SCRAM notice sent on 5/23/2024 kc/co

DOCKET NO. X03-CV-22-6166055-S	:	SUPERIOR COURT
BBSR, LLC	:	JUDICIAL DISTRICT
V.	:	OF HARTFORD
ANHEUSER-BUSCH, LLC	:	MAY 23, 2024

FILED
MAY 23 2024
HARTFORD J.D.

MEMORANDUM OF DECISION ON

MOTION TO STRIKE CUTPA COUNTERCLAIM

This case arises out of an equity purchase agreement pursuant to which the defendant, Anheuser-Busch, LLC, purchased all equity interests in Boathouse Beverage LLC dba SpikedSeltzer ("Boathouse"), the developer of a clear, alcoholic, carbonated liquid called SpikedSelter. Under the purchase agreement the defendant acquired all the rights to SpikedSeltzer. The plaintiff, BBSR LLC, is the sellers' representative authorized to represent and bind the selling interest holders in Boathouse. In addition to a specific purchase price for the sellers' interests in Boathouse, the contract includes an earnout provision that is the subject of the parties' dispute. The earnout provision provides for additional payments to the sellers based on future sales of SpikedSeltzer over a period of three years after the closing. To prevent the defendant from avoiding earnout payments by launching its own competing product, the earnout provision calculates earnout payments, under specified circumstances, based on the sale of such competing products. The plaintiff alleges the defendant did develop competing products but manipulated the implementation and administration of the contract with the intended result to minimize the amounts owed to the sellers under the earnout provision.

Under the earnout provision the sellers were to receive additional payments based on the volume of Boathouse product sales over a three-year period commencing in January, 2019 or,

#226.00

alternatively, the volume of sales in calendar year 2021. If, however, the defendant was to sell "any flavored alcohol seltzer product that is competitive with [Boathouse's] flavored alcohol seltzer beverage product" during the three years following the closing (beginning August 29, 2016), unless the plaintiff authorized the sale of that product, the earnout provision would be based on the sales of the competitive product(s) if that yielded a higher amount. The latter calculation only applied, however, if the annual volume of Boathouse product sales was less than 250,000 barrels. The defendant did begin manufacturing and selling competitive products within the three-year period following the closing. The parties' dispute focuses upon a particular product the defendant began brewing and selling in 2018 called Bon & Viv. The plaintiff claims Bon & Viv was a competitive product, and that the defendant took certain actions designed to disguise it as a Boathouse product. While the annual sales of SpikedSeltzer were well below 250,000 barrels, the annual sales of Bon & Viv combined with the sales of SpikedSeltzer during the relevant period exceeded 250,000 barrels. Combining the two avoided an earnout calculation based on sales of competitive products, which would have produced a much higher earnout amount.

On October 6, 2023, the court denied the defendant's motion to strike count four of the plaintiff's complaint alleging a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). After resolving that the parties had not waived all unfair trade practice claims in the equity purchase agreement, the court concluded that the facts alleged in the plaintiff's complaint support an inference that the defendant consciously sought to falsely position Bon & Viv as a Boathouse product, making misrepresentations to the plaintiff toward that end, and to deprive the plaintiff of its contractual rights under the earnout provision. Following that ruling, on November 6, 2023, the defendant filed a counterclaim alleging in count

two that the plaintiff violated CUTPA in the course of events leading up to this dispute and the commencement of the plaintiff's lawsuit.

The defendant's counterclaim advances a narrative concerning the underlying events that contrasts starkly with the version of events described in the plaintiff's complaint. The counterclaim alleges that representatives of the plaintiff, who were employed by the defendant following the sale of Boathouse in 2016, have manipulated events in an effort to falsely position Bon & Viv as a competitive product. The defendant alleges that the plaintiff's representatives made misrepresentations to the defendant and engaged in other deceptive conduct to manufacture a claim that the defendant owed substantially more under the earnout provision than the amount calculated based on Bon & Viv sales.

The counterclaim alleges that the plaintiff's representative, Nicholas Shields, who was intimately involved in the development of Bon & Viv while employed by the defendant, fully understood that Bon & Viv was a Boathouse product and that the earnout amount would be calculated based on Bon & Viv sales in 2019, which exceeded the 250,000-barrel threshold. During his employment by the defendant, Shields was paid a salary and bonus that were premised upon Bon & Viv's status as a Boathouse product. In this and other ways he misled the defendant into believing he understood and accepted that Bon & Viv was a Boathouse product, not a competitive product, and the plaintiff accepted the earnout proceeds paid by the defendant on that basis in January, 2022. Immediately after accepting the earnout payments, the plaintiff commenced this lawsuit claiming on behalf of the Boathouse sellers that the defendant owes tens of millions of dollars more than the defendant has already paid pursuant to the earnout provision. The defendant alleges that the plaintiff's commencement of the lawsuit breached § 2.10 (e) of the equity purchase agreement. The defendant's counterclaim alleges that in the event of a dispute

such as this, § 2.10 (e) required the plaintiff to serve the defendant with a notice of dispute, engage in a good faith effort to reach an agreement and, failing such agreement, to tender the dispute to an "Independent Earnout Accountant" for a final and binding resolution.

A claim under CUTPA must satisfy the act's threshold requirement that the claimant have sustained an ascertainable loss. The plaintiff has moved to strike the defendant's CUTPA counterclaim, arguing that the claim fails to satisfy this requirement because the defendant maintains it paid the correct amount under the earnout provision, not that it overpaid the plaintiff. The counterclaim does not seek a refund of any earnout amounts paid to the plaintiff. In its answer to the plaintiff's complaint, the defendant states that it "properly calculated the earnout payment based upon the shipments of Boathouse products or brands in 2019." Thus, while the plaintiff claims additional amounts are owed by the defendant pursuant to the earnout provision, the defendant's position in the pleadings is clear: neither party owes the other anything. As the parties' dispute is framed by the pleadings, the plaintiff argues that the defendant has suffered no harm with respect to the earnout provision. The only harm the defendant can suffer, according to the plaintiff, is an adverse judgment on the plaintiff's complaint.

DISCUSSION

"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." (Citation omitted). *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). This court must construe the complaint "in the manner most favorable to sustaining its legal sufficiency . . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . . [A]ll well pleaded facts and those facts necessarily implied from the

allegations are taken as admitted." (Citations omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership,* 309 Conn. 342, 350, 71 A.3d 480 (2013). If, however, the plaintiff has failed to allege a valid cause of action, the motion to strike is properly granted. See *Sturm* v. *Harb Development , LLC*, 298 Conn. 124, 127, 2 A.3d 859 (2010). Practice Book § 10-39(2) explicitly authorizes a motion to strike to challenge the legal sufficiency of any prayer for relief. "In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Citation omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 580, 693 A.2d 293 (1997).

An action under CUTPA requires a threshold finding that a claimant suffered an "ascertainable loss of money or property, real or personal . . . ." General Statutes § 42-110g (a). "[T]o prevail on a CUTPA claim, the plaintiff must prove, pursuant to General Statutes § 42-110b (a), that the defendant engaged in unfair or deceptive acts or practices in the conduct of any trade or commerce and that as a result of the use of the act or practice prohibited by § 42-110b (a), the plaintiff suffered an ascertainable loss of money or property . . . . The ascertainable loss requirement is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief." (Citation omitted; internal quotation marks omitted.) *Di Teresi* v. *Stamford Health System, Inc.*, 149 Conn. App. 502, 508, 88 A.3d 1280 (2014). Section 42-110g (a) further provides that once the threshold predicate of ascertainable loss of money or property is present, the claimant may recover "actual damages."

"An ascertainable loss is a loss that is capable of being discovered, observed or established." (Internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.,* 287 Conn. 208, 218, 947 A.2d 320 (2008). "The term loss necessarily encompasses a broader

meaning than the term 'damage,' " and "has been held synonymous with deprivation, detriment and injury." *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810, aff'd 192 Conn. 252, 470 A.2d 1216 (1984). "To establish an ascertainable loss, a plaintiff is not required to prove actual damages of a specific dollar amount." (Internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, supra, 218. This is so because "[a]scertainable means capable of being discovered, observed, or established." (Internal quotation marks omitted.) *Hinchliffe* v. *American Motors Corp.*, supra, 613. "[A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known." Id., 614.

The defendant identifies four different ways in which it claims to have suffered an ascertainable loss. First, it argues that the plaintiff misled the defendant into believing that there was no disagreement over the proper calculation of the earnout amount and, had it known the matter was in dispute, it would have withheld the earnout payment until after the dispute was resolved. Second, it argues the salary and bonus earned by Shields was based on Bon & Viv being a Boathouse product and his allegedly duplicitous conduct aimed at establishing it was not a Boathouse product, for the plaintiff's benefit, recasts the salary and bonus payments as harm to the defendant. Third, the defendant claims its legal fees in defending the plaintiff's lawsuit constitute an ascertainable loss. Finally, the defendant maintains that the plaintiff's scheme deprived it of the benefit of the dispute resolution provision (§ 2.10 (e)) of the equity purchase agreement. The court concludes that none of these alleged harms satisfies the ascertainable loss requirement.

The defendant's first argument is that the plaintiff concealed its intent to assert a claim that the earnout amount was not to be calculated based on Bon & Viv sales, until after the defendant paid and the plaintiff accepted an earnout payment that was calculated based on Bon & Viv sales.

The defendant argues that it would have withheld these amounts, which it acknowledges it was contractually obligated to pay, as a strategic response to the plaintiff's claim that Bon & Viv was a competitive product. No authority is cited in support of the proposition that a lost opportunity to strategically breach a contract satisfies CUTPA's ascertainable loss requirement. The plaintiff points out that such conduct itself might constitute a CUTPA violation. See *O&G Industries, Inc.* v. *Earth Technology, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-08-5006408-S, (Jan. 6, 2010) (2010 WL 625581) (CUTPA claim viable where defendant alleged to have withheld contract payments solely to exert financial pressure); see also *Vita* v. *Berman, Devalerio & Pease, LLP*, 967 N.E.2d 1142, 1149 (Mass. App. 2012) (conduct in disregard of knowing contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice). The court cannot entertain a potential lost opportunity to breach a contract, or violate CUTPA, as an ascertainable loss providing a threshold to advance a CUTPA claim. Nor is it evident that withholding the earnout funds would have positively impacted the defendant's financial position in any event, when the defendant concedes the funds eventually had to be paid to the plaintiff. The alleged lost opportunity to withhold the earnout payment does not satisfy the ascertainable loss requirement.

The defendant's second argument fares no better. The defendant alleges Shields was "paid a substantial bonus by [the defendant] in the first quarter of 2020 specifically for his work on Bon & Viv Spiked Seltzer. Mr. Shields' incentive compensation was determined by sales of Boathouse products, which included Bon & Viv Spiked Seltzer, and Mr. Shields' submission of brand plans for Bon & Viv Spiked Seltzer, including an updated Boathouse Beverage roll-out plan for 2019 developed by Mr. Shields." The defendant argues that the bonus and Shields' salary, paid while Shields was also allegedly engaged in a scheme to manipulate the earnout provision to unfairly

benefit the plaintiff, "tainted Mr. Shields' employment." The parties debate the question whether Shields' conduct while employed by the defendant is regulated by CUTPA. In general, claims arising out of the employment relationship are not considered to occur in the conduct of "trade or commerce" and therefore are not recognized under CUTPA, unless the alleged misconduct occurs "outside the confines of the employer-employee relationship." *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 493-94, 656 A.2d 1009 (1995). Whether Shields may be held accountable for his conduct under CUTPA is not a question posed in the present case. [1] While Shields' conduct may arguably be attributable to the plaintiff, the question before the court is whether the defendant has alleged an ascertainable loss. As that question concerns Shields' compensation by the defendant, the causal link between the alleged misconduct and the claimed ascertainable loss is missing. The defendant does not allege that Shields failed to earn his salary and bonus. On the contrary, the complaint alleges that he did earn those payments through his intimate involvement and extensive efforts in the development and marketing of Bon & Viv as a Boathouse product.

CUTPA provides a private cause of action to "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b. . . ." General Statutes § 42–110g (a). "Thus, in order to prevail in a CUTPA action, a plaintiff must establish both that the defendant has engaged in a prohibited act and that, 'as a result of' this act, the plaintiff suffered an injury. The language 'as a result of' requires a showing that the prohibited act was the proximate cause of a harm to the

[1] The court also notes that the plaintiff's motion to strike is based only on the claim that the defendant's counterclaim fails to allege an ascertainable loss, not on a claim that the alleged misconduct is outside the scope of "trade or commerce." "In ruling on a motion to strike the trial court is limited to considering the grounds specified in the motion." *Meredith* v. *Police Commission of Town of New Canaan*, 182 Conn. 138, 140, 438 A.2d 27 (1980).

plaintiff." *Abrahams* v. *Young and Rubicam, Inc.*, 240 Conn. 300, 306, 692 A.2d 709 (1997). The defendant does not allege that it paid Shields in 2020 as a result of his efforts to reposition Bon & Viv as a competitive product in 2022. The counterclaim alleges that the defendant paid Shields in 2020 because of his documented efforts to promote Bon & Viv as a Boathouse product in 2019, even after Shields had requested a meeting with the defendant in September, 2019 where he originally advanced a theory that Bon & Viv was not a Boathouse product. Even if the alleged duplicitous effort by Shields to set up a claim that Bon & Viv was a competitive product constitutes a CUTPA violation, that conduct is not an alleged proximate cause of the defendant's payment of Shields' salary and bonus in 2020. It is a proximate cause of the plaintiff's allegedly meritless lawsuit filed in 2022 claiming that Bon & Viv is a competitive product. The defendant's 2020 payments to Shields cannot satisfy CUTPA's ascertainable loss requirement.

Next, the defendant claims its legal fees in defending the plaintiff's lawsuit constitute an ascertainable loss. Our Supreme Court, upholding a directed verdict on a CUTPA counterclaim stated, in dictum, "it is doubtful" that attorney's fees incurred in defending an action constitute an ascertainable loss under CUTPA. *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 685, 657 A.2d 1087 (1995). Other courts that have decided the issue have taken this signal from the Supreme Court and held that the cost of defending a lawsuit is not an ascertainable loss, at least not when CUTPA is asserted as a counterclaim in a pending action that has occasioned the incurrence of the claimed fees. *National Loan Acquisitions Co.* v. *Olympia Properties, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-18-6085015-S (Sept. 23, 2019) (69 Conn. L. Rptr. 335); *Bloomfield Health Care Center of Connecticut, LLC* v. *Jones*, Superior Court, judicial district of Hartford, Docket No. CV-17-5044111-S (April 2, 2018) (66 Conn. L. Rptr. 200); *Saporoso* v. *Connective Wireless, Inc.*, Superior Court, judicial district of Hartford, Docket No.

CV-14-4073963-S (Feb. 26, 2018) (66 Conn. L. Rptr. 25); *RJ Reuter, LLC* v. *Fifty-Eight Lafayette Street, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-13-6019983-S (April 29, 2016) (2016 WL 2935444). The court agrees with these decisions insofar as they do not recognize the cost of defending a pending lawsuit as cognizable harm under CUTPA.

The court does not conclude that litigation expenses incurred in the defense of a lawsuit may never satisfy the ascertainable loss requirement. Such losses could constitute an ascertainable loss when all the requirements of a claim for litigation misconduct are satisfied, as well as the other requirements under CUTPA. In particular, the underlying litigation must be completed and terminated favorably to the claimant before such expenses may be recognized as an actionable loss under CUTPA. See *Wes-Garde Components Group, Inc.* v. *Carling Technologies, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-09-5028121-S (March 10, 2010) (49 Conn. L. Rptr. 671). Thus, if the present action does terminate in favor of the defendant, the other elements of a vexatious litigation claim are met, and it can also be established that the plaintiff's conduct occurred in the conduct of trade or commerce, the court would not bar such a CUTPA claim on the ground that the ascertainable loss requirement was not met. In the present case, however, the court concludes that legal expenses incurred in defense of the plaintiff's claim are not cognizable harm for purposes of the defendant's CUTPA counterclaim.

Finally, the defendant argues that the plaintiff's failure to invoke the dispute resolution provision in the equity purchase agreement, opting to prosecute this action instead, satisfies CUTPA's ascertainable loss requirement. The cost of defending the plaintiff's claim in the context of this lawsuit, as opposed to doing so pursuant to dispute resolution provision, logically constitutes the loss of money or property associated with the plaintiff's alleged disregard of that

contract provision. This argument is merely a reformulation of the defendant's claim that the legal expenses incurred in defense of the present lawsuit satisfy the ascertainable loss requirement. The court reiterates its resolution of that argument.[2] The defendant cannot pursue a CUTPA counterclaim that relies upon the cost of defending the plaintiff's claim to satisfy the ascertainable loss requirement.

CONCLUSION

Count two of the defendant's counterclaim, asserting a violation of CUTPA, is legally insufficient because it fails to allege an ascertainable loss. The motion to strike count two is granted.

436946

Farley, J.

[2] It is noteworthy that the defendant itself has not invoked the dispute resolution provision as an independent basis upon which to stay the plaintiff's lawsuit. See General Statutes § 52-409. The plaintiff argues in support of its motion to strike that the dispute resolution provision is not applicable to this controversy. The court, however, does not have the equity purchase agreement before it on this motion, which addresses only the allegations of the counterclaim. The applicability of the dispute resolution provision cannot be determined based on those allegations. *Zirinsky* v. *Zirinsky*, 87 Conn. App. 257, 268-69 n.9, 865 A.2d 488, cert. denied, 273 Conn. 916, 871 A.2d 372 (2005) ("It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents, such as the agreement between the parties.")