DOCKET NO.: CV-01-0450989-S	:	SUPERIOR COURT
NEATO, LLC	:	JUDICIAL DISTRICT OF NEW HAVEN
v	:	AT NEW HAVEN
SOUNDVIEW PARTNERS	:	
v.	:	
PETER TRACY	:	APRIL 18, 2002

DEFENDANT SOUNDVIEW PARTNER'S
MEMORANDUM OF LAW IN OPPOSITION TO
MOTIONS TO STRIKE

INTRODUCTION

On May 7, 2002, third-party defendant Peter Tracy ("Tracy") and plaintiff Neato LLC ("Neato") jointly moved to strike counts of defendant Soundview Partners' ("Soundview") third party complaint and counterclaim. As set forth more fully herein, the court should deny the motions to strike because:

(A) the facts alleged give rise to personal liability on the part of Tracy;

(B) the counts for intentional misrepresentation and fraud are not duplicative, and, in any event, a request to revise, not a motion to strike, is the proper procedural device for the deletion of duplicative pleadings; and

(C) the Connecticut Unfair Trade Practices Act ("CUTPA") does not require more than a single improper act; Soundview has alleged a fraudulent course of conduct consisting of multiple improper acts; and Neato and Fellowes are subject to liability under CUTPA for their misconduct with respect to the sale of Neato.

BACKGROUND

Neato formerly manufactured, distributed and licensed devices, software and media for the application of labels on CD's and CD packages throughout the world. First Amended Counterclaim, ¶ 1. Tracy was the principal officer and owner of Neato. Id., ¶ 3. On or about October 13, 2000, Tracy caused Neato to enter into a letter agreement with Soundview ("the Agreement") whereby Soundview agreed to purchase Neato's assets and business for a net total price (less adjustments) of approximately Seventeen Million Dollars ($17,000,000.00). Id., ¶ 4 and Exhibit A thereto; Third Party Complaint, ¶ 4. The Agreement was subject to a number of conditions, including a pre-existing right of first refusal by a licensee of Neato's products, Fellowes Manufacturing ("Fellowes"). Third Party Complaint, ¶ 5. The Agreement required Neato to pay Soundview a $500,000.00 Breakup Fee in the event that Fellowes exercised it rights to purchase Neato. Id.

On or about February 12, 2001, Tracy caused Neato to execute an amendment to the Agreement with Soundview (collectively"the Amendment") that required Soundview to pay Neato a good faith deposit of $50,000. Id., ¶ 6. The Amendment provided that Soundview would be entitled to a return of the deposit in the event that Neato refused to consummate the sale or breached the Agreement, or if Fellowes exercised its first refusal right. Id. Upon learning that Fellowes' intended to exercise its right of first refusal, Tracy terminated the Agreement. Id., ¶ 7. However, to avoid paying the break-up fee or returning the deposit to Soundview, Tracy intentionally misled Soundview to believe that Fellowes was not exercising its right of first refusal, and that Neato was terminating the Agreement because it believed that Soundview was in breach of the Agreement. Id., ¶¶ __.

Thereafter, Neato filed the above captioned declaratory judgment action, seeking a judgment that it did not breach the Agreement and is, therefore, entitled to retain Soundview's good faith deposit. By the Counterclaim and Third Party Complaint, Soundview alleges that Tracy not only caused Neato to breach the Agreement, but that Neato and Tracy schemed to intentionally and wrongfully deprive Soundview of its deposit. Id., ¶ 8. Additionally, the Counterclaim and Third Party Complaint seek the $500,000.00 Breakup Fee to which Soundview is entitled by virtue of Fellowes' exercise of its first refusal right and by virtue of its eventual purchase of Neato's business.

Tracy has moved to strike the Third Party Complaint on the ground that Soundview has failed to allege sufficient facts to "pierce the corporate veil." Tracy and Neato move to strike the intentional misrepresentation and fraud counts against them on the ground that they are duplicative. Tracy and Neato also seek to strike the CUTPA counts against them on the ground that Soundview has alleged only a single unfair trade practice, which was not in the course of Tracy and Soundview's business. As set forth below, these arguments are without merit.

ARGUMENT

A. STANDARD FOR GRANTING A MOTION TO STRIKE

"The purpose of a motion to strike is to 'contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff." Novametrix Medical Systems, Inc. v. BOC Group. Inc., 224 Conn. 210, 214-15, 618 A.2d 25 (1992). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." Id., at 215.

B. THE COURT SHOULD NOT STRIKE THE THIRD PARTY COMPLAINT

1. The Facts Alleged Give Rise to Personal Liability on the Part of Tracy

The court should deny Tracy's motion to strike the Third Party Complaint because the corporate form is not a veil behind which officers may commit fraud with impunity, as Tracy argues. Memo, pp.3-6. Soundview's claims are not dependant upon piercing "the LLC protective veil," because they are based on Tracy's own negligence, fraud, and bad faith: "It is black letter law that an officer of a corporation who commits a tort is personally liable to the victim . . ." Kilduff v. Adams, Inc. 219 Conn. 314, 331-332, 593 A.2d 478 (1991) (holding that corporate officer "were personally liable for their participation in the fraud, regardless of whether the corporate veil should have been pierced."); Scribner v. O'Brien, Inc., 169 Conn. 389, 404, 363 A.2d 160 (1975); See also Senior v. Hartford Financial Services Group, 2002 Conn.Super.LEXIS at * 6 (January 14, 2002) (Peck, J.) (attached); Am. Prot. Servs. v. Brady, 2001 Conn.Super.LEXIS 3449 at * 5-6 (December 7, 2001) (Jones, J.) (attached).

In this case, as in Kilduff and Scribner, Soundview has alleged that Tracy engaged in tortious conduct. Specifically, Soundview has alleged that Tracy schemed to use the Agreement with Soundview to coax Fellowes to commit to purchase Neato. Third Party Complaint, ¶ 19. In furtherance of this scheme, Tracy mislead Soundview to believe that Fellowes had no interest in purchasing Neato while continually contacting Fellowes to encourage Fellowes to exercise its right of first refusal in violation of the Agreement between Neato and Soundview. Id., ¶¶ 20(b)-24, 29, 31. Tracy further intentionally concealed his contacts with Fellowes from Soundview. Id., ¶¶ 23-24, 30. In order to buy time to induce Fellowes to offer to purchase Neato, Tracy continually demanded that the parties change and re-change the structure of the purchase agreement under false pretenses.

Id., ¶¶ 26, 28, 34. In furtherance of the scheme, and in order to avoid paying the Breakup Fee or returning Soundview's deposit, upon receiving notice on February 26, 2001 that Fellowes intended to exercise its right of first refusal, Tracy not only failed to notify Soundview of Fellowes' pending offer, but affirmatively misrepresented that Fellowes had no interest in purchasing Neato. Id., ¶ 33, 35. Further, on February 27, 2001, Tracy claimed that Neato needed to restructure the deal yet again so that Soundview would be unable to finalize the purchase prior to Fellowes' offer and the March 14, 2001 deadline for consummating the sale. Id., ¶ 34. Tracy lulled Soundview into believing that time was not of the essence in meeting the deadline for consummating the sale by continuing to negotiate the terms of the sale up to, and after, the deadline. Id., ¶¶ 36-37. When, on March 16, 2001, Fellowes formally offered to purchase Neato, Tracy contacted Soundview and misrepresented that Neato was terminating the Agreement on the grounds that Soundview had failed to consummate the sale by the March 14, 2001 deadline, and omitted to inform Soundview of Fellowes offer to purchase Neato in order to avoid paying the break-up fee and returning Soundview's deposit. Id., ¶¶ 38-39.

Under these circumstances, it is "black letter law" that Tracy may be held personally liable for his fraudulent and bad faith acts, and Soundview need not pierce the veil of the LLC to recover damages from Tracy personally. Kilduff, supra; Scribner, supra. Whether or not Tracy committed his torts on behalf of Neato is irrelevant. "Where . . . an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." Sribner, at 404; Contra, Memo, p.3.[1] For this reason, Tracy's

[1] Similarly, the identity of the factual allegations in the Counterclaim and Third Party Complaint is irrelevant. The only issue before the court is whether Soundview has stated valid causes of action against Tracy in the Third Party Complaint. Memo, p.3, fn.1. As Tracy is

authorities are inapt; none of Tracy's authorities involved claims against a corporate officer for torts that he committed. See SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 230-231, 585 A.2d 666 (1991) (attempt to pierce veil between Connecticut corporation and foreign corporation in order to impose Connecticut tax liability upon foreign corporation); Angelo Tomasso, Inc. v. Arrow Construction & Paving, Inc., 187 Conn. 544, 558-559, 447 A.2d 406 (1982) (attempt to hold individual liable for corporation's breach of contract); United Electrical Contractors, Inc. v. Progress Builders, Inc., 26 Conn.App. 749, 603 A.2d 1190 (1992) (same).

Finally, as Tracy's own authorities explain, contrary to Tracy's argument, there is no "public policy of the state" to allow officers of LLC to commit fraud with impunity. SFA Folio Collections, Inc., 217 Conn. at 230, fn.7 ("The concept [of corporateness] will be sustained only so long as it is invoked and employed for legitimate purposes. Perversion of the concept to improper uses and dishonest ends (e.g., to perpetuate fraud, to evade the law, to escape obligations), on the other hand, will not be countenanced.")

2. The Intracorporate Conspiracy Bar Has No Application to Soundview's Causes of Action

The court should similarly reject Tracy's bizarre argument that the court should dismiss Soundview's causes of action for bad faith (Count One); innocent misrepresentation (Count Two); negligent misrepresentation (Count Three); intentional misrepresentation (Count Four); fraud (Count

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well aware, Soundview amended the Counterclaim concurrently with filing the Third Party Complaint to incorporate many of the discovered facts that led to the Third Party Complaint. The identity of allegations between the two pleadings reveals, at most, that the Counterclaim also states facts that give rise to personal liability on the part of Tracy.

Five); and CUTPA (Count Six) on the ground that a conspiracy claim cannot be maintained against a corporation and its officer. Memo, pp.5-6 (emphasis added).

First, the intracorporate conspiracy bar does not apply where, as here, the agent of the corporation has an independent personal stake in achieving the corporation's illegal objective. See Findell v. Koos, 2002 Conn. Super. LEXIS 887 at *4-5 (March 11, 2002) (Berger, J.). In this case, Soundview has alleged that Tracy was the owner of Neato, and that his misconduct was motivated by the desire to sell Neato for the highest price possible, and to avoid paying Soundview the break-up fee and return Soundview's deposit; "Tracy had a personal interest and involvement in taking every conceivable action, including the scheme, to sell Neato because of his desire and his family's demands that he retire to Florida." Third Party Complaint, ¶ 3, 10, 19-20. Thus, Soundview has alleged facts that preclude the application of the intra-corporate conspiracy doctrine. Id.

Second, the intracorporate conspiracy bar has no application to Soundview's causes of action - none of which required Soundview to prove the elements of a conspiracy. Tracy has not cited a single authority that supports dismissal of non-conspiracy claims based on the intracorporate conspiracy bar. Rather, every case cited by Tracy involved the adjudication of causes of action that **depended** upon the plaintiff's ability to establish a conspiracy. See Lieberman v. Grant, 474 F.Supp. 848, 874-875 (D.Conn. 1979) (claim of conspiracy under 42 U.S.C. § 1985); Doe v. Board of Education, 833 F.Supp. 1366 (N.D.Ill. 1993) (same); Day v. General Electric Corp., 15 Conn.App. 677, 684, 546 A.2d 315 (1988) (holding that plaintiff could not prevail on claim that statute of limitations did not begin to run until the last act of the alleged conspiracy took place because there could be no conspiracy between the defendant employees and corporation); Harp v. King, 2001 Conn.Super.LEXIS 88 at * 11 (January 10, 2001) ("it is clear that Harp is pursuing a

theory of liability based on the defendants' agreement and joint action."). Significantly, to the extent these cases discussed the plaintiff's non-conspiracy causes of action, they did not dispose of those claims simply on the ground that plaintiff was unable to establish a conspiracy, as Tracy asks this court to rule. See Lieberman, at 875-876 (disposing of plaintiff's defamation claim on other grounds). Because none of Soundview's causes of action depend upon establishing the elements of a conspiracy, there is no basis to dismiss the claims.

C. THE COURT SHOULD DENY THE IMPROPER MOTIONS TO STRIKE THE INTENTIONAL MISREPRESENTATION COUNTS

The court should deny Tracy and Neato's motions to strike the intentional misrepresentation counts of the Third Party Complaint and Counterclaim on the ground that they duplicate the fraud causes of action, because the motions are improper. "A motion to strike is not the proper vehicle to rid a complaint of duplicative counts. A request to revise may be filed in order to obtain . . . the deletion of any unnecessary [or] repetitious . . . allegations in an adverse party's pleading . . . Accordingly, a request to revise, and not a motion to strike, is the proper vehicle for the deletion of repetitious pleadings." Faragasso et al. v. DeGeorge Home Alliance, Inc. 1998 Conn. Super. LEXIS 3449 at * 14-15 (December 7, 1998) (D'Andrea, J.) (attached), citing, Downing v. Yale University Health Services, 1995 Conn.Super. LEXIS 3612 (December 26, 1995) (Zoarski, J.) (attached) and Gamelstaden PLC v. Backstrom (May 17, 1995) (Karazin, J.); See also Atlas Construction Co. v. Amity Regional School District No.5, 1999 Conn. Super. LEXIS 831, (March 25, 1999) (Moran, J.) (same).

D. THE COURT SHOULD NOT STRIKE THE CUTPA COUNTS

Tracy and Neato's motions to strike the CUTPA counts against them because, contrary to their claim (1) CUTPA does not require Soundview to allege multiple acts; (2) Soundview has

alleged a fraudulent course of conduct consisting of multiple improper acts; and (3) CUTPA applies to the sale of a business by a commercial parties. See Memo, pp.7-9.

First, "[a]lthough there is a split of authority within the Superior Court as to whether a single act is sufficient to constitute a violation of CUTPA, the majority of Superior Court decisions have held that a party need not allege more than a single act of misconduct to bring an action under CUTPA." Pollock v. Panjabi, 47 Conn.Supp. 179, 198-199 & fn.10, 781 A.2d 518 (2000).[2] These decisions are correct because nothing "in the text of CUTPA, its legislative history or the interpretation of the Federal Trade Commission Act by the Federal Trade Commission or the federal courts n11 that requires the commission of multiple unfair or deceptive acts or practices before civil liability in a private cause of action may be imposed." Pollock, at 198-199.

Second, even assuming *arguendo* that CUTPA required multiple acts, the complaint is sufficient where, as here, the plaintiff has alleged multiple misrepresentations and omissions in furtherance of a single improper purpose. Pollock, at 200; Miller v. Laskowski 2000 Conn. Super. LEXIS 808 at * 1-2 (March 27, 2000) (Bishop, J.) (attached)

Finally, CUTPA applies to Neato and Tracy's sale of the business. As this court has concluded on numerous occasions:

CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative

[2] See also New England Mortgage Group, Inc. v. Lebowitz, 2001 Conn.Super.LEXIS 2018 at * 8-10 (July 20, 2001) (D'Andrea, J.) (attached); Lovick v. Nigro, 1997 Conn.Super.LEXIS 448 at * 37-38 (February 24, 1997) (Lager, J.) (attached);Yale University School of Medicine v. Wurtzel, 1990 Conn.Super.LEXIS 1720 at * 7-8 (November 9, 1990) (Flanagan, J.) (attached).

> provision of the act, 42-110b(a), states merely that 'no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.' Trade or commerce, in turn, is broadly defined as 'the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.' General Statutes 42-110a(4). . . . **there is no requirement that a person be in the business of selling [or leasing or renting] such property or commodities in order to be engaged in trade or commerce within the meaning of the act** . . . Rather, the defendant's activities which allegedly violate CUTPA must constitute "trade or commerce" as that term is defined.

Holeva v. M & Z Associates, Inc., 1998 Conn.Super.LEXIS 3757 at * 9-14 (November 9, 1998) (Levin, J.) (attached); Horowitz v. Cottle, 1992 Conn.Super.LEXIS 1842 at * 13-14 (July 9, 1992) (Vertefeuille, J.) (CUTPA applies to one time sale of residence) (attached); Geltman v. Ciardiello 14 CLT 5 pp. 75, 76 (Superior Court, Reynolds, J. 1988). The act specifically defines “trade or commerce” to include the “sale or. . . the offering for sale . . . of any property,” which includes the sale of a business such as Neato.

CONCLUSION

For the foregoing reasons, Soundview respectfully requests that the court deny the motions to strike.