

**BY THE COURT**

THOMAS BALVIN,  
Plaintiff/Counterclaim  
Defendant,  
v.  
BIOREFERENCE LABORATORIES, INC.,  
Defendant/Counterclaimant.

BIOREFERENCE LABORATORIES, INC.,  
Third-Party Plaintiff,  
v.  
ACCU REFERENCE MEDICAL LAB, LLC,  
Third-Party Defendant.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MORRIS COUNTY**

**DOCKET NO.: MRS-L-001214-22**

**CIVIL ACTION**

**ORDER**


**THIS MATTER** having been brought before the Court by Bailey Duquette, P.C. (David I. Greenberger, Esq., admitted *pro hac vice*, Hozaifa Y. Cassubhai, Esq. and Shashi K. Dholandas, Esq., appearing), attorneys for Third-Party Defendant Accu Reference Medical Lab, L.L.C., (“Third-Party Defendant”) on a motion to dismiss the third-party complaint for failure to state a claim pursuant to Rule 4:6-2(e) and Genova Burns (Harris S. Freier, Esq. and Latiqua Liles, Esq., appearing), attorneys for Defendant/Third-Party Plaintiff BioReference Laboratories, Inc. having filed opposition and on notice to the Law offices of Damian Christian Shammas, L.L.C. (Damian Christian Shammas, Esq., appearing), attorney for Plaintiff Thomas Balvin who did not file a response to the motion and the court having reviewed the moving, opposition and reply submissions of the parties and the court having heard oral argument on April 28, 2023 and for the reasons set forth on the record on April 28, 2023 and in the attached Statement of Reasons;

**IT IS** on this 2<sup>nd</sup> day of May 2023

**ORDERED** that the motion of Third-Party Defendant Accu Reference Medical Lab, L.L.C. to dismiss Count Three (Tortious Interference with Business Relations/Economic Advantage) and Count Four (Tortious Interference with Contract) of the third-party Defendant/Third-Party Plaintiff BioReference Laboratories, Inc. is **granted, as modified**. Count Three and Count Four of the third-party complaint as to Third-Party Defendant Accu Reference Medical Lab, L.L.C. are **dismissed without prejudice**.

**IT IS FURTHER ORDERED** that **by June 2, 2023**, Defendant BioReference Laboratories, Inc. may file a Third Amended Answer, Affirmative Defenses and Counterclaims and Third-Party Complaint against Accu Reference Medical Lab, L.L.C. with additional factual allegations to support its claims of tortious interference with business relations and economic advantage and tortious interference with contract.

**IT IS FURTHER ORDERED** that this Order shall be deemed served upon all parties upon the upload to E-Courts. Pursuant to Rule 1:5-1(a), the movant shall serve a copy of this Order on all parties not served electronically within seven days of the date of this Order.

  
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Hon. Marcy M. McMann, J.S.C.

**BALVIN VS. BIOREFERENCE LABORATOIRES, INC., ET.AL.**  
**DOCKET NUMBER MRS-L-1214-22**

This is a motion by Third Party Defendant Accu Reference Medical Laboratories, Inc. (“Accu Reference”) to dismiss the third-party complaint filed by Defendant/Third- Party Plaintiff BioReference Laboratories, Inc. (“BioReference”) pursuant to Rule 4:6-2(e). The parties work in the medical labs industry. On July 14, 2023, Plaintiff Thomas Balvin (“Plaintiff”) filed this breach of contract action alleging that BioReference failed to fully compensate him as set forth in the employment contract. BioReference filed an answer and counterclaim. In the counterclaim, BioReference alleges that Plaintiff resigned his employment on March 25, 2022 and began to work for a competitor Accu Reference. BioReference claims Plaintiff breached his employment contract by failing to return company property and by violating the restrictive covenant not to compete by servicing clients in territories he serviced while employed by BioReference. After limited discovery, with leave of court, on January 6, 2023, BioReference filed a Second Amended Answer, Affirmative Defenses and Counterclaim, which added a Third-Party complaint against Accu Reference for tortious interference with business relations and economic advantage and tortious interference with contract. Accu Reference moves to dismiss the third-party complaint. BioReference opposes the motion. Plaintiff did not file a response to the motion.

Initially, the court observes that the Third-Party Complaint contains four counts. Count One and Count Two each allege breach of contract claims against Plaintiff. These counts do not contain any claims against Accu Reference and thus, they are not the subject of this motion. To the extent Accu Reference requests dismissal of the third-party complaint, the motion only pertains to Count Three and Count Four of the third-party complaint, the tortious interference claims against Accu Reference. Nevertheless, the allegations contained in Count One and Count Two are relevant to the motion as these allegations are incorporated into Count Three and Count Four.

A. Standard of Review

When considering a motion to dismiss pursuant to Rule 4:6-2(e), the plaintiff must receive the benefit of all reasonable inferences. The complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The court may consider exhibits attached to the complaint, documents that form the basis of the claim and matters of public record. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). The court may consider documents specifically referenced in the complaint without converting the motion into a motion for summary judgment. Myska v. New Jersey Manufacturers Insurance Company, 440 N.J. Super. 458, 482 (App. Div.) app. dismissed 224 N.J. 523 (2015). The pivotal inquiry is whether the fundament of a cause of action exists in the complaint and the documents, not the ability of the plaintiff to prove the allegations. Banco Popular N. Am., 184 N.J. at 183.

In reviewing the motion, the Court is not concerned with the “ability of plaintiffs to prove the allegation[s] contained in the complaint.” Id. at 165 (quoting Printing Mart-Morristown, 116 N.J. at 746). The complaint need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the plaintiff’s complaint is only appropriate after the complaint has been “accorded . . . [a] meticulous and indulgent examination.” Printing Mart-Morristown, 116 N.J. at 772. If dismissal of the plaintiff’s complaint is appropriate, the dismissal “should be without prejudice to a plaintiff’s filing of an amended complaint.” Id. In circumstances where the plaintiff’s pleading is inadequate in part, the Court has the discretion to dismiss only certain counts from the complaint. Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258 (App. Div. 1997).

In support of its motion, Accu Reference cites to numerous unpublished federal cases and New Jersey Appellate Division cases and as required by Rule 1:36-3 provides a copy of the cases to the court. Rule 1:36-3 provides that, “[n]o unpublished opinion shall constitute precedent or be binding upon any court.” See, e.g., Badiali v. New Jersey Manufacturers, Inc., 220 N.J. 544, 559 (2015). Likewise, the court is not permitted to cite unpublished opinions except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law. R. 1:36-3. The cases cited by Accu Reference do not fall within the exceptions for citing unpublished opinions. Accordingly, the court declines to rely on or cite to the federal unpublished cases cited by Accu Reference.

In opposition to the motion, BioReference attaches a complaint it filed against Accu Reference in the New Jersey Superior Court, Law Division, Bergen County regarding another BioReference former employee, Sean Todd (hereinafter “the Bergen Complaint”). BioReference contends the complaint shows that Accu Reference engaged in similar conduct with Mr. Todd and thus, the complaint pertaining to Plaintiff Thomas Balvin should not be dismissed. The fact that BioReference filed a significantly more detailed complaint against Accu Reference for similar conduct involving a different employee is not pertinent to the court’s inquiry as to the sufficiency of the pleading of the present third-party complaint against Accu Reference. Although the court can consider matters of public record, the matter must be referenced within the complaint before the court. Banco Popular N. Am., 184 N.J. at 183. The third-party complaint does not reference the Bergen complaint. Accordingly, the allegations in the Bergen Complaint are not relevant to whether BioReference has sufficiently plead a cause of action in the third-party complaint as required by Rule 4:5-2.

## B. Pleading Requirements

New Jersey is a “fact pleading” state, not a “notice pleading” state. Printing Mart-Morristown, 116 N.J. at 768; Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011) affirmed as modified in part 213 N.J. 109 (2013). New Jersey requires fact pleading which sets forth a cause of action. Printing Mart-Morristown, 116 N.J. at 768. The pleading requirements are set forth in Rule 4:5-2. The rule states that a third-party claim “shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief.” R. 4:5-2. The extent to which facts must be pled depends on the nature of the claim. For example, claims involving allegations of misrepresentation, fraud, mistake, breach of trust and willful default or undue influence must be pled with particularity including dates and items, if necessary. R. 4:5-8. “Malice, intent, knowledge, and other condition of mind of a person may be alleged generally.” R. 4:5-8(a).

It is well established that “pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit.” Glass v. Suburban Restoration Co., Inc., 317 N.J. Super 574, 582 (App. Div. 1998). It is not enough for plaintiffs to assert “that any essential facts that the court may find lacking can be dredged up in discovery.” Printing Mart-Morristown, 116 N.J. at 768. A vague non particularized claim does not suffice. In this context, the court considers the claims set forth in the third party complaint against Accu Reference.

The third party complaint filed by BioReference against Accu Reference contains the following factual allegations. BioReference claims that it hired Plaintiff in 2009 in the position of technical support and subsequently promoted him to a sales representative. In 2016, Plaintiff signed a Key Employee Agreement (hereinafter “2016 KEA”) and in 2020, Plaintiff signed an updated Key Employee Agreement (hereinafter “2020 KEA”). Both agreements define what items

constitute BioReference property. Both agreements state that reports, memoranda, manual, agreements, books, computer records and printouts, customer lists and sales records are the property of BioReference. The 2020 KEA further provides for a one year covenant not to compete in any county or state in which Plaintiff worked while employed by BioReference. See, Paragraphs 7 to 16 of Third-Party Complaint. On March 25, 2022, Plaintiff resigned his employment with BioReference and certified that he did not analyze, alter, copy, disclose or disseminate BioReference property. Despite the certification, the complaint indicates that Plaintiff retained property of BioReference. See, Paragraphs 17 to 22 of Third-Party Complaint.

After he resigned, Plaintiff went to work for Accu Reference on an unspecified date. The one year covenant not to compete expires March 25, 2023. Plaintiff services clients for Accu Reference for the same counties in which he serviced clients while employed by BioReference. See, Paragraphs 23 to 24 of Third-Party Complaint. There is no indication of which geographic area BioReference refers to and there is no indication that Plaintiff is servicing clients who used BioReference services. The complaint only indicates that Plaintiff is working in the same counties. Presumably, the counties are Bergen and Passaic County and/or South Jersey, as Plaintiff indicates in Paragraphs 8 and 10 of his complaint that he was assigned to service these counties at various times during his employment with BioReference. The third party complaint then alleges that the 2016 KEA and 2020 KEA each provide for damages upon breach of the terms. See, Paragraphs 25 to 27 of Third-Party Complaint.

Although Count One and Count Two of the Third-Party Complaint only alleged causes of action against Plaintiff, these counts contain additional factual assertions that are incorporated into Count Three and Count Four. In Count One of the Third-Party Complaint, BioReference further alleges that the 2016 KEA and 2020 KEA are valid, binding and enforceable contracts supported

by adequate consideration and that it fully performed under the contracts. BioReference alleges Plaintiff breached the contracts by retaining confidential information. In Count Two of the Third-Party Complaint, BioReference repeats the same information and adds that Plaintiff breached the 2020 KEA by servicing clients for Accu Reference in the same counties that he serviced BioReference clients during his employment with BioReference causing damages and irreparable harm.

Count Three and Count Four to the Third-Party complaint repeat and reallege all the facts previously pled. The only additional statements are conclusory allegations setting forth the elements of tortious interference with business relations and economic advantage and tortious interference with contract.

C. Tortious Interference

The elements of tortious interference with business relations and economic advantage and tortious interference with contract claims are similar, differing only in that the tort of tortious interference with contract does not require a contractual relationship. Tortious interference claims focus on the performance of an existing contract, inducing or otherwise causing another person to refrain from entering into or continuing the contract and preventing another from acquiring or continuing the prospective relation. Nostrame v. Santiago, 213 N.J. 109, 122 (2013); Macdougall v. Weichert, 144 N.J. 380, 403 (1996). The essence of tortious interference is the luring away of a customer of another by improper and unrighteous means. Printing Mart-Morristown, 116 N.J. at 751-752.

To establish a claim for tortious interference with economic advantage, the plaintiff must prove: (1) a protectable right, either a prospective economic or contractual right, that gives rise to a reasonable expectation of economic advantage evolving from a plaintiff's pursuit of business;



(2) the interference was inflicted intentionally and with malice; (3) that the interference caused the loss of prospective gain; and (4) that the interference caused the plaintiff damage. Printing Mart-Morristown, 116 N.J. at 751-752; Macdougall, 144 N.J. at 403-404. As to causation, the plaintiff must show that there was “a reasonable probability that the victim of the interference would have received the anticipated economic benefits.” Printing Mart-Morristown, 116 N.J. at 751 (quoting Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185-186 (App. Div. 1978)).

To establish a claim for tortious interference with contract, a plaintiff must prove: (1) actual interference with an existing contract or a prospective business relationship; (2) that the interference was inflicted intentionally and with malice by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage. Printing Mart-Morristown, 116 N.J. at 751-752; Nostrame, 213 N.J. at 121-122; Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003); Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 49 (App. Div. 1997) cert. granted 152 N.J. 9 (1998) appeal dismissed 153 N.J. 45 (1998).

Interference with a contract is intentional “if the actor desires to bring about or if he knows that the interference is certain or substantially certain to occur as a result of his action.” Russo, 358 N.J. Super. at 268 (quoting Restatement (Second) of Torts §766A, comment e (1977)). The term malice does not require ill will toward the plaintiff. “Rather, malice is defined to mean that the harm was inflicted intentionally and without justification or excuse.” Printing Mart-Morristown, 116 N.J. at 751. The requisite intent “may be either a specific intent to interfere with the contract or the taking of improper action with knowledge that interference will probably result.” Velop, Inc., 301 N.J. Super. at 49. “[T]he relevant inquiry is whether the conduct was sanctioned by the ‘rules of the game.’” Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div. 1995) cert. den. 141 N.J. 99 (1995).

To determine if interference was intentional and with malice, the court considers whether the actor had an improper motive or used an improper means to induce the conduct. The court considers “the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties.” Nostrame, 213 N.J. at 122. Our courts recognize that certain types of conduct constitute improper conduct which is actionable. For example, when a competitor engages in fraudulent, dishonest or illegal conduct thereby interfering with another’s economic advantage, the conduct is deemed to be intentional and with malice. Ideal Dairy Farms, Inc., 282 N.J. Super. at 205. Inducing another to end a contractual relationship by fraud, defamation, deceit, violence, criminal or civil threats and or violations of the law are considered wrongful means sufficient to sustain a cause of action. Nostrame, 213 N.J. at 124. In contrast, sneaky or underhanded acts are not actionable. Id. (citing C.R. Bard, Inc., v. Wordtronics Corp., 235 N.J. Super. 168, 174 (Law Div. 1989)). Likewise, vigorous solicitation of a competitor’s customers is not actionable. Ideal Dairy Farms, Inc., supra.

Generally, inducement of an employee to move to a competitor is not actionable where the employment is terminable at will. If the competitor induces the employee to move for an unlawful or improper purpose then the conduct is actionable. Avtec Industries, Inc. vs. Sony Corporation of America, 205 N.J. Super. 189, 194 (App. Div. 1985). Here, there is no allegation that Accu Reference unlawfully induced Plaintiff to leave BioReference. At oral argument, BioReference indicated that it was not alleging that Accu Reference unlawfully lured Plaintiff to leave BioReference. As such, the claim of BioReference is based on the luring of clients by Accu Reference in an unlawful manner and/or with an improper purpose.

Giving BioReference all favorable inferences and liberally reading the complaint, BioReference alleges that Plaintiff terminated his employment with BioReference, retained confidential information, went to work for Accu Reference servicing clients in the same area that he serviced while employed by BioReference within the one year time prohibited by the non-compete clause and that the practice is continuing. There is no allegation that Plaintiff contacted any of the clients in the area that he serviced while employed by BioReference or that any of the clients currently serviced by Accu Reference in this sales area had contracts with BioReference or were contemplating entering contracts with BioReference. If Plaintiff has not contacted any of the BioReference clients in this area, there is no *prima facie* claim of interfering with existing clients and the prospective business those clients may generate by renewing their contracts.

Interference is not improper if the relation concerns a matter involved in competition between the two entities, the actor does not employ wrongful means, the action does not create or continue an unlawful restraint of trade and his purpose, at least in part, is to advance his interests of competing with the other. Restatement (Second) of Torts §768(1); Nostrame, 213 N.J. at 122-123. Malice or wrongful conduct is not established if the breaching party acted to advance his own interest and financial position. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 451-452 (App. Div. 1976) certif. den. 71 N.J. 503 (1976). In the present case, the parties are competitors in the same business trying to attract the same group of clients. Absent factual allegations showing that Accu Reference acted with an improper motive and/or that unlawful means were used to induce existing BioReference clients or clients contemplating contracting with BioReference to do business with Accu Reference, the claim is not actionable.

In Count Three, in conclusory terms, BioReference states each element of the tortious interference with business relations and economic advantage claim but it provides minimal factual

support to establish each element. BioReference alleges that it has existing business relationships with current and prospective clients and that Accu Reference has known about these relationships including clients serviced by Plaintiff while employed by BioReference. The complaint states that Accu Reference “intentionally interfered” with these existing relationships and that the interference is “malicious, intentional and unjustified.” The complaint further alleges that BioReference sustained damages and there is no adequate remedy at law to prevent this practice from continuing. Printing Mart-Morristown, 116 N.J. at 751-752; Macdougall, 144 N.J. at 403.

The complaint is devoid of any factual allegations to show how Accu Reference “intentionally interfered” with the business relationship or of what damages were sustained. As such, the court cannot articulate what facts show that Accu Reference employed wrongful means in assigning Plaintiff to his current area of service. For example, there is no allegation that Accu Reference was aware of Plaintiff’s post-employment obligations under the 2016 KEA and/or 2020 KEA. There is no indication that Accu Reference actually contacted any existing or past BioReference client serviced by Plaintiff and thus, the court cannot infer that Plaintiff is utilizing the confidential client information he allegedly retained to the benefit of Accu Reference. There is no indication that specific clients were lured to leave BioReference and sign contracts with Accu Reference and thus, there are no factual allegations supporting the damages claim. Absent factual allegations to support each element of the stated cause of action, the pleading is deficient. R. 4:5-2; Printing Mart-Morristown, 116 N.J. at 768; Nostrame, 420 N.J. Super. at 436.

Count Four is also deficient because there are no factual allegations to support the stated conclusory elements of the cause of action for tortious interference with contract. Incorporating the prior allegations, Count Four adds that Accu Reference is not a party to the agreement between BioReference. While this factual assertion is sufficient to support the added element that there be

no contractual relationship between the parties, there are no additional factual pleadings to show how Accu Reference intentionally interfered with the business relationship and there is no indication of what damages were sustained.<sup>1</sup> Since there are no factual allegations to show the interference was intentional or willful, as defined above, the causes of action set forth in Count Three and Count Four for tortious interference with business relations and economic advantage and tortious interference with contract are insufficiently pled and do not state a claim upon which relief may be granted.

Although the court finds that BioReference did not adequately plead the causes of action for tortious interference with business relations and economic advantage and tortious interference with contract, the court finds that the proper remedy is to dismiss these counts without prejudice and to permit BioReference to file an amended third-party complaint with setting forth the factual allegations to support each element of each claim. Printing Mart-Morristown, 116 N.J. at 772; Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258 (App. Div. 1997).

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<sup>1</sup> In contrast to the third-party complaint, the Bergen Complaint attached as Exhibit H to BioReference's opposition contains extensive factual allegations supporting the elements of the cause of action including factual allegations that Accu Reference was aware of the employee's post-employment obligations to BioReference under a KEA and that at least one specific client was solicited.