IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLABERMAN ASSOCIATES, INC., dba CHRISTMAS PROMOTIONS	:	CIVIL ACTION
v.	:	
	:	No. 98-3711
J. KINDERMAN & SONS, dba BRITE STAR MANUFACTURING COMPANY and BRITE STAR HONG KONG	:	

O'Neill, J. February , 1999

M E M O R A N D U M

In this diversity action, plaintiff alleges breach of contract and a variety of commercial torts.[1] Before the Court is defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. See Fed. R. Civ. Proc. 12(b)(6). For the reasons set forth below, the motion will be granted.

I.

In considering defendant's motion to dismiss, I accept as true the well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiff. I may grant the motion only if I determine that plaintiff may not prevail under any set of facts that may be proven consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

[1] Plaintiff filed suit in the United States District Court for the Eastern District of New York. On July 13, 1998, that Court, inter alia, granted defendant's motion to transfer venue to this Court. See Court's Memorandum and Order dated July 13, 1998 (Sifton, Chief Judge).

II.

The following facts are alleged in plaintiff's complaint. Plaintiff Glaberman Associates, Inc.,[2] a New Jersey corporation owned by Sam Glaberman, sells Christmas decorations to retailers in the New York and New Jersey areas. Defendant J. Kinderman & Sons, doing business as "Brite Star Manufacturing Company," ("Brite Star") is a Pennsylvania partnership that manufactures and imports Christmas decorations. (Compl. ¶¶ 1-3.)[3]

On February 1, 1996, Sam Glaberman and Brite Star entered into a written agreement that was to last through the 1996 calendar year.[4] It appears from the complaint that the parties undertook two different sorts of transactions pursuant to this agreement. First, Glaberman served as a sales representative for certain established Brite Star accounts in the New York area, for which he was paid by commission. Second, Glaberman made so-called "drop ship" sales of Brite Star products to his own established customers, who had not previously bought Brite Star products and/or had not been able to obtain credit from Brite Star to buy its products. (Compl. ¶¶ 5, 14, 17.) Pursuant to "drop ship" sales arrangements, which are customary in the Christmas decorations industry, the sales representative (Glaberman) buys decorations from the manufacturer (Brite Star) and sells them at a higher price to his own customers (retailers). Upon receiving an order, the manufacturer ships the products directly to the sales representative's customer but does not bill the customer. Rather, the manufacturer bills the sales representative, who then bills his customers, the retailers. Thus,

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[2] D/b/a "Christmas Promotions."

[3] Defendant contends, and plaintiff has not disputed, that Kinderman & Sons is actually a Pennsylvania corporation. See Mem. and Order dated July 13, 1998, supra, at 2, note 1.

[4] Plaintiff incorporates the sales agreement in his complaint, but only one page of the two page contract is attached to the complaint. The entire contract is attached as Exhibit A to Defendant's Supplemental Brief filed August 27, 1998.

Glaberman's drop ship customers did not know the prices he paid to Brite Star and therefore could not learn the amount of his "middleman" mark-up. (See Compl. ¶¶ 11-16.)

The contract between Glaberman and Brite Star expired at the end of 1996 and was not renewed. Glaberman alleges that Brite Star failed to pay $8,622.07 in commissions due him under this contract, and sues in part to recover this sum. (Compl. ¶¶ 6-9.) Defendant does not challenge the legal sufficiency of this claim in its motion to dismiss.

The remainder of plaintiff's claims, which defendant does challenge, concern defendant's alleged conduct immediately following the termination of the parties' contract at the end of 1996. The complaint alleges in relevant part:

> 19. [After the relationship between plaintiff and defendant terminated] defendant Brite Star . . . contacted the "drop ship" customers of Glaberman.
> 20. Defendant told customers of plaintiff, inter alia, that because Sam Glaberman no longer represented the defendants that the customers could save 10% to 20%. Defendant, Brite Star . . . disclosed the prices paid by Glaberman to Brite Star to Glaberman's "drop ship" customers.
> 21. Defendant, by its aforesaid actions, caused Glaberman embarrassment, harm and damages and/or disparaged plaintiff Glaberman in the Christmas decorations trade. . . .

These allegations are elaborated upon by Sam Glaberman in an affidavit, which I will consider as evidence of additional facts plaintiff might allege in support of its claims should it be granted leave to amend its complaint. According to the affidavit, defendant sent a letter to all plaintiff's drop ship customers stating that they could save 10-20% by buying direct from Brite Star.[5]

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[5] According to the affidavit, the letter stated:

> Please take notice that as of January 1, 1997 Sam Glaberman and Christmas Promotions no longer represent Brite Star Manufacturing Company.
> Buy direct and save 10% to 20%. Either Leon Vilinsky or John Sherow will be calling you for a February Toy Show appointment.

Glaberman further states "on information and belief" that as a follow-up to the letter defendants' representatives

> made statements to my drop ship accounts to the effect that I was over charging [sic] them, cheating them, disclosed my cost prices to my drop ship customers and lowered Brite Stars quotations using exactly the same items I sold to specific drop ship customers to undercut my best prices, to make me look overpriced. Brite Star specifically told my customers what my cost prices were."

(Glaberman Aff. at 10-11.) As a result, plaintiff lost eighteen of his long-time drop ship customers and had to lower his prices to keep three others. (Id. at 11.)

Plaintiff claims that as a result of defendant's actions he has lost or will lose sales of $1.5 million and profits of $250,000. He seeks compensatory and punitive damages on a variety of contract and tort theories: (1) breach of contract; (2) breach of defendant's confidential relationship with plaintiff; (3) willful and malicious breach of contract; and (4) tortious interference with plaintiff's business relationships. Plaintiff has withdrawn a claim for unfair competition.

III.

As an initial matter, I note that the parties disagree as to whether this action is governed by New York or Pennsylvania law. Because there is no conflict between New York and Pennsylvania law with regard to any of plaintiff's claims, I will not engage in a choice of law analysis. See

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> Don't wait until late spring to review Christmas decorations. You'll miss early buy order discounts in February.
>
> Hope you had a good sell-through [sic]
>
> Regards,
>
> Sandy Kinderman
> Vice President
> Brite Star Mfg.

Williams v. Stone, 109 F. 3d 890, 893 (3rd Cir. 1997); Howard v. Clifton Hydraulic Press Co., 830 F. Supp. 708, 712 (E.D.N.Y. 1993).

A.

Glaberman first alleges that Brite Star breached its contract with him "by disclosing information to plaintiff's customers that defendant was obligated to conceal." (Compl. at ¶ 25.) The information to which plaintiff apparently refers is his costs for Brite Star products. (See Compl. ¶ 20.) In other words, plaintiff claims that Brite Star is liable in contract for disclosing its own prices to potential customers.

These allegations fail to state a claim for breach of contract for the simple reason that they do not identify any contractual obligation that was breached.[6] According to plaintiff's allegations, the one and only written contract between the parties expired in 1996. Plaintiff does not identify, and I have not found, any provision in that contract requiring that Brite Star keep the prices it charged Glaberman confidential after the parties' relationship expired. (See Def. Supp. Brief, Ex. A.) Nor, as to the drop ship sales, does plaintiff allege or attach to the complaint any contract requiring Brite Star to keep the prices it charged Glaberman secret after the sales were completed.[7]

[6] To state a claim for breach of contract, plaintiff must, of course, allege both the existence and the breach of a contractual obligation. See, e.g. Universal Marine Medical Supply, Inc. v. Lovecchio, 1998 WL 354050, at *7 (E.D. N.Y. June 30, 1998) (setting forth elements of breach of contract claim under New York law); Rototherm Corp. v. Penn Linen & Uniform Service, Inc., 1997 WL 419627, at *12 (E.D. Pa. July 3, 1997) (setting forth elements of claim under Pennsylvania law).

[7] Plaintiff appears to argue that both industry custom and an oral promise made by Sandy Kinderman obliged defendant to keep the prices it charged Glaberman confidential from his "drop ship" customers. See Compl. ¶ 15 ("The custom and usage of 'drop ship' sales mandates that shipper's cost prices be kept confidential from drop ship customers. The customer is invoiced by the shipper, the shipper is invoiced by the manufacturer. The manufacturer ships directly to the customer"); Glaberman Aff. at 8-9 (stating that Sandy Kinderman "orally agreed that prices charged to Glaberman were to be

In sum, there was no contractual obligation that defendant could have breached when it solicited plaintiff's customers in early 1997. Accordingly, plaintiff's claims for breach of contract and for "malicious and willful" breach of contract will be dismissed.

B.

Plaintiff next claims that Brite Star breached a confidential relationship by revealing his costs (i.e., Brite Star's prices) to his retail customers. (See Compl. ¶¶ 28-29.) A tort claim for breach of a confidential relationship may arise where the defendant owes the plaintiff a duty of confidentiality independent of a contract. See, e.g., Morelli v. Leach & Garner Co., 1986 WL 3576, at *2 (E.D. Pa. March 20, 1986) (applying Pennsylvania law and concluding that, where alleged breach of duty of confidentiality arose within scope of a contract, claim for breach had to be brought in contract rather than tort); Feinman v. Parker, 675 N.Y.S. 2d 711, 712 (N.Y. App. Div. 1998) (breach of a contract does not give rise to tort claim unless duty independent of contract is violated). In a commercial context, such a duty may arise if the relationship between the parties involves a

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kept confidential . . . . he assured me that my cost prices would be kept from my drop ship customers and the packing slips would block out any prices from being shown to the purchasers of the goods.") Plaintiff makes no allegations, however, from whence it could be inferred that such an obligation of confidentiality was to continue even after the shipper-manufacturer relationship had ended. To the contrary, the allegations suggest that such a duty existed only with regard to the actual performance of the "drop ship" sales arrangements.

In any event, any "industry custom" requiring that prices be kept secret even after the drop-ship sale is made and the manufacturer and shipper have terminated their relationship would be an unenforceable artificial restraint on trade. Cf. SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1257 (3d Cir. 1985) ("[T]he information SI wishes to enjoin appellants from using (the identity of the vendors and the price of their merchandise) is already in the hands of third parties --i.e., the bearing suppliers-- who have every incentive, and every right, to disclose it to their customers. To prevent appellants from using this information would put an undue burden on the innocent vendors, as well as place an artificial constraint on the free market.")

trade secret.[8] Thus, the threshold issue presented by plaintiff's claim is "not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated." Tyson Metal Products, Inc. v. McCann, 546 A.2d 119, 121 (Pa. Super. Ct. 1988). If a trade secret was involved, the next question is whether it was improperly obtained or improperly used or disclosed by the defendant. See Restatement (First) of Torts § 757 (1939).

To determine whether certain information could constitute a trade secret, both New York and Pennsylvania courts look to § 757 of the Restatement (First) of Torts. See SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1256 (3d Cir. 1985); Tyson, 546 A.2d at 121; Hancock v. Essential Resources, Inc., 792 F. Supp. 924, 926 (S.D.N.Y. 1992). The factors to be considered include: (1) to what extent the information is known outside of the owner's business; (2) whether the information is known by others involved in the owner's business; (3) the measures taken by the owner to keep the information secret; (4) the value of the information to the owner and its competitors; (5) the

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[8] Aside from trade secret cases, claims concerning confidential relationships (or fiduciary duties) arise in both the New York and Pennsylvania case law in the context of unequal relationships in which one party relies upon or places trust in the greater strength or knowledge of another. See, e.g., Drapeau v. Joy Technologies, Inc., 670 A.2d 165, 172 (Pa. Super. Ct. 1996) (concurring opinion) (a confidential relationship is one "with trust and reliance on one side and a corresponding opportunity to abuse that trust for personal gain on the other") (citation omitted). The stronger or more knowledgeable party in such relationships may be required to act with the utmost good faith and in the best interests of the weaker party. See e.g., Rebidas v. Murasko, 677 A.2d 331, 334 (Pa. Super. Ct. 1996) (attorney trustee in confidential relationship with settlor of trust); In the Matter of the Estate of Marie Antoinette, 657 N.Y.S.2d 97, 98 (N.Y. App. Div. 1997) (elderly decedent had been in confidential relationship with niece who persuaded her to change her will to niece's benefit); cf. Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Brothers Int'l. Ltd., 674 N.Y.S.2d 648, 649 (N.Y. App. Div. 1998) (confidential relationship may arise between parties to a business relationship); Drapeau, 670 A.2d at 172 (concurring opinion) (same).

No such relationship appears from plaintiff's allegations here. The parties are businesses which are experienced in their industry and undertook an arms-length contractual relationship. There is no basis in the complaint or in reason for finding that defendant was obligated to act in other than its own interests. To the extent plaintiff relied upon defendant to act otherwise, his reliance was unreasonable. See, e.g., Gaidon v. Guardian Life Ins. Co. of Am., 679 N.Y.S.2d 611, 611 (N.Y. App. Div. 1998) (even if confidential relationship exists, plaintiff must show his reliance was reasonable to recover for breach).

effort and money spent to develop or obtain the information; and (6) the difficulty with which the information could be obtained or duplicated by others. Restatement (First) of Torts § 757 cmt b.

Plaintiff appears to allege that two types of confidential information were misappropriated by defendant: (1) the identities of his customers and (2) his costs (i.e., the prices he paid defendant for its products). As to the latter, I think it obvious that plaintiff's costs -- i.e., Brite Star's prices -- could not constitute a trade secret.[9] Even if they could, however, the information was Brite Star's, not plaintiff's. Absent a contractual obligation not to do so, Brite Star was entitled to disclose its prices to whomever it wished.

I also think it clear that the identities of plaintiff's customers is not information entitled to trade secret protection. There is nothing in plaintiff's allegations to suggest that his customers were not readily ascertainable to the extent they were not already known to Brite Star. (See Compl. ¶ 14 ("Sales made by "drop ship" were to customers of Glaberman's who were unable to obtain credit from Brite Star and/or were not prior customers of Brite Star.").) At any rate, plaintiff does not allege that he took any steps to keep these customers "secret," that they could have been kept secret, or that defendant could not have identified them easily through independent means. Thus, there are no allegations to support a claim that plaintiff"s customer list could constitute a trade secret. Compare Hancock v. Essential Resources, Inc., 792 F. Supp. 924, 926-27 (S.D.N.Y. 1992) (noting "[g]enerally where the customers are readily ascertainable outside the employer's business as

[9] Cf. Tyson Metal Products, Inc. v. McCann, 546 A.2d 119, 121-122 (Pa. Super. Ct. 1988) (refusing to enjoin plaintiff's former employee from revealing to a competitor the prices plaintiff paid a supplier and holding that the supplier's price list was not a trade secret); SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1257 (3d Cir. 1985) ("'Material sources and costs' are 'something that would be learned in any productive industry.'"), quoting Van Products Co. v. General Welding and Fabricating Co., 213 A.2d 769, 776 (Pa. 1965).

prospective users or consumers of the employer's services or products, trade secret protection will not attach" to customer information) (citation and inner quotations omitted).

Defendant's alleged disclosures of plaintiff's costs and its solicitation of his customers did not involve any information entitled to trade secret protection. As plaintiff alleges no other facts that could give rise to a duty of confidentiality on defendant's part, his claim for breach of confidential relationship must be dismissed.

C.

Finally, plaintiff claims that defendant tortiously interfered with his prospective business relations when it "disclosed confidential and private information" to his customers "in such a way as to intentionally cause embarrassment, harm and injury" to his longstanding business relationships. (Compl. ¶¶ 43-44.) Again construing the complaint liberally in plaintiff's favor, these allegations appear to refer to defendant's conduct in disclosing his costs to his customers and stating that plaintiff was "overcharging" and "cheating" them. (See Comp. ¶ 20; Glaberman Aff. at 10-11.)

Both New York and Pennsylvania courts look to the Restatement (Second) of Torts § 768 to define the scope of the cause of action for tortious interference with prospective business relations.[10] See, e.g., Hannex Corp. v. GMI, Inc., 140 F.3d 194, 205-206 (2d Cir. 1998) (applying

[10] Plaintiff's complaint merely asserts a claim for "tortious interference" with its "longstanding [business] relationships;" it does not specify whether the claim is one for interference with existing contracts or with only prospective or terminal-at-will contracts. The distinction is significant under both New York and Pennsylvania law, both of which follow the Restatement (Second) of Torts. Compare § 768(1), quoted in the text above, with § 768(2) ("The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.")

It is clear from the complaint, however, that plaintiff can only be asserting a claim for improper interference with prospective business relations, as (1) there is no allegation that defendant interfered

New York law); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 529-31 (3d Cir. 1998) (applying Pennsylvania law). A claim for this tort will lie only where a defendant acted without privilege or justification and for the purpose of harming plaintiff's business relations. Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 530 (3d Cir. 1998), citing, inter alia, Pelagotti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1988); Thompson Coal Company v. Pike Coal Company, 412 A.2d 466, 470 (Pa. 1979). In this case, defendant claims the competitor's privilege set forth in § 768 of the Restatement (Second) of Torts, which provides in relevant part:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint on trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768 (1977).

It is clear on the face of the complaint that defendant was acting as a competitor with plaintiff and seeking to advance its own competitive interests when it contacted plaintiff's customers and attempted to sell its products to them directly.[11] Plaintiff does not contend otherwise. Accordingly, defendant may be held liable for tortious interference with plaintiff's

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with any existing contract between plaintiff and one of its customers and (2) the allegations show that plaintiff's relationships with customers involved only prospective sales or terminable-at-will contracts for sales.

[11] See BLACKS' LAW DICTIONARY 284 (defining "competitors" as "persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the services better or cheaper than his rival"); see also Compl. ¶ 28 (defendant "exploit[ed] information about plaintiff's business for its own economic benefit"), ¶ 32-35 (stating claim, now withdrawn, that defendant unfairly competed with plaintiff).

prospective business relations only if it "employ[ed] wrongful means" in its competitive efforts.

"Wrongful means" as used in § 768 includes "physical violence, fraud, civil suits and criminal prosecutions," § 768, cmt. e, and may also include conduct that is independently actionable. See Brokerage Concepts, 140 F.3d at 531; Hannex Corp., 140 F.3d at 206. No such conduct has been alleged by plaintiff. Plaintiff alleges that defendant disclosed the prices it charged plaintiff to his customers and did so in "such a way as to intentionally" cause plaintiff embarrassment. While this conduct may have humiliated plaintiff and hurt his business, it simply does not constitute the sort of criminal, fraudulent, or independently-actionable conduct required to support a claim for tortious interference against a business competitor. Accordingly, plaintiff's claim for tortious interference must be dismissed.

Conclusion

Plaintiff's only remaining claim is for the $8,622.07 in commissions Brite Star allegedly owes it under the 1996 contract. As this claim does not meet the amount in controversy requirement for diversity jurisdiction, see 28 U.S.C. § 1332, I have discretion as to whether I will exercise supplemental jurisdiction over the claim pursuant to 28 U.S.C. § 1367 (c). See Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995); Friedrich v. U.S. Computer Systems, Inc., 1996 WL 32888, at *3-4 (E.D. Pa. Jan. 22, 1996). Because I discern no compelling reason at this early stage of the litigation to exercise supplemental jurisdiction over the claim, I decline to do so. Accordingly, Count I will be dismissed without prejudice.[12]

[12] The attention of plaintiff's counsel is directed to 42 Pa. C.S.A. § 5103(b).

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	:	No. 98-3711
J. KINDERMAN & SONS, dba BRITE STAR	:	
MANUFACTURING COMPANY and BRITE	:	
STAR HONG KONG	:	

O R D E R

AND NOW, this day of February, 1999, upon consideration of defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and the parties' filings related thereto, it is hereby ORDERED that the motion is GRANTED:

(1) plaintiff's first cause of action, for commissions allegedly due from defendants, is DISMISSED without prejudice; and

(2) the remainder of plaintiff's claims are DISMISSED.

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THOMAS N. O'NEILL, JR. J.