DOCKET NO: X01-CV05-4009529S	:	SUPERIOR COURT
CHARTER OAK LENDING GROUP, INC. d/b/a DANBURY MORTGAGE	:	JUDICIAL DISTRICT OF WATERBURY
V.	:	COMPLEX LITIGATION DOCKET
JANET AUGUST, ET AL	:	JULY 7, 2009

MEMORANDUM OF DECISION

The initial decision by this Court under Practice Book Section § 15-8 was rendered on August 27, 2008 relating to certain counts in the plaintiff's amended complaint of October 19, 2005. That was the same complaint which was pursued at trial by the plaintiff and responded to by the defendants. Those counts that had been dismissed under Practice Book Section § 15-8 have been enumerated in the Court's decision of August 27, 2008 and will be referenced as necessary in relationship to the remaining counts that will be addressed in this memorandum of decision which relies in part on the findings made in that decision of August 27, 2008.

I.

The Court begins with Count 1 of the Plaintiff's said Amended Complaint involving civil conspiracy relating to all defendants in this matter. The claim of civil conspiracy involves a four part test that has been established by an early case in Connecticut law, Williams v. Maislen, 116 Conn., 433 (1933); and developed over time; Marshak v. Marshak, 226 Conn. 652, 665 (1993); Macomber v. Travelers Property & Casualty, 277 Conn. 617 (2006).

Those elements are:

> The requisites of a civil action for conspiracy are (1) A combination between two or more persons; (2) to do a criminal or unlawful act or a lawful act by criminal or unlawful means; (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object; (4) which act results in damage to the plaintiff.

As indicated in the earlier decision of August 27, 2008, the claim of civil conspiracy is legally insufficient unless it is based on some underlying cause of action. This means that there has to be some positive act in furtherance of the conspiracy in order for there to be actionable damages. This cause of action may lie for the damages resulting from conspiratorial behavior that involves a criminal or unlawful intent such as fraud, but not for the conspiracy itself.

> Under Connecticut law, technically speaking, "there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself." *Cole v. Associated Construction Co.,* 141 Conn. 49, 54, 103 A.2d 529 (1954); see also 16 Am. Jur. 2d 275-76, Conspiracy § 50 (1998). A claim of civil conspiracy, therefore, is "insufficient unless based on some underlying cause of action . . . ." (Citations omitted.) *Marshak v. Marshak*, supra, 226 Conn. 665. Consequently, for a plaintiff to recover on a conspiracy claim, the court must "find the facts necessary to satisfy the elements of an independent underlying cause of action." *Litchfield Asset Management v. Howell*, 70 Conn. App. 133, 140 (2002).

The court found in its August 27, 2008 decision that the civil conspiracy allegations survive only by their interdependence on the CUTPA allegations[1] and the validity of those

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[1] The respective CUTPA counts in the amended complaint are as follows: (4)(7)(10)(13)(16)(19)(22)(25)(28)(31)(33).

underlying CUTPA counts. The interdependence between this civil conspiracy count and all of the other remaining CUTPA counts(See Footnote 1) against the various defendants needs to be addressed in a interrelated fashion in order for the Court to make any findings in this count in favor of the plaintiff. The civil conspiracy action requires two or more people acting in concert with a common purpose that can be achieved. Harp v. King, 266 Conn. 747, 779 (2003). The more credible evidence adduced at trial indicates that some individual defendants made independent decisions to leave the plaintiff's employment and in effect sought out and related to the corporate defendant CTX as a possible source of employment. The individual defendants as independent contractors and "at will" employees, not under any contractual restraints with the plaintiff, could seek whatever employment opportunities were available in the marketplace without being conspiratorial about it.[2] The fact remains that two or more defendants had a "book of work" and realized independently that their best economic interests as loan originators were not going to be served by remaining within the plaintiff's employment. This does not mean that they engaged in some unlawful act(s) or were necessarily exercising unlawful means to seek new employment with a ready, willing and able new employer, namely CTX.[3] William Raveis Real Estate, Inc. v. Giordano, 2003 WL 21525221, 4 Conn., Superior Court, June 18, 2003 (McWeeny, J.)

The plaintiff never established with any credible evidence the existence of any particular single purpose, scheme or network between the various defendants in furtherance of a positive

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[2] Trial testimony of Patricia Kay (4/16/08), Janet August (4/16/08), William Dolbur 4/10/08.

[3] Trial testimony of William Dolbier (4/10/08).

act that would result in direct damages to the plaintiff. The fact that people leave employment for various reasons, to include financial reasons, does not turn the ending of one business relationship for another relationship into a conspiracy.[4] Therefore, the Court finds that the plaintiff has failed to prove by a fair preponderance of the evidence the allegations in Count One (1) relating to civil conspiracy and therefore finds in favor of all of the individual defendants and defendant CTX on that particular count.

II.

The next series of counts that the plaintiff has alleged involve the Connecticut Unfair Trade Practice Act, General Statute § 42-110a et seq. (CUPTA), in which the plaintiff alleges that the defendants in various ways engaged in "immoral, oppressive, and unscrupulous acts that were likely to cause substantial injury to the marketplace for mortgage loans and consumers of mortgages as well as marketplace competitors such as the plaintiff." These allegations are made against many of the defendants in the said amended complaint. (See Footnote #1.) In this case, any CUTPA violations would be derivative from the various other counts which have been addressed in the August 27th decision. The fact that many of the underlying allegations concerning trade secrets, conversion and statutory theft and breach of fiduciary duty have already been dismissed in the Court's August 27th decision under Practice Book Section § 15-8 would suggest that the remaining underpinnings for any kind of a CUTPA claim have been marginalized. The lack of a factual foundation of bad acts or intentions militates against the

[4] Apparently none of the individual defendants are still employed by CTX per testimony of Migliaro, McKenna, Stites and August.

validity of an unfair trade practice claim against any of the defendants. Lydell, Inc. v. Ruschmeyer, 282 Conn. 209, 247-248 (2007).

The *Lydell* case is a good example of how an employment type situation involving executives who were charged with violating Connecticut's Trade Secrets Act became the plaintiff's basis for a CUTPA violation. The court's analysis was that allegations with insufficient facts or inferences are not enough to constitute a CUTPA violation and the similarities between *Lydell* and this case are significant enough in the CUTPA arena for this Court to place some reliance on it.

The elements of a CUTPA claim have been articulated in numerous cases and broken down into three elements which include (1) whether the practice without necessarily having been previously considered unlawful, offends public policy as has been established by statutes, common law, or otherwise; . . . (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers, competitors, or to businessmen. Rameria v. Health Net of the NE, Inc., 285 Conn. 1 (2008); Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 589-593 (1995).

The plaintiff emphasizes the fact that a tort or a criminal violation is not necessary in order to constitute a violation of CUTPA. Sportsman's Boating v. Hensley, 192 Conn. 747 (1984); Dunham v. Dunham, 204 Conn. 303 (1987). There was virtually no evidence that the defendants engaged in any concealment or misapplication of any mortgage documentation, data, or programs that benefitted them or any other competitor. There was no credible evidence that mortgage customers and applicants were damaged in any way by the actions of the defendants. The underlying violation, however, must be substantial and not be negated by other

countervailing benefits that may ensue to consumers as well as to former employees who become competitors, especially where there is no contractual or statutory restraints on the freedom of association or trade in the mortgage brokerage business in general and in this case in particular.

It is established that in order to prove a claim under CUTPA, the plaintiff must allege that the actions of the defendants were performed in the conduct of "trade or commerce". It has been held that an employment relationship which is wrongly interrupted does not constitute "trade or commerce" for purposes of a CUTPA claim. Muniz v. Kravis, 59 Conn. App. 704, 711 (2000). Drybrough v. Acxiom Corp., 172 F. Supp. 2nd 366, 369. The defendants can be classified as employees or agents "at will". Thibodeau v. Design Group One Architects, LLC, 260 Conn. 691, 697 (2002). Trial transcript D. DeRespinis (4/08/08).

There was further argument without any convincing evidence that the customers' financial information contained on Form 1003 (mortgage application) was disclosed or used inappropriately by the defendants in violation of certain federal act. Gramm-Leach-Bliley Financial Modernization Act of 1999 (15 U.S.C. 6801- et seq.) The allegation of secret activity between the various defendants to misappropriate undefined trade secrets in order to enter into some unethical or improper competition with the plaintiff was never established by sufficient credible evidence by the plaintiff. The departure from one employer, who had announced a new business model with the cutting of benefits and other financial remunerations in order to go to another employer is not unfair and not unlawful especially in a situation where the parties are under no contractual obligations concerning confidentiality or competition and in effect are employed "at will." (Court's August 27th Decision, Page 3.)

> Plaintiff's corporate representative admitted that the employees were at-will and free to seek employment elsewhere. Of course, Connecticut law mandates that answer. Thibodeau v. Design Group One Architects, LLC, 260 Conn. 691, 697-98 (2002) ("In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability.").

Defendant's brief, pg. 69, footnote 14.

Although CTX's recruitment with bonus and the defendants' transition from the plaintiff to the defendant CTX was driven financially as much as by personalities between the various parties, that does not mean that those acts and motives were immoral, unethical, oppressive, or unscrupulous on the part of the individual defendants or CTX and therefore do not constituted unfair trade practices. The reality is that the customer tends to follow the loan originator regardless of who the "employer" is.

Competition is an element to be encouraged in a free enterprise society and restraint of trade or any impingement on freedom to associate and/or contract is to be discouraged under the common law to include the Constitution of this state (Art. First, Sect. 14) and of the United States (Art. I, Sect. 10).

The fact that certain elements of the plaintiff's complaint have already been dismissed only weakens and negates the viability of the remaining counts in the plaintiff's amended complaint and therefore leaves the CUTPA counts as enumerated without any legal basis or factual foundation. Therefore (see footnote 1) those counts are found in favor of the respective defendants and against the plaintiff.

III.

The remaining Count 36 entails computer related offenses (CGS 53a-251) that would criminalize unauthorized access to the plaintiff's computer system entitled "Loan Manager". This was a data base driven system that compiled certain information that was developed by and used by the various defendants as loan originators. These broker/agents had general access to "Loan Manager" for purposes of completing mortgage applications and finalizing the closing procedures as well as developing a marketing base for known customers and for those that might be referred to or through the individual brokers and third parties. If there was any proprietary interest in this information, it was primarily with the individual originator who had the client contacts. Such data would be centralized by the individual defendants into this particular data system with oversight by the plaintiff. Access was available to the respective parties in the day to day workings of the mortgage originating business. The plaintiff's contention that "confidential information" relating to customer loan data was proprietary or secret in nature and therefore owned by the plaintiff was not supported by the evidence.[5] The plaintiff alleges that such unlimited access was not authorized and was in violation of the plaintiff's company policy and in violation of the computer-related offenses act C.G.S. § 52-570b. The relief of a private cause of action for such computer related offenses under C.G.S. § 52-570b would not have any application unless there is some credible evidence to believe that an "other person" has or will engage in an alleged violation of any provision under the C.G.S. § 53a-251 sections. New America Marketing In-Store, Inc. v. Marquis, 86 Conn. App. 527, 546-549 (2004). However,

[5] Trial testimony of Lea Stites (4/15/08); Patricia Kay (4/16/08); James McKenna (4/11/08); Patricia Holland (4/17/08); Janet August (4/16/08); John Migliaro (4/11/08).

an affirmative defense is built into this statutory scheme (C.G.S. 53a-251 (b) (2)) with the provision of "authorized access". Such provision is applicable as pled by the defendants under the facts of this case especially in light of the fact that no charges of a "computer crime" have been lodged against any defendants.

The plaintiff has failed to establish that there was any such unauthorized access to its computer data system by the defendants other than which was within the normal scope of their employment and general work activities as mortgage originators/brokers. Such activities were encouraged and promoted by the plaintiff in order to provide mortgage services to clients and to develop further markets and client lists for the mutual benefit of the plaintiff and the defendants. Newinno, Inc. v. Pouprino Development, Inc., 2004 NL 1098753 at 3 (Conn. Superior Court, April 27, 2009) (Stevens, J.). The crucial element in the violation of this statutory framework is that the individual defendant had to know that access was unauthorized at the time such access was made. It was never established by credible evidence from the plaintiff that the access by the various defendants was not authorized. In fact, the defendants' access to the computer data system (Loan Manager) and programs that were part of the plaintiff's business systems were authorized until that point at which the various defendants started to leave the employment of the plaintiff at which time their access was terminated either voluntarily or involuntarily. Therefore the interrelationship of the allegations cannot be sustained based on the totality of evidence presented by both parties and it is the conclusion of the Court that the plaintiff cannot prevail on this particular count #36.

Although the plaintiff asserts substantial monetary losses due to the actions of the various defendants, this Court finds that they were not operating in concert. The evidence

concerning such monetary damages was not credible nor probative of specific damages that the plaintiff was alleging as a result of the defendant's actions.[6]

The testimony of the plaintiff's financial expert, Carlton Helming, did not evaluate in relevant terms the losses claimed nor the causal linkage between the defendants' actions and the plaintiff's decline in value. (Exhibit 160) The plaintiff's expert opinion was based on historical earnings and future protections that were not probative, in fact in some ways contradicted the plaintiff's position. The reality is that broker/loan originators left the plaintiff for personal financial reasons in part due to the plaintiff's own actions and attitudes regarding decreased commission rates and added expenses for each loan originator. The decline in income would logically follow as originators left the employment of the plaintiff.

IV. Conclusion

Therefore, the Court concludes that the entire claim as enunciated in the remaining counts of the plaintiff's said amended complaint is hereby found in favor of all of the defendants and judgment enters accordingly for the defendants on all of the said remaining counts. No costs or fees are awarded to any of the parties.

BY ORDER OF THE COURT,

Roche, J.

[6] The defendants at various times after the period between November 12th - November 15, 2004, left the plaintiff's employ, some of whom were hired by CTX under various terms and conditions.