SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

NICOLOSI DISTRIBUTING, INC.,

Plaintiff,

vs.

FERNANDO MATOS, et al.,

Defendants.

/

And RELATED ACTIONS AND CROSS-CLAIMS

/

Master File CIV 508434
(Consolidated with CIV 513539 and 522307)

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

ORDER GRANTING SUMMARY JUDGMENT

On November 13, 2014, hearing was held on Defendant Annex Santa Clara Inc.'s Motion for Summary Judgment and Alternative Motion for Summary Adjudication of the fourth cause of action and fifth cause of action alleged by Plaintiff Nicolosi Distributing Inc. in its Third Amended Complaint in Department 2 of this Court before the Honorable Marie S. Weiner. Herman Franck of Franck & Associates appeared on behalf of Plaintiff Nicolosi Distributing Inc., and Rachel Darvish, Esq. and Wendy Hillger of Ad Astra Law Group LLP appeared on behalf of Defendant Annex Santa Clara Inc.

Upon due consideration of the briefs and evidence submitted, and the oral argument of counsel for the parties, and having taken the matter under submission,

IT IS HEREBY ORDERED as follows:

1. Defendant Annex Santa Clara Inc.'s Motion for Summary Judgment against Plaintiff Nicolosi Distributing Inc. on its remaining claims under the Third Amended Complaint is GRANTED.

2. Defendant Annex Santa Clara Inc.'s Motion for Summary Adjudication of Plaintiff's fourth cause of action for intentional interference with contract or intentional inducement to breach a contract is GRANTED.

3. Defendant Annex Santa Clara Inc.'s Motion for Summary Adjudication of Plaintiff's fifth cause of action for intentional interference with prospective economic advantage is GRANTED.

4. Defendant's request for monetary sanctions against Plaintiff is DENIED.

5. Defendant's Evidentiary Objections to the Franck Declaration Nos. 2, 3, 5, are SUSTAINED, No. 1 (but not for the truth as to Plaintiff) is OVERRULED, and as to No.4 is SUSTAINED as to HF2 00131 and paragraph 10 but OVRRULED as to the deposition transcript. Defendant's Evidentiary Objections to the Danny Nicolosi Declaration Nos. 1, 2, 3, 4, 7, 8, 9, 11, 12, 13, 14, and 16 are SUSTAINED, Nos. 5, and 6 are OVERRULED. And as to No. 10 is SUSTAINED as to Paragraphs 17 and 18 as to statements by Vaugh but is OVERRULED as to Paragraph 20, and as to No. 15 is SUSTAINED as to Paragraph 32(b) second sentence and is otherwise OVERRULED. Defendant's Evidentiary Objections to the Tony Nicolosi Declaration No. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 are SUSTAINED, and as to No. 7 is SUSTAINED

as to paragraphs 20-21 and Exhibit D but OVERRULED as to Paragraphs 14-19, 22-33 and Exhibit C.

THE COURT FINDS as follows:

Procedural Status

Action No. 508434 is a lawsuit by Plaintiff Nicolosi Distributing, Inc. ("Nicolosi") against Defendant Annex Santa Clara, Inc. ("Annex"), suppliers of automotive products to body shops. Nicolosi filed the operative Third Amended Complaint ("TAC") on November 7, 2012. The Third Amended Complaint asserted three causes of action against Annex (fourth, fifth, and sixth), but on August 7, 2013, the Law & Motion Department issued an order striking the sixth cause of action. The only causes of action remaining against Annex are the fourth cause of action for intentional interference with contract / intentional inducement to breach a contract and the fifth cause of action for intentional interference with prospective economic advantage.

Fourth cause of action for intentional interference with contract / intentional inducement to breach a contract

Nicolosi claims that Annex intentionally interfered with the exclusive contract between Nicolosi and Matos Automotive Enterprises Inc. dba Matos Auto Body ("Matos"), an auto body shop located in the Bay Area.

Annex asserts that the fourth cause of action for intentional interference with contract / intentional inducement to breach a contract fails as a matter of law because Nicolosi cannot establish (1) Annex's knowledge of the contract and intent to induce its breach or (2) that the breach was caused by Annex's unjustified or wrongful conduct.

Matos and Nicolosi entered into a contract on or about October 9, 2006, which had an exclusivity clause prohibiting paint and supply purchases from other vendors. (SSUF 1.) Starting on December 3, 2009, Matos stopped paying Nicolosi for all of the paint and supplies received. (SSUF 2.)

It is undisputed that in approximately April 2011, Nicolosi informed Matos that Matos was required to make payments on the account balance before Nicolosi would provide any further supplies, and all future supplies would be provided on a cash-on-delivery basis. (SSUF 3.) It is undisputed that in April 2011, Fernando Matos, the owner of Matos, decided he could not make good on the money owed to Nicolosi (SSUF 4.) Nicolosi's final sale to Matos was on or about April 15, 2011. (SSUF 5.)

Matos needed clear sealer to continue operating. (SSUF 6.) It is undisputed that on April 20, 2011, Matos purchased clear sealer from Cook's Automotive ("Cook's"), and the clear sealer was covered by the exclusivity clause of the Matos–Nicolosi contract. (*Id.*)

It is undisputed that at some point in April 2011, Mr. Matos called a friend who runs Milpitas Auto Body, and the friend told Mr. Matos that Annex was Milpitas Auto Body's supplier. (SSUF 7.) It is undisputed that Matos then initiated the change to Annex as Matos's paint supplier. (*Id.*) Mr. Matos called Vincent Rojas, Vice President of Annex, and requested a meeting. (Hillger Decl., Exh. D [Rojas Depo.] at 22:14-16.) Annex began selling to Matos in April 2011. (*Id.* at 11:13-15.) It is undisputed that Mr. Matos did not inform Annex of Matos's exclusive contract with Nicolosi at the time of Annex's first sale. (SSUF 8.)

On June 6, 2011, Nicolosi instructed ColorNet to cancel the DuPont paint mixing computer system at Matos because Matos is no longer Nicolosi's customer. (SSUF 9.)

On August 1, 2011, counsel for Nicolosi sent a letter to Annex, informing Annex about the exclusive contract between Matos and Nicolosi and demanding that Annex cease selling automotive supplies to Matos. (SSUF 10.) It is undisputed that after receipt of the cease-and-desist letter, Annex continued selling supplies to Matos. (SSUF 11.) Additionally, in or around August 2011, Mr. Rojas spoke to Danny Nicolosi, and Danny Nicolosi informed Mr. Rojas of the exclusive contract. (D. Nicolosi Decl., ¶¶ 25-32.)

On August 16, 2011, counsel for Nicolosi sent a letter to Cook's, informing Cook's about the exclusive contract between Matos and Nicolosi and demanding that Cook's cease selling automotive supplies to Matos. (Hillger Decl., Exh. C [Bartles Depo.] at Exh. 2.) Heinz Bartels, manager and owner of Cook's, testified that he tossed the cease-and-desist letter aside. (Hillger Decl., Exh. C at 29:1-30:3.) Mr. Bartels testified that after Cook's receipt of the cease-and-desist letter, Cook's made several sales to Matos, and Mr. Bartels never told Matos that Cook's would no longer sell to Matos (30:5-12.)

Mark D'Angelo of D'Angelo & Son's, a distributor of automotive supplies in Southern California, testified that Annex has interfered with exclusive contracts between D'Angelo & Sons and auto body shops in that area. (Franck Decl., Exh. F [D'Angelo Depo.] at 42:7-23.)

To prove a claim for intentional interference with contract, the plaintiff must establish that: "(1) he had a valid and existing contract; (2) the defendant had knowledge of the contract and intended to induce its breach; (3) the contract was in fact breached by the contracting party; (4) the breach was caused by the defendant's unjustified or wrongful conduct; and (5) the plaintiff has suffered damage." Dryden v. Tri-Valley Growers (1977) 65 Cal.App.3d 990, 995.

In Dryden, plaintiffs entered into contracts with owners of an olive oil processing plant to purchase certain waste products with a right of option extending until 1982. Approximately three years later, the owners advised the plaintiffs that they intended to rescind and cancel the waste contracts on grounds of material breach and fraudulent representations. The plaintiffs brought action against original owners. While the action was pending, the owners transferred ownership of the plant to the defendant. The plaintiffs then sued the defendant for intentional interference of the waste contracts between the original owners and plaintiffs. The complaint conceded that the defendant learned of the waste contracts after defendant executed the agreement to purchase the plant. Plaintiffs claimed the defendant should have rescinded or cancelled the purchase agreement after learning of the waste contracts and, by failing to do so, defendants had induced the original owners' breach of the waste contracts.

The First Appellate District held that the plaintiffs had failed to state a claim for intentional interference with contract. Id. at pp. 995-996. The Court of Appeal explained that an action for intentional interference with contract fails absent facts showing the defendant's knowledge of the contract at the time of breach, and the plaintiffs' complaint admitted that the defendant did not learn of the waste contract until after defendant agreed to purchase the plant. Id. at p. 996. As to the plaintiffs' "novel proposition" that the defendant was required to rescind or cancel the purchase agreement after learning of the waste contracts, the appellate court concluded that the proposition was not supported by reason or law. Id. at p. 996.

The Court of Appeal explained,

> While the law rightly prohibits an intentional interference with contractual rights or beneficial economic relations existing between others, there is no equivalent duty to rescind a contract lawfully entered into on the ground that it might offend the legal rights of others [citation]. On the contrary, it

> is well settled that no actionable wrong is committed where, as here, the defendant's conduct consists of something which he had an absolute right to do [citations].

Id., at p. 996.

In addition, the actions of the Defendant must be the actual cause of the break in the relationship between the contracting parties. "[A]m action for interference with contractual rights lies only if the defendant's act *induced* the breach of contract between the plaintiff and the third party or if the defendant *purposely* caused a third person not to perform the contract with another. [Citations.]" Dryden, at pp. 995-966, emphasis original. "It has been repeatedly held that a plaintiff seeking to hold one liable for unjustifiably inducing another to breach a contract, must allege that the contract would otherwise have been performed, and that it was breached and abandoned by reason of the defendant's wrongful act and that such act was the moving cause thereof. [Citations.]" Dryden, at p. 997; see also Hill v. Progress Co. (1947) 79 Cal.App.2nd 771, 780.

Annex points out that the allegations in the TAC and the undisputed evidence further show that prior to the Annex sale, Matos had already failed to pay Nicolosi, Nicolosi had already refused to extend further credit to Matos and demanded that Matos come current on its account before Nicolosi would deliver more paint, Matos had already purchased supplies from Nicolosi's other competitor Cook's, and Nicolosi had already canceled the ColorNet computer service required to mix DuPont paint at Matos. Thus there are no facts supporting causation. The relationship between Nicolosi and Matos was already broken before Annex ever got involved.

Similarly, in Augustine v. Trucco (1954) 124 Cal.App.2d 229, the Court of Appeal explained that "[t]here is no liability for inducing a breach of contract where the breach is caused by the exercise of an absolute right -- that is, an act which a person has a

definite legal right to do without any qualifications." "The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." Augustine, at p. 245.

> The principles governing an action for unjustifiably inducing a breach of contract are stated in *Imperial Ice Co. v. Rossier*, supra, (p. 36): "A person is likewise free to carry on his business, including reduction of prices, advertising, and solicitation in the usual lawful manner although some third party may be induced thereby to breach his contract with a competitor in favor of dealing with the advertiser. [Citations.] .... A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor. The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts. ..."The complaint in the present case alleges that defendants actively induced Coker to violate his contract with plaintiffs so that they might sell ice to him. The contract gave to plaintiff the right to sell ice in the stated territory free from the competition of Coker. The defendants, by virtue of their interest in the sale of ice in that territory, were in effect competing with plaintiff. By inducing Coker to violate his contract, as alleged in the complaint, they sought to further their own economic advantage at plaintiff's expense. Such conduct is not justified. *Had defendants merely sold ice to Coker without actively inducing him to violate his contract, his distribution of the ice in the forbidden territory in violation of his contract would not then have rendered defendants liable. They may carry on their business of selling ice as usual without incurring liability for breaches of contract by their customers. It is necessary to prove that they intentionally and actively induced the breach.*" [Citations.]

Id. at pp. 244-245, emphasis original.

Here, Annex has made a prima facie showing that Nicolosi's claim for intentional interference with contract fails as a matter of law. Nicolosi claims that Annex intentionally interfered with the exclusive contract between Nicolosi and Matos by selling supplies to Matos. Annex presents undisputed evidence that Annex did not know of the exclusivity clause in the Matos-Nicolosi contract when Annex began selling to Matos in April 2011. (*See* SSUF 8.) Further, Annex presents undisputed evidence that

Annex did not initiate the sale to Matos. The undisputed evidence shows that by April 2011, payment disputes had caused Fernando Matos, the owner of Matos, to look elsewhere for automotive supplies. (SSUF 4, 6.) Mr. Matos purchased clear sealer from Cook's in violation of the exclusivity clause of the Matos–Nicolosi contract. (SSUF 6.) Mr. Matos also decided to contact Annex regarding purchasing automotive supplies after Mr. Matos' friend recommended the company. (*See* SSUF 7.) The above-described evidence negates Nicolosi's claim that Annex induced or otherwise purposefully caused Matos to breach the Matos-Nicolosi contract.

Annex concedes that it has continued to sell supplies to Matos after it received Nicolosi's cease-and-desist letter in August 2011 and thereby learned of the Matos-Nicolosi contract, but under California law, Annex had no duty to discontinue selling products to Matos because Annex is in the business of selling automotive supplies to body shops like Matos and Annex was not a party to the Matos-Nicolosi contract.

Nicolosi fails to present evidence raising a triable issue of material fact on the claim for intentional interference with contract. Nicolosi presents no evidence showing Annex's knowledge of the Matos-Nicolosi contract in April 2011, when Annex began selling to Matos. In fact, Nicolosi's own evidence confirms that Annex did not learn of the contract until it received Nicolosi's cease-and-desist letter months later.

Nicolosi argues that Mr. Matos informed Annex about the contract "during April 2011, or some other date to be discovered in this action." (Opp. at 14:8-12.) However, Nicolosi presents no evidence supporting this argument. Indeed, the only evidence regarding Mr. Matos' statements to Annex show that Mr. Matos did *not* notify Annex of the contract when Mr. Matos initiated the purchases from Annex. (SSUF 8.)

Nicolosi argues it may reasonably be inferred that Annex knew of the contract because exclusive supply agreements are common in the industry. First, Nicolosi presents no admissible evidence that exclusive supply agreements are common in the automotive supply industry. To establish that exclusive supply agreements are common in the industry, Nicolosi cites its own allegations in the TAC. (*see* Pl. Resp. to SSUF at p. 8.) Moreover, Danny Nicolosi opines that that it is understood in the industry that a contract between a distributor and an auto body shop is for the exclusive supply of materials. (D. Nicolosi Decl. ¶ 32(b).) A party cannot rely on the allegations of his or her own pleadings, even if verified, to support or oppose a motion for summary judgment or summary adjudication. College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 720 fn. 7. Accordingly, Nicolosi cannot rely on its own allegations to establish that exclusive supply agreements are common in the industry. Furthermore, Danny Nicolosi fails to explain why he is qualified to opine regarding the customs of the automotive supply industry, and his statement has been properly objected as inadmissible opinion. (*See* Annex Objections to D. Nicolosi Decl., Evid. Objection No. 15.) Second, even if exclusive agreements are common in the automotive supply industry, such evidence at best shows that Annex should have known about the Matos-Nicolosi contract. Such evidence does not permit the reasonable inference that Annex had actual knowledge of the contract and intended to cause its breach.

Nicolosi argues it may reasonably be inferred that Annex knew of the contract in April 2011 because Annex's Vice President, Mr. Rojas, arrived unannounced at Nicolosi's place of business in August 2011 and asked Danny Nicolosi "what's up with the Matos situation." (*See* D. Nicolosi Decl. ¶ 25, 29-31.) However, the fact that Mr. Rojas asked Danny Nicolosi about the "Matos' situation" in August 2011 does not create

the reasonable inference that Annex knew about an exclusive contract between Matos and Nicolosi back in April 2011. Nicolosi's own evidence show that the visit occurred after Nicolosi sent Annex the cease-and-desist letter dated August 1, 2011. (*See* D. Nicolosi Decl., Exh. D at DN 00011.) Thus, it is entirely speculative to assume Annex gained knowledge of the contract in April 2011, as opposed to some later date. None of Mr. Rojas' statements can be reasonably interpreted as evidence that Annex knew of the Matos-Nicolosi contract before or at the time Annex first began selling to Matos.

Nicolosi argues it may reasonably be inferred that Annex intentionally interfered with the Matos-Nicolosi contract because Annex previously interfered with another supplier's exclusive contracts. Such character evidence is inadmissible to prove Annex's conduct with respect to the instant Matos-Nicolosi contract. *See* Evid. Code, § 1101; Clark v. Optical Coating Laboratory, Inc. (2008) 165 Cal.App.4th 150, 174 (Evidence Code § 1101 applies to corporations). Moreover, Annex's prior interference with other suppliers' exclusive contracts does not create a triable issue that Annex intentionally interfered with it when there is no evidence that Annex knew of the contract when it began selling to Matos or initiated the sales in the first instance.

Plaintiff asserts that there is a tort committed each time that Defendant did work for Matos, as each time was a breach of the exclusivity clause. Defendant cites to Romano v. Rockwell International Inc. (1994) 14 Cal.4th 479, but that case makes no such holding. In Romano, the issue was the triggering and running of the statute of limitations on a claim for wrongful termination. The specific discussion in the case referenced by Plaintiff has to with what constitutes a breach of contract. The case has nothing to do with the tort of intentional interference and makes no holding regarding the tort of intentional interference.

The case of Hill, 79 Cal.App.2nd at p. 780 holds contrary to Plaintiff's position:

> Likewise, to merely show that Berry continued to haul drums under an arrangement with the company after plaintiff told him he had a contract for all the hauling fails to prove this act to have caused the employers to have breached their contract with plaintiff. Such breach, if any occurred, took place with the hiring of Berry or other truckers and not by, or at the time of, the subsequent conversation complained of.

Fifth cause of action for interference with prospective economic advantage

Nicolosi claims Annex interfered with Nicolosi's prospective sales by selling DuPont paint products to unauthorized distributors in violation of Annex's contract with DuPont, and these unauthorized distributors in turn re-sold DuPont paint to Nicolosi's prospective customers.

The TAC alleges that DuPont and Annex have a written contract that prohibits Annex from selling DuPont's paint products to unauthorized distributors. (SSUF 12.) The TAC alleges in violation of Annex's contract with DuPont, Annex sold DuPont paint products to unauthorized distributors, and these unauthorized distributors have re-sold the products to body shops in the Bay Area that Nicolosi also sells to. (SSUF 13-14.)

Annex claims the fifth cause of action for intentional interference with prospective economic advantage fails as a matter of law because Nicolosi cannot establish that Annex committed any independently wrongful acts.

To prove a claim for interference with prospective economic advantage, the plaintiff must establish

> an economic relationship between it and a third party that carries a probability of future economic benefit to the plaintiff, defendant's knowledge of the relationship, intentional acts by the defendant designed to disrupt the relationship, actual disruption of the relationship, and economic harm to the plaintiff proximately caused by the defendant's acts.

Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal.App.4th 1215, 1220. Additionally, the plaintiff must prove that the defendant's conduct was independently wrongful. Id. An act is independently wrongful if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. Id.

There is no triable issue of material fact of any independently wrongful acts by Annex. It is undisputed that Nicolosi claims Annex interfered with Nicolosi's prospective sales to customers by selling DuPont paint to unauthorized distributors in violation of Annex's contract with DuPont because these unauthorized distributors then re-sold DuPont paint to Nicolosi's customers. The conduct attributed to Annex – breaching Annex's contract with DuPont – is not independently wrongful because it is not proscribed by constitutional, statutory, regulatory, or common law, it is only proscribed by a contract to which Nicolosi is not a party or a third party beneficiary. Nicolosi has cited no authority for the proposition that a defendant's breach of contract with third party is an independently wrongful act for purposes of a claim for interference with prospective economic advantage

Nicolosi argues the motion should be denied because it is procedurally defective in that Annex's motion relies solely on the allegations in TAC. Although a party cannot rely on its own pleadings on summary judgment, a party seeking or opposing summary judgment under these circumstances can rely on admissions of material fact made in the opposing party's pleadings. 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1210-11. Thus, Annex may rely on allegations in the TAC, filed by Nicolosi, in support of Annex's motion for summary judgment.

Nicolosi argues the motion should be denied because Annex's prior demurrer to the TAC was overruled, therefore the instant motion is essentially an improper motion for reconsideration. Nicolosi's argument lacks merit. Different standards are applicable to a demurrer as compared to a motion for summary judgment. Moreover, the Lase & Motion Judge did not rule that the TAC stated sufficient facts to support a claim for intentional interference with prospective economic damage. Rather, the court held that the demurrer was directed to the entire TAC and not to any specific causes of action asserted therein, the entire TAC stated "at least one cause of action," therefore the demurrer should be overruled. (*See* Opp., Exh. B.)

DATED: November 20, 2014

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT