

FIRST JUDICIAL CIRCUIT
OF VIRGINIA



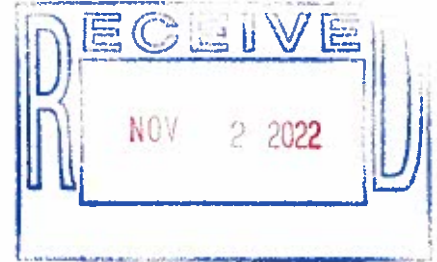
MARJORIE A. TAYLOR ARRINGTON
JUDGE

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Re: Chanah, Inc. v. Summers et al.; CL22-3681

Dear Counsel,

This case between a body piercing business and its former employees and a newly formed competitor came before the Court on September 21, 2022 on the Defendants' Demurrer. The Court has considered the Demurrer, Brief in Support, and Memorandum in Opposition, as well as the arguments of counsel in reaching this ruling.

Factual Allegations

Plaintiff, Chanah, Inc., is a corporation owned by Kimberly Summers that performs body piercing services. Defendants are seven former employees of the corporation, including Summers' son, Jordan Summers, who was also an officer and director of the corporation. Plaintiff alleges that Jordan, while still employed in that capacity, carried out a plan to open a competing business and coordinate a mass resignation. It alleges one count of breach of fiduciary duty against Jordan, one count of breach of fiduciary duty against the other employees, one count of tortious interference with contract against Jordan, one count of statutory conspiracy against all defendants, one count of common law conspiracy against all defendants, one count of conversion and one count of violation of the Computer Crimes Act against employee Matthew Francis for deleting Plaintiff's data from its YouTube site, and one count of injunction against all defendants.

Demurrer

A demurrer tests the legal sufficiency of the Complaint. In determining whether the

Complaint contains sufficient factual allegations to state a cause of action, the Court is guided by the long-standing rule that “[a] demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations. A demurrer does not, however, admit the correctness of the pleader’s conclusions of law.” *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001). The Court accepts as true all properly pleaded facts and all reasonable inferences that may be fairly drawn in the pleader’s favor. *Russo v. White*, 241 Va. 23, 24, 400 S.E.2d 160, 161 (1991).

Count I and II, Breach of Fiduciary Duty

Defendants demur on the basis that the allegations demonstrate nothing more than preparations to start a competing business, which is not tortious. Defendants cite *Williams v. Dominion Tech. Partners, LLC*, 265 Va. 280, 576 S.E.2d 752 (2003), in which the Supreme Court of Virginia stated that “in the absence of a contract restriction regarding this duty of loyalty, an employee has the right to make arrangements during his employment to compete with his employer after resigning his post.” *Id.* at 289, 576 S.E.2d at 757. They argue that all of the defendants “had the right to quit, and they exercised that right.”

However, as Plaintiff points out, *Williams* also said that “an employee must not have ‘misappropriated trade secrets, misused confidential information, [or] solicited an employer’s clients or other employees prior to termination of employment.’” 265 Va. at 291, 576 S.E.2d at 758 (citing *Feddeman & Co. v. Langan Assoc.*, 260 Va. 35, 42, 530 S.E.2d 668, 672 (2000)). Plaintiff here does claim that the Defendants solicited other employees and clients. *Feddeman* also involved a “mass resignation,” which the employees knew would be “devastating” to the employer, *id.*, as Plaintiff alleges here, due to the time it takes to train and license. The demurrer to these counts is overruled.

Count III, Tortious Interference with Contract against Jordan

Defendants argue that there is no allegation of a contract between Plaintiff and the six employees with which he could have interfered, and therefore Plaintiff has failed to allege the existence of a valid contractual relationship. A contractual relationship is an essential element of a tortious interference claim. *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 216, 754 S.E.2d 313, 318 (2014). Plaintiff has not provided any legal authority for its argument that mere at-will employment is a contractual relationship, akin to a contract terminable at will. The demurrer to this count is sustained with leave to amend.

Count IV and V, Statutory and Common Law Conspiracy

Defendants argue that they were all part of the same entity at the time they were alleged to have conspired, and that an entity cannot conspire with itself. Defendants refer to the “intra-corporate conspiracy doctrine” which dictates that members of the same corporate entity cannot conspire, citing *White v. Potocska*, 589 F. Supp.2d 631 (E.D. Va. 2008). However, in that case, the court states that “[a] corporate entity, acting through its agents, cannot conspire with itself, so

a conspiracy cannot exist if Defendants are agents of the same principle acting within the scope of the agency.” *Id.* at 660 (internal quotation and citation omitted).

However, these Defendants were not alleged to be acting on behalf of the corporation or within the scope of their agency for the corporation when they acted according to their own personal motives. Plaintiff cites *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993), in which two employees of one entity were found to have conspired to form a competing entity. Indeed, as alleged, these defendants were working outside the scope of their employment for the Plaintiff, and it can be fairly inferred that they were also conspiring with the newly formed competitor. The demurrer to these counts is overruled.

Count VI and VII, Conversion and Violation of the Computer Crimes Act

Matthew Francis demurs on the basis that the description of the goods converted or the subject of the computer crimes is overly vague and conclusory because it refers only to videos, and does not specify their value, whether they were unable to be retrieved, or how Plaintiff was damaged. Conversion is “the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial or inconsistent with the owner’s rights.” *Economopoulos v. Kolaitis*, 259 Va. 806, 814 (2000). Plaintiff alleges that it owned the videos on the YouTube channel, that Matthew Francis deleted them from the channel without authority to do so, and that it was damaged in the amount of \$100,000.00. Defendants cite no legal authority requiring a plaintiff pleading conversion to also plead the value of the goods converted or the nature of their damages, which may be proven at trial, or that the owner was permanently deprived of their possession.

The Computer Crimes Act states that “[a]ny person who uses a computer or computer network, without authority and [. . .] [c]onverts the property of another; is guilty of the crime of computer fraud.” Va. Code § 18.2-152. Plaintiff has sufficiently pled that Matthew did not have authority to use the Plaintiff’s YouTube channel and converted its property when it deleted the videos. The demurrers to these counts is overruled.

Count VI[II], Injunction

Plaintiff seeks to enjoin further operation of the competing business. Defendants demur on the basis that there is no covenant restricting competition for the Court to enforce, that Plaintiff has not pled the requirement for posting a bond, and that there is not a separate cause of action for an injunction. Defendants do not argue that the elements of injunction and preliminary injunction have not been pled.

To sustain the demurrer on the basis that injunction is not an independent cause of action would be to put form over substance. The injunction count puts the Defendants on notice that Plaintiff intends to seek an injunction as a separate form of relief. The statutory bond requirement is a matter of procedure that may be addressed if and when Plaintiff moves for that relief, at which time the Defendants may also raise their restrictive covenant argument. The demurrer to this count is overruled.

Attorney's Fees

Plaintiff seeks attorney's fees on all counts. With the exception of the statutory conspiracy count, it has not identified the basis for the requests as required by Rule 3:25, R. Sup. Ct. Va. The demurrer is sustained with leave to amend as to attorney's fees for these counts.

Mr. Walsh, please draft an order setting for the above rulings, and submit the fully endorsed order to the Court for entry.

Sincerely,



Marjorie A. Taylor Arrington, Judge
Chesapeake Circuit Court

Cc: Hon. Alan P. Krasnoff, Clerk of Court