

[Cite as *Vestige, Ltd. v. Bur. of Criminal Identification & Investigation*, 2008-Ohio-3643.]

Court of Claims of Ohio

The Ohio Judicial Center
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VESTIGE, LTD.

Plaintiff

v.

BUREAU OF CRIMINAL
IDENTIFICATION & INVESTIGATION

Defendant

[Cite as *Vestige, Ltd. v. Bur. of Criminal Identification & Investigation*, 2008-Ohio-3643.]

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Case No. 2005-09251

Judge Joseph T. Clark

DECISION

{¶1} Plaintiff brought this action against defendant alleging tortious interference with a contract. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff is a company that provides computer forensics services including expert testimony on behalf of criminal defendants. Plaintiff employs experts who analyze the nature of information found on a defendant's computer. As part of its business operations, plaintiff entered into a contract with Guidance Software (Guidance) to purchase software known as EnCase. The software enables plaintiff to analyze data associated with images that have been stored on a computer, specifically child pornography. Plaintiff contends that the software is expensive and that tracking the path used to transport and store images can be rather complicated. As such, plaintiff frequently sought assistance and technical support via message boards¹ hosted by Guidance. According to plaintiff, agents of defendant communicated with Guidance beginning in early 2004 and that, as a result of those exchanges, plaintiff's employees were denied access to the message boards.

{¶3} Defendant denies liability and contends that any statements communicated to Guidance were truthful and were made in response to assurances from Guidance that the message boards were not open to persons providing assistance for criminal defendants. In addition, defendant argues that loss of access to the message boards does not constitute interference with a contract or a business relationship inasmuch as plaintiff never lost its license to use EnCase and Guidance offered technical support by telephone.

{¶4} Donald Wochna, the chief legal officer for plaintiff, testified that he provides attorneys and clients with technical advice on how to extract and use data contained on computers. Wochna acknowledged that although he has obtained technical support via the telephone, that type of service is available only Monday through Friday, and not on the weekends. According to Wochna, plaintiff's employees often worked throughout the weekend to prepare analytical reports for clients. If plaintiff encountered a problem, the message boards were available 24 hours every day.

¹A message board is an electronic forum that consists of various software users throughout the world who respond to technical queries with helpful information.

Wochna explained that the message boards could be accessed by registered users of EnCase and that use of the boards was included as part of the licensing agreement with Guidance. Wochna recalled that in March 2004, he was denied access to the message boards. Upon inquiry, he learned that Guidance had a policy that if any law enforcement officer complained, then those persons who assisted criminal defendants would be denied access to the message boards. Over the next several months, two other employees of plaintiff were denied access as well.²

{¶5} Plaintiff submitted an e-mail communication from Bill Seibert, the Director of Customer Relations for Guidance, who informed various employees of plaintiff including Wochna, Greg Kelley, and Damon Hacker, that “[t]o keep a peace with our very large law enforcement customer base on the Message Boards, we have always excluded criminal defense computer forensic examiners from the Message Board. * * * The message Board policy has been in place since its inception. * * * [L]aw enforcement personnel from Ohio pointed out a number of cases where they were up against [defense experts from] Vestige. It was cordially requested that you be removed from the Message Board.” (Plaintiff’s Exhibit 5.) Plaintiff’s claim for tortious interference is based upon the assertion that defendant improperly and without justification harmed plaintiff’s business by limiting its access to technical support that was both free and timesaving. Wochna asserts that plaintiff has lost not only clients and productivity, but that it must now pay a fee to receive technical support by telephone.

{¶6} Defendant’s employees, Allan Buxton and Lee Lerussi, testified that they too are computer forensics specialists and that they specifically recall attending training sessions offered by Guidance where they learned that Guidance excluded defense experts from using the message boards. Buxton recalled being advised that anyone discovering an abuse of this policy was to notify Guidance. Buxton admitted that he

²Wochna stated that plaintiff instituted a civil action against Guidance in 2004 for alleged breach of contract, unfair trade practices, and fraud. According to Wochna, the parties eventually entered into a

alerted Guidance to the fact that certain employees of plaintiff were using the message boards while they were working for or consulting with defendants in either civil or criminal cases.

{¶7} Lerussi testified that he is employed with defendant as a senior special agent and that he uses EnCase software to search computer hard drives for evidence of criminal content. He also recalled learning at a training session sponsored by Guidance that the message boards were not open for use by criminal defense experts. After Guidance was notified of the identities of certain employees of plaintiff, Guidance requested and received verification from Buxton and Lerussi that plaintiff was preparing evidence to be used on behalf of criminal defendants.

{¶8} The elements of the tort of tortious interference with contract are “(1) the existence of a contract, (2) the wrongdoer’s knowledge of the contract, (3) the wrongdoer’s intentional procurement of the contract’s breach, (4) lack of justification, and (5) resulting damages.” *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 1999-Ohio-260. “The tort of interference with business relationship occurs when a person, without privilege to do so, induces or otherwise purposefully causes a third person not to enter into or continue a business relationship with another. The elements of tortious interference with a business relationship are (1) a business relationship; (2) the tortfeasor’s knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom.” *Diamond Wine & Spirits v. Dayton Heidelberg Distributing Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶23, citing *Geo-Pro Serv. Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 525.

{¶9} The main difference between tortious interference with a contract and tortious interference with a business relationship “is that interference with a business relationship includes intentional interference with prospective contractual relations, not

yet reduced to a contract. Such interference must be intentional because Ohio does not recognize negligent interference with a business relationship.” *Diamond Wine & Spirits*, supra. (Citations omitted.) It is axiomatic that the wrongdoer must be a non-party to the contract. See, e.g., *Kenty v. Transamerica Premium Ins.*, 72 Ohio St.3d 415, 418, 1995-Ohio-61.

{¶10} In this case, it is undisputed that a contractual business relationship between plaintiff and Guidance existed in 2004. The court finds that defendant knew or should have known that the contract existed inasmuch as Guidance markets EnCase, defendant has one or more licenses for EnCase, and those who purchase the software are required to execute a licensing agreement. According to Wochna, access to the message boards is restricted to licensed users who must enter an assigned identification number and a password before they can post a query. Thus, Buxton, as a licensed user himself, would have known that for employees of plaintiff to have participated in exchanges on the message boards, they must have been licensed users. Both Buxton and Lerussi admitted that they knew that upon notification, Guidance would most likely deny plaintiff access to the message boards. Based upon the testimony and evidence submitted, the court finds that agents of defendant acted intentionally to effectuate the loss of access to message boards by employees of plaintiff.

{¶11} Nevertheless, the Restatement of the Law 2d, Torts (1979) Section 766, entitled “Intentional Interference with Performance of Contract by Third Person” states that “One who intentionally and *improperly* interferes with the performance of a contract * * * between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.” (Emphasis added.)

{¶12} Thus, the remaining issue before the court is whether defendant acted improperly or whether it was justified in informing Guidance that the employees of Vestige who were receiving information from the message boards were also working for

defendants in either criminal or civil matters. “[I]n determining whether an actor has acted improperly in intentionally interfering with a contract or prospective contract of another, consideration should be given to the following factors: (a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference, and (g) the relations between the parties.” *Fred Siegel Co.*, supra, at 178-179.

{¶13} Buxton and Lerussi acknowledged that they identified certain employees of plaintiff to Guidance and informed Guidance that plaintiff provided expert advice for criminal defendants. However, Guidance made the decision whether or not to deny plaintiff access to the message boards. As to motive, Buxton and Lerussi testified that they were following the directive that they had received at training sessions. Plaintiff asserts that defendant sought to hamper the ability of plaintiff to advise its clients. Wochna explained that he relied on the availability of the message boards for time-saving solutions to problems that were routinely encountered when using EnCase. For example, Wochna described one instance where plaintiff spent over 30 hours on a task that could have been resolved in 30 minutes with the information already posted on the message boards. Plaintiff also argues that defendant and plaintiff were in adversarial positions during criminal proceedings that were pending at the time that Buxton and Lerussi contacted Guidance.

{¶14} After careful consideration of the testimony presented, the court finds that Buxton and Lerussi consistently and credibly testified that they had been assured by Guidance that the message boards were available exclusively to law enforcement agents and that, accordingly, they had acted with the understanding that plaintiff was posting inquiries in restricted areas in violation of the policies put in place to benefit law enforcement officers.

{¶15} Defendant maintains that “[a]ccording to Section 772 of the Restatement of the Law 2d, Torts, one who intentionally causes a third person not to perform a contract does not do so improperly by giving the third person truthful information.” *Dryden v. Cincinnati Bell Tel.* (1999), 135 Ohio App.3d 394.

{¶16} The Restatement of the Law 2d, Torts (1979) Section 772, is entitled “Advice as Proper or Improper Interference” and reads as follows:

{¶17} “One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other’s contractual relation, by giving the third person

{¶18} “(a) truthful information, or

{¶19} “(b) honest advice within the scope of a request for the advice.”
(Emphasis added.)

{¶20} Defendant cites this section as justification for its position that liability cannot be charged to defendant for communicating truthful statements. Nevertheless, plaintiff argues that there are three requirements for the exception to apply and that since Guidance did not seek advice from defendant, the rule does not apply. The court notes that the comments included with section 772 provide some clarification that is helpful in this particular instance. Comment (a) states in part that “[t]his Section is a special application of the general test for determining whether an interference with an existing or prospective contractual relation is improper or not, as stated in §§ 766-766B and 767.”

{¶21} Plaintiff references Comment (c) which states in relevant part that “[t]he rule *as to honest advice* applies to protect the public and private interests in freedom of communication and friendly intercourse. * * * [T]he rule protects the amateur as well as the professional adviser. The only requirements for its existence are (1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest. If these conditions are present, it is immaterial that the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm

caused to him by the advice. If one or more of the three stated conditions are lacking, the rule stated in this Section does not apply.” (Emphasis added.)

{¶22} Comment (b) states that “[t]here is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. *It is also true whether or not the information is requested.*” (Emphasis added.) The court finds that Comment (b) is applicable to the facts of this case. Buxton and Lerussi both testified convincingly that their actions were motivated by the sincere belief that Vestige was accessing the message boards in direct violation of a policy that Guidance emphasized when marketing EnCase to law enforcement clients.

{¶23} Upon review of the evidence and testimony presented, the court finds that the information provided by defendant to Guidance was not advice as posited by plaintiff, but rather truthful information presented by defendant to Guidance, and that such communication was in response to instructions received from Guidance. Therefore, based upon the foregoing, the court concludes that the intentional interference by defendant was not improper.

{¶24} According to plaintiff, Guidance has refused to renew licenses held by plaintiff and Guidance has declined to enter into any new business with plaintiff, actions which plaintiff attributes to defendant’s interference. The court disagrees. The court finds that Guidance informed plaintiff of its decision by letter wherein Guidance stated “Vestige has initiated and is pursuing a harassing and frivolous lawsuit against Guidance Software. While Guidance will continue to fulfill all current and pre-existing software license and support commitments to Vestige, we have decided at this time to not enter into any future new business with your company.” (Plaintiff’s Exhibit 13.) Thus, the court finds that plaintiff has also failed to prove that the loss of future business

contracts with Guidance was caused by defendant. To the extent that plaintiff argued that Buxton and Lerussi were motivated by a desire to achieve a professional edge in the criminal proceedings, or that they acted with malice, the court finds that plaintiff failed to produce sufficient credible evidence to support such allegations. Accordingly, judgment shall be rendered in favor of defendant.

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Judge Joseph T. Clark

JUDGMENT ENTRY

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

cc:

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SJM/cmd
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