UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-92

GENERAL ELECTRIC COMPANY, et al., PLAINTIFFS
,

V. **MEMORANDUM OPINION AND ORDER**

LATIN AMERICAN IMPORTS, S.A., d/b/a
LATAM, et al., DEFENDANTS

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This matter is before the court upon GE's motion (Record No. 139) for summary judgment on LATAM's counterclaims. The court, having reviewed the record and being otherwise sufficiently advised, will deny the motion with regard to Count 14, LATAM's tortious interference counterclaim.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The plain language of Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Betkerur, M.D. v. Aultman Hospital Assoc.*, 78 F.3d 1079, 1087 (6th Cir. 1996).

As it presents a fairly discrete subject matter, we will address LATAM's tortious interference counterclaim, which focuses on Perusphere's participation in EDITRADE, a consortium formed to commercialize GE Information Systems ("GEIS") software.[1] LATAM contends, in its Second Amended Counterclaim, that it and its affiliate, Perusphere, formed the consortium, and Perusphere had a contractual relationship with its members. In February of 1998, however, LATAM asserts, GEIS representatives attended a meeting in Orlando, Florida with representatives of EDITRADE and announced that it wanted to buy an interest in the consortium, but conditioned further negotiations on the elimination of Perusphere from EDITRADE. LATAM further alleges, citing the deposition testimony of Gerardo Valera (an Information Systems consultant who worked for EDITRADE), that GEIS representatives (specifically, Guillermo Niezen) told members of the consortium, who were also bankers and creditors of LATAM, that GE had "problems" with LATAM in its other businesses, particularly GE Appliances. As a result, LATAM contends that the members of EDITRADE forced Perusphere out, and thereafter, LATAM found it almost impossible to get credit from those banks.[2]

The elements of a claim for tortious interference with a contractual relationship are: (1) the existence of a contract; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the contract's breach; (4) absence of any

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[1] LATAM purchased a license for the use of this software from GEIS, which it then sold to EDITRADE in the establishment of the consortium.

[2] As Count 14 of LATAM's Second Amended Counterclaim alleges only interference in the EDITRADE relationship, and LATAM similarly focused only on this relationship in its response, LATAM has not sufficiently alleged any claim based on the disruption of its credit or banking relationship with the bankers who were also EDITRADE members.

justification or privilege; and (5) damages resulting from the breach. *See McDonald v. McGowen*, 402 So.2d 1197, 1201 (Fla. Dist. Ct. App. 1981).[3] In arguing that summary judgment is warranted on this counterclaim, GE asserts that LATAM has not produced any evidence regarding either the existence of a contract or the breach of any contract. In support, GE cites Gonzalez's deposition testimony which indicates his view that neither the banks nor EDITRADE had a contract or breached any contract with LATAM. Further, GE contends that any discussions GEIS may have had with EDITRADE do not amount to malicious or unjustifiable conduct, but rather, there is evidence that EDITRADE independently severed its relationship with Perusphere because the members felt that LATAM had inflated the price of the software license it assigned to EDITRADE, *see supra* note 1. GE also cites the deposition testimony of Walter Bayly, chairman of EDITRADE (and manager of Banco de Credito in Peru) that GEIS did not condition its involvement on Perusphere's expulsion and EDITRADE did not sever its ties with Perusphere for that reason.[4] Bayly also testified that it was Telefonica, a rival

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[3] The parties appear to agree that Florida law governs this claim.

[4] Specifically, Bayly testified that, at the Orlando conference in February of 1998, he and Niezen were chatting *after* a meeting involving the other consortium members, when Niezen made the comment that if GEIS were to join EDITRADE, it was likely that GEIS would want only the banks, not Perusphere, to be involved. Later, Niezen called Bayly and stated that he had said more than he should have, and that this comment was not made on behalf of GEIS and did not represent GEIS policy -- all of which Bayly recounted to Gonzalez. The transcript of a conversation with Bayly surreptitiously recorded by Gonzalez confirms that Bayly told Gonzalez of Niezen's subsequent phone call retreating from any comments he had made at the Florida conference and clarifying that "[Perusphere's elimination] was not a condition and that what he had told me over there was no longer valid." The following exchange then occurred:

> (Gonzalez) But what he [Niezen] said and what his boss ratified in some way, has echoed here among the banks and
> (Bayly) No, no, look, the first thing is that his boss did not ratify it, he said

company which ultimately joined EDITRADE (instead of GEIS), that conditioned its involvement on the buy-out of Perusphere, because it wanted only the three banks as shareholders. Thus, GE contends that evidence of any causation is also lacking, mandating the entry of summary judgment on this counterclaim.

In response, LATAM counters that the existence of a contract regarding Perusphere's status as a shareholder of EDITRADE is irrelevant, since Florida law requires only "the existence of a business relationship, not necessarily evidenced by an enforceable contract." *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985). This is true of claims for tortious interference with a business relationship, which LATAM asserts is "basically the same cause of action" as that pled in its counterclaim. *Smith v. Ocean State Bank*, 335 So.2d 641 (Fla. Dist. Ct. App. 1976). In *Smith*, the appellant contended that the trial court had erred in dismissing his counterclaim because it stated a cause of action for intentional and unjustified interference with a business relationship; the appellee argued that the counterclaim had been pled as a suit for tortious interference with contract rights, and the appellate court initially remanded the action to the trial court for consideration of both theories. *See Smith*, 335 So.2d at

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> it and second, it has nothing to do with any decision we might have taken, the banks.
> (Gonzalez) I agree
> (Bayly) We, the banks, have felt a little uncomfortable about the issue of the prices, as I said quite plainly when we spoke last time. You gave me a number of reasons, you are right in some way, and this, and to TELEFONICA yes, the only reason why TELEFONICA is entering this company is because the partners are BANCO DE CREDITO, BANCO WIESE, INTERBANK.
> (Gonzalez) Of course, logically
> (Bayly) If it were BAYLY, GONZALEZ and. . .forget it, they wouldn't be interested.

642. On remand, the trial court concluded that "tortious interference with contract rights [is] included within the definition of 'tortious interference with a business relationship,'" and that the appellant had not stated a cause of action under either theory. *Id.* On appeal, the court delineated the elements required to establish tortious interference with a business relationship as follows: "The existence of a business relationship not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the interferer; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Id.* at 644. The court reversed the trial court's dismissal of the counterclaim.

It is undisputed here that LATAM pled, in its Second Amended Counterclaims, tortious interference with a contractual relationship. GE asserts that for this court now to consider whether LATAM has adequately alleged tortious interference with a business relationship is to allow it effectively to amend its complaint. GE also points out that the *Smith* case holds tortious interference with a contractual relationship to be included within tortious interference with a business relationship -- not vice versa. We think, however, that the *Smith* case compels us to look at LATAM's allegations and determine whether they have stated a cause of action for tortious interference with a business relationship, together with sufficient facts to avoid summary judgment.

LATAM cites again Valera's deposition testimony, in which he recounts the making of a statement at the Florida meeting whereby GEIS would condition further negotiations with EDITRADE on Perusphere's elimination. LATAM also cites the deposition testimony of German Leguia, another EDITRADE representative, who

recalled that it was a condition of GEIS that Perusphere would not be a shareholder of EDITRADE.[5] Finally, LATAM attacks the Bayly testimony as inconsistent with the record and refers to Gonzalez's account of their conversations and the fact that Perusphere was "forced out" of EDITRADE, was to be given only $200,000 for its interest (which it alleges was worth $1 million), and in fact, never actually received even the smaller amount.

GE encourages the court to find that, even under the "tortious interference with a business relationship" analysis, LATAM's claim does not survive summary judgment because Bayly was the only witness in a position to know how the banks made the decision to buy out Perusphere, and he has testified that nothing GEIS did contributed thereto. It is true that LATAM has not proffered evidence from EDITRADE decision-makers that GEIS's alleged statements did cause the buy-out. Gonzalez, however, testified in deposition that he met with Bayly, and recounted the conversation thusly:

> . . .he said to me, Guillermo, General Electric no longer wants you. They don't want you in the company, EDITRADE. Niesen has told us that they don't want you in Appliances either and you have to leave the company.

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[5] In addition, LATAM cites a document in which Bayly allegedly reported to the EDITRADE board that GEIS had said that an obstacle to reaching an agreement was LATAM's participation; this document also purportedly discusses the Telefonica offer without mention of any similar condition by Telefonica. The difficulty here is, as with all the exhibits cited by LATAM in its response to the motion for summary judgment, the exhibit is merely given a number, i.e., "L2-0030-38", with no indication to the court as to where it might be located (no exhibits were attached either to LATAM's initial response or to its corrected response). Some exhibits are appended to the deposition transcripts which the court requested that the parties file, but again, there is no directory telling the court where to look for a particular exhibit. The court has, through diligence (and what can only be characterized as "combing the record") located some of the exhibits LATAM cites, but not all. This particular document is one which the court has not located. In the future, it would behoove LATAM's attorneys to append to its pleadings any exhibits or deposition excerpts utilized in those pleadings.

> He asked me if I had ever heard of a hostile offer. He said to me, you have to leave the company now.
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> And we spoke with Mr. Gonzalo de la Puente Piese who was a Banco Wiese director at EDITRADE, and we're going to offer you $200,000, but you're not going to get them. We're going to use that for or match it with the accounts that you have at Banco Wiese and we want you to sign the contracts tomorrow or day after tomorrow.
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> So if you know what's convenient for you, accept this offer. That's what happened.

To grant summary judgment on GE's reasoning, above, would be to transgress the province of the jury and would, the court believes, involve impermissible credibility determinations. Accordingly,

IT IS ORDERED that GE's motion for summary judgment with regard to LATAM's tortious interference counterclaim is **DENIED**.

This is the _____ day of _____, 2002.

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Jennifer B. Coffman, Judge
United States District Court
Western District of Kentucky