaintiffs’ allegations, taken as true for the purposes of this motion, properly state a claim under the statute. First, Defendants’ statements touch upon the plaintiff's business by stating that the plaintiff can no longer service the customers needs. Second, Defendants’ statements intentionally misled Plaintiff’s customers to believe that Plaintiff no longer did business in the area and therefore, could no longer serve the customer's needs. Accordingly, I recommend that the Court deny Defendants' motion to dismiss Plaintiff's deceptive trade practices claim.

b. Count VI - Common Law Unfair Competition

Plaintiff alleges Defendants have violated common unfair trade competition by leading Plaintiff's customers to believe that Plaintiff no longer "provides service to the industrial/commercial market or is going out of business altogether. As a result, Blake Equipment has been damaged by the loss of business." Plaintiff's Complaint 43. Defendant argues that in Maine, common law unfair competition is limited to situations when a defendant tries to "pass off" one's goods as its own. The Court agrees. In Maine, a common law unfair competition claim is limited to when one attempts to pass off its goods. *LaPointe Machine Tool Co. v. J.N. LaPointe Co.*, 115 Me. 472, 477-78 (1916) ("The underlying element in all [definitions of unfair competition] is that no person shall be permitted to pass off his goods or products as the goods or products of the other."); *Hubbard v. Nisset*, 159 Me. 406, 407 (1963) (affirming the rule in *LaPointe*).

Plaintiff argues that the Court should not read *LaPointe* narrowly and quotes portions of opinion where the law Court explains the type of remedy being sought by the plaintiff. "In a sense the remedy that is sought invades the realm of private enterprise and private rights, and it is only when the necessity and justice of such an invasion are made clear that the Court will interfere." *Lapointe*, 115 Me. at 477. In this passage the Law Court is merely explaining the equitable remedy that arises once a meritorious claim is raised. To raise a meritorious claim the plaintiff must allege facts that defendant "passed off" its goods. This the plaintiff has failed to do. Accordingly, I recommend that the Court GRANT Defendants' motion to dismiss plaintiff's common law unfair competition claim.

Conclusion

Accordingly, I recommend that the Court DENY Defendants' motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. Proc. 12(b)(1) I also recommend that the Court DENY Defendants' motion to dismiss as to Count V and GRANT Defendants' motion to dismiss as to Count VI pursuant to Fed. R. Civ. Proc. 12(b)(6).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on June 8, 1998.