

Supreme Court
of the
State of New York



CAROLYN E. DEMAREST
JUSTICE

JUSTICES' CHAMBERS
360 ADAMS STREET
BROOKLYN, N.Y. 11201

October 20, 2004

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Lopresti v. Mass. Mutual, # 12719/04

Dear Counsel:

Enclosed please find a decision rendered by Justice Demarest regarding the above-captioned matter.

Very truly yours,



Sandra Kuperman
Confidential Secretary to
Hon. Carolyn E. Demarest

SK
Encl.

At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of October, 2004

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X

CARMINE A. LOPRESTI,

Index No. 12719/04

Plaintiff,

- against -

MASSACHUSETTS MUTUAL LIFE INSURANCE
COMPANY, ET AL.,

Defendants.

-----X

The following papers numbered 1 to 13 read on this motion:

	<u>Papers Numbered</u>				
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1</u>	<u>2-3</u>	<u>4</u>	<u>5-6</u>	<u>7-9</u>
Opposing Affidavits (Affirmations) _____					<u>10-11</u>
Reply Affidavits (Affirmations) _____					<u>12</u>
_____ Affidavit (Affirmation) _____					
Other Papers <u>Transcript of oral argument dated August 18, 2004</u>					<u>13</u>

Upon the foregoing papers in this action by plaintiff Carmine A. Lopresti (plaintiff) purporting to allege causes of action for violation of General Business Law § 340 (the Donnelly Act), violation of Insurance Law § 2123 (b), tortious interference with contract, tortious interference with prospective contractual relations and/or economic advantage, and unfair competition and misappropriation of business, and seeking a permanent injunction and

compensatory, treble, and punitive damages, defendants Massachusetts Mutual Life Insurance Company, Oppenheimer Funds, Inc., and Oppenheimer Funds Distributor, Inc; defendant Yankee Financial Group, Inc.; defendant Calvin Greilsamer; defendants American Express Company, American Centurian Life Assurance Company, IDS Life Insurance Company of New York, American Financial Corporation, American Express Financial Advisors, Inc., and Paul Trause; and defendants Wyckoff Heights Medical Center (Wyckoff) and Dominick Gio (collectively, defendants), by five separate motions, each move, pursuant to CPLR 3211 (a) (7), 3013, and 3016, to dismiss plaintiff's complaint as against them.

Plaintiff is a salesperson from New Jersey who sells insurance products, including tax-sheltered retirement annuities qualified under Internal Revenue Code (26 USC) § 403 (b) (IRC § 403 [b]), through an annuity insurance company, North American Company for Life and Health Insurance of New York (NACOLAH), to employees of not-for-profit organizations. Employees of Wyckoff, a hospital in Brooklyn, New York, are given the opportunity to participate in an IRC § 403 (b) individual retirement plan, and those employees who choose to participate select an investment provider and arrange for contributions to be made to their individual retirement accounts via voluntary salary reductions. Plaintiff alleges that there were initially 17 investment providers available to Wyckoff's employees, including NACOLAH, and that, since 1978, plaintiff sold IRC § 403 (b)-qualified NACOLAH products to Wyckoff's employees.

By letter to its employees dated November 24, 2003, Wyckoff informed them that effective January 1, 2004, IRC § 403 (b) retirement plan investments made via salary reductions would only be processed for participants utilizing certain IRC § 403 (b) providers, i.e., American Express or Oppenheimer, and that they would have to discontinue remitting their salary reductions to other providers, such as plaintiff's insurer, NACOLAH, and redirect their salary reductions to one of these providers. Since NACOLAH was not selected to be one of those providers, plaintiff could no longer sell NACOLAH retirement annuities to Wyckoff's employees, or receive the commission income on the monies withheld from Wyckoff's employees' salaries and paid to NACOLAH.

Consequently, on April 22, 2004, plaintiff brought the instant action against 14 defendants, including Wyckoff, Dominick Gio (individually and in his capacity as CEO, chairman, and/or president of Wyckoff), and IRC § 403 (b) investment providers who allegedly were selected by Wyckoff to continue to sell tax-sheltered annuities to Wyckoff's employees and certain of such providers' sales agents and/or representatives (the 403 [b] provider defendants). Plaintiff claims that Wyckoff conspired with the 403 (b) provider defendants and undertook wrongful means to eliminate NACOLAH as an annuity provider for Wyckoff's employees and destroyed his annuity business at Wyckoff.

In addressing defendants' motions insofar as they seek dismissal of plaintiff's first cause of action which alleges violation of the Donnelly Act, the court notes that the Donnelly Act provides that "[e]very contract, agreement, arrangement or combination whereby a

monopoly . . . is or may be established or maintained, or whereby competition . . . may be restrained” is illegal. A party, to state a claim of a violation of the Donnelly Act, “must (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities” (*Yankees Entertainment & Sports Network, LLC*, 224 F Supp 2d 657, 678 [SD NY 2002]; *see also Great Atlantic & Pacific Tea Co. v Town of East Hampton*, 997 F Supp 340, 352 [ED NY 1998]). The failure to allege any one of these elements is fatal to the claim (*see Watts v Clark Assocs. Funeral Home*, 234 AD2d 538, 538 [1996]; *Constant v Hallmark Cards*, 172 AD2d 641, 642 [1991]; *Primo Constr. v Swig Weiler & Arnow Mgmt. Co.*, 160 AD2d 379, 380 [1990]).

“In order properly to plead a conspiracy, the plaintiff must do more than make a ‘bare bones’ allegation that such a conspiracy exists” (*Beyer Farms v Elmhurst Dairy*, 142 F Supp 2d 296, 300-301 [ED NY 2001], *affd* 2002 WL 1059087 [2d Cir 2002]). “Conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act” (*Yankees Entertainment & Sports Network, LLC*, 224 F Supp 2d at 678; *see also Sands v Ticketmaster-New York*, 207 AD2d 687, 688 [1994]). The complaint must allege facts to support the existence of a conspiracy (*see Great Atlantic & Pacific Tea Co.*, 997 F Supp at 352).

Here, plaintiff's allegations of a conspiracy are wholly conclusory in nature. There are no facts alleged in the complaint to support plaintiff's charges (*see generally* CPLR 3013; *Elsky v KM Ins. Brokers*, 139 AD2d 691, 691 [1988]; *SRW Assocs. v Bellport Beach Prop. Owners*, 129 AD2d 328, 331 [1987]; *Di Pace v Figueroa*, 128 AD2d 942, 942-943 [1987]). Plaintiff merely alleges that defendants have violated the Donnelly Act by conspiring through alleged contracts, agreements, arrangements, and combinations thereof, to limit the number of Wyckoff's § 403 (b) annuity providers to the exclusion of plaintiff. Plaintiff does not specify which defendants entered into any agreements, when such agreements were made, or the nature and scope of any agreement (*see Creative Trading Co. v Larkin-Pluznick-Larkin, Inc.*, 75 NY2d 830, 830-831 [1990]).

Plaintiff has failed to set forth a conspiracy or reciprocal relationship necessary to allege a violation of the Donnelly Act. Wyckoff claims that it made the decision to reduce the number of 403 (b) providers available for its own administrative purposes. While plaintiff conclusorily argues that from Wyckoff's action, it should be inferred that there was a conspiracy involved, he concedes that it was Wyckoff's unilateral decision to limit the number of 403 (b) providers available to its employees. Plaintiff's conclusory and vague allegations are devoid of any facts to suggest that the limiting of 403 (b) providers at Wyckoff had anything to do with a conspiracy, as opposed to a unilateral act by Wyckoff that may have inured to the benefit of other existing 403 (b) providers (*see Yankees Entertainment & Sports Network, LLC*, 224 F Supp 2d at 678).

Furthermore, identification of a relevant market “must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs” (*Pyramid Co. of Rockland v Mautner*, 153 Misc 2d 458, 463 [1992]). However, plaintiff, in his complaint, alleges the relevant market to be the retirement annuity market at Wyckoff. His description of the relevant market is patently under-inclusive. Plaintiff’s business encompasses a much wider geographic area than Wyckoff alone, and he fails to include all relevant geographic areas in his alleged market. Moreover, “a single building cannot constitute a relevant geographic market under the Donnelly Act” (*Simon & Son Upholstery v 601 W. Assocs. LLC*, 2003 WL 22231540, *4 [Sup Ct, NY County 2003]), and, thus, a single hospital, such as Wyckoff, cannot properly be considered large enough to constitute a relevant geographic market for purposes of the Donnelly Act (*see Brader v Allegheny General Hosp.*, 64 F 3d 869, 877-878 [3d Cir 1995]). Additionally, the annuity product sold by plaintiff to Wyckoff’s employees cannot be characterized as a product market in and of itself given the other substitute investment options available, such as stocks, bonds, or mutual funds, that may also be available to Wyckoff’s employees (*see Pyramid Co. of Rockland*, 153 Misc 2d at 463). Consequently, no relevant market has been pleaded by plaintiff.

Plaintiff has also failed to sufficiently allege how the economic impact of the purported conspiracy does or could restrain trade in the market in question. Courts have recognized the right of a company “to select a person with whom it does business and to

refuse to deal or continue to deal with anyone for reasons sufficient to itself” (*Hsing Chow v Union Central Life Ins. Co.*, 457 F Supp 1303, 1306 [ED NY 1978]; *see also Saxe, Bacon & Bolan, P.C. v Martindale-Hubbel, Inc.*, 710 F 2d 87, 90 [2d Cir 1983]). A single concern may choose who it wishes to deal with as long as its decision is not the result of a combination with others to destroy competition so far as the whole relevant product market is concerned (*see Beyer Farms*, 142 F Supp 2d at 300; *Hsing Chow*, 457 F Supp at 1306; *Fisher v Health Ins. Plan of Greater New York*, 67 Misc 2d 674, 678 [1971]).

While Wyckoff’s decision to reduce the number of 403 (b) providers available to its employees limits the choices of its employees, this action is brought by plaintiff, a salesperson for one of the providers, not the employees, and there is no law prohibiting Wyckoff from acting in its own interests where no unlawful conspiracy in restraint of trade is properly alleged. Although plaintiff has lost commissions, the injury alleged, to be cognizable under the Donnelly Act, must be to competition in the market, not merely a loss of commissions by one competitor (*see Beyer Farms*, 142 F Supp 2d at 304; *Korshin v Benedictine Hosp.*, 34 F Supp 2d 133, 137-138 [ND NY 1999]; *Watts*, 234 AD2d at 538). The decision to limit the annuity providers at Wyckoff is not sufficiently unreasonable as to be considered a restraint of trade under the Donnelly Act, as “[a]ntitrust laws are concerned with acts that harm ‘competition, not competitors’” (*Simon & Son Upholstery*, 2003 WL 22231540 at * 4). Plaintiff’s mere allegation that his business at Wyckoff has been eliminated does not adequately allege a restraint of trade in the market in question (*see Fogel*

v Metropolitan Life Ins. Co., 871 F Supp 571, 574-575 [ED NY 1994], *affd* 122 F 3d 1056 [2d Cir 1995]).

Plaintiff's reliance upon *Eagle Spring Water Co. v Webb & Knapp, Inc.* (236 NYS2d 266, 277-278 [1962]) is misplaced. That case, which turned upon an analysis of landlord and tenant rights, involved a conspiracy as evidenced by written contracts between the conspirators as well as injury to competition (*id.* at 276-279). Additionally, the Supreme Court, New York County, in *Eagle Spring Water Co.* (236 NYS2d at 276-278), made factual determinations in an adjudication on the merits about the precise size of the market in question and the reasonableness of the defendant landlord's lease restrictions, and, further, it found that the geographic market at issue included substantially more than simply that defendant's buildings. Most distinctive, however, is the finding that the sole purpose of the monopoly imposed was pecuniary gain to the landlord which was receiving "commissions" from the coconspirators. There is no allegation here that any defendant gave or received consideration to or from the other for instituting the limitation of choice of annuity providers. In fact, Wyckoff's sworn representation by its Chief Financial Officer Hal McNeil that it unilaterally instituted the change without consultation with any of the named defendants, and that the particular companies that continued as options were selected because they already served the greatest number of employees, is not disputed.

Consequently, inasmuch as plaintiff's failure to allege a conspiracy or reciprocal relationship between Wyckoff and the 403 (b) provider defendants, a relevant geographic

market and product market, and an anticompetitive effect on the market, is fatal to his Donnelly Act claim, dismissal of his first cause of action is required (*see* CPLR 3211 [a] [7]). It is noted that plaintiff has not requested leave to replead in his opposing papers or set forth any evidence that could properly be considered on a motion for summary judgment in support of a new pleading (*see* CPLR 3211 [e]). Thus, the court does not find that plaintiff has good ground to support his cause of action to justify the granting of such leave.

Plaintiff's second cause of action alleges that defendants have violated Insurance Law § 2123 (b), which deems any comparison of policies or contracts of an insurer "to be an incomplete comparison if it does not conform to all the requirements for comparisons established by regulation." New York State Insurance Department Regulation 60 (11 NYCRR §§ 51.1-51.8) establishes disclosure procedures an insurance agent must follow when encouraging an individual to replace an insurance policy with another. Plaintiff asserts that defendants failed to provide full disclosure under Regulation 60 and made misleading statements, incomplete comparisons, and misrepresentations, as defined in Regulation 60, to induce his customers to replace their existing individual IRC § 403 (b) annuity contracts with those sold by the 403 (b) provider defendants.

There is no allegation in the complaint, however, that the 403 (b) provider defendants acted as agents or encouraged any individual to replace one policy with another. Rather, the complaint alleges only that Wyckoff, who is not an insurance agent (and is not bound by Insurance Law § 2123 [b] requirements), decided to limit the number of 403 (b) investment

providers available to its employees. Furthermore, plaintiff has not alleged any misleading statements, incomplete comparisons, or misrepresentations purportedly made by the 403 (b) provider defendants (*see* CPLR 3016 [b]; *Precision Concepts v Bonsanti*, 172 AD2d 737, 738 [1991]).

In addition, Insurance Law § 2123 (d) only permits an “agent, representative or broker” to “sue[] for and recover[]” lost commissions when those commissions have been lost “as a result of a violation of th[at] section or the making of such false or misleading statement.” As noted above, according to plaintiff’s complaint, plaintiff’s loss of commissions is not alleged to have resulted from any purported misleading statements, incomplete comparisons, or misrepresentations by defendants, but was due to Wyckoff’s decision to limit the number of providers. Thus, plaintiff has not stated a cognizable claim under Insurance Law § 2123 and his second cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

Plaintiff’s third cause of action purports to allege that defendants have tortiously interfered with NACOLAH’s annuity contracts with Wyckoff’s employees. In order to state a claim for tortious interference with contract, a plaintiff must allege ““(1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance of the contract impossible; and (4) damages to plaintiff”” (*M.J. & K. Co. v*

Matthew Bender & Co., 220 AD2d 488, 490 [1995], quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

Plaintiff has not alleged the existence of any contract between him and Wyckoff. Plaintiff's claim is based upon Wyckoff's employees' voluntary salary reduction agreement between each of them and Wyckoff, pursuant to which the employee then applied to NACOLAH for an annuity contract. Since plaintiff was not a party to these voluntary salary reduction agreements entered into by Wyckoff, its employees, and NACOLAH, plaintiff's claim for tortious interference with contract must fail (*see Bogan v Northwestern Mut. Life Ins. Co.*, 292 AD2d 411, 412 [2002]).

Plaintiff's claim that he was a third-party beneficiary of the voluntary salary reduction agreements between Wyckoff and its employees is unavailing as no showing has been made that these agreements were entered into or intended for plaintiff's benefit (*see State of California Public Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]). Moreover, the salary reduction agreement, by its terms, permits its termination at any time for amounts not yet paid, and Wyckoff could therefore properly exercise its right to terminate its relationship with NACOLAH.

Furthermore, to state a viable tortious interference with contract claim, the defendant must have improperly interfered with a contract (*see Guard Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 189-190 [1980]; *Conversion Equities v Sherwood House Owners*

Corp., 151 AD2d 635, 637 [1989]). Here, plaintiff has failed to allege any improper interference with a contract by defendants.

Plaintiff's commission agreement with NACOLAH also cannot provide a basis to show an intentional inducement by defendants to breach plaintiff's contract since plaintiff does not allege that such agreement was breached, but merely alleges that he no longer could receive commissions therefrom when Wyckoff's employees terminated their annuity contracts with NACOLAH. Thus, absent an allegation that there was a wrongfully induced breach of contract, plaintiff's third cause of action for tortious interference with contract cannot be sustained, and dismissal of this cause of action is mandated (*see* CPLR 3211 [a] [7]; *D'Andrea v Rafia-Demetrious*, 146 F 3d 63, 65-66 [2d Cir 1998]).

With respect to plaintiff's fourth cause of action for tortious interference with prospective contractual relations and/or economic advantage, it is noted that such a claim requires that the defendant, in interfering with business relations, acted with the sole purpose of maliciously harming the plaintiff or used dishonest, unfair, improper, or wrongful means (*Wolff v Rare Medium*, 171 F Supp 2d 354, 360 [SD NY 2001]; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300; *John R. Loftus, Inc.*, 150 AD2d 857, 860 [1989]; *NRT Metals v Laribee Wire*, 102 AD2d 705, 706 [1984]). Therefore, inasmuch as plaintiff's allegations fail to specifically allege any malice by defendants or conduct which could be characterized as committed for the sole purpose of harming him, or any wrongful means used by defendants, this cause of action must similarly be dismissed (*see* CPLR 3211 [a] [7];

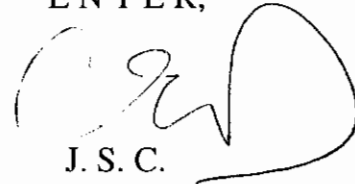
Guard-Life Corp., 50 NY2d at 191; *Snyder*, 252 AD2d at 299-300 [1999]; *John R. Loftus, Inc.*, 150 AD2d at 860; *NRT Metals*, 102 AD2d at 706).

Plaintiff's opposition papers do not oppose dismissal of his fifth cause of action for unfair competition and misappropriation of business. In any event, dismissal of this cause of action is warranted since plaintiff has not shown any misappropriation for commercial advantage of a benefit or property right belonging to another (*see* CPLR 3211 [a] [7]; *Vision Specialty Food Prods. v Ultimate Gourmet, LLC*, 2001 WL 1506008, *5 [SD NY 2001]).

Accordingly, defendants' motions to dismiss plaintiff's complaint as against them are granted.

This constitutes the decision, order, and judgment of the court.

ENTER,

A handwritten signature in black ink, appearing to be 'J.S.C.', written over the printed name 'J.S.C.' below it.

J. S. C.