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**COMMONWEALTH OF MASSACHUSETTS**

**BRISTOL, ss.**

**SUPERIOR COURT**
**CIVIL ACTION**
**NO. 2173CV00426**



**TORI MACAROCO f/k/a TORI BORGES**
**Plaintiff,**

**vs.**

**VANITY LAB, LLC d/b/a VANITY LAB MEDSPA & another[1]**
**Defendants.**

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS**

Defendants Vanity Lab, LLC, doing business as Vanity Lab MedSpa ("Vanity Lab"), and Darline Martins (collectively "Defendants") have moved, pursuant to Mass. R. Civ. P. 12(b)(6), to dismiss Counts I-IV,[2] VII, IX, and X of Plaintiff Tori Macaroco's, formerly known as Tori Borges ("Macaroco"), Amended Complaint. The court has reviewed the Amended Complaint (Paper #4) and its exhibits, the Defendants' motion (Paper #13), and Macaroco's opposition (Paper #13.1). On February 22, 2022, the parties appeared before the court in argument on the motion. For the following reasons, the Defendants' motion is **ALLOWED** in part and **DENIED** in part.

**BACKGROUND**

Vanity Lab is a company offering medical spa services and is wholly owned by defendant Darline Martins. Beginning in April, 2019, the Defendants employed Macaroco as an aesthetician. On June 7, 2019, Macaroco signed a Covenant Not to Solicit and Confidentiality Agreement (the "Contract"), in which Macaroco agreed that she would not solicit any employees or patients/customers of Vanity Lab, attempt to persuade any customer, patient, or employee

1 Darline Martins

2 At hearing, the parties advised the court that they had reached agreement to resolve Counts I and II without a court ruling. For that reason, the court does not address either of these counts.

from leaving Vanity Lab's services, or reveal any of Vanity Lab's confidential information. The Contract also contained a restrictive covenant that sought to prevent Macaroco from practicing her profession entirely for a period of one year from her date of separation from Vanity Lab.[3]

On or about May 25, 2021, Vanity Lab terminated Macaroco. On or about May 26, 2021, Macaroco began establishing her own business providing aesthetician services.

On June 3, 2021, Macaroco received a cease and desist letter dated June 1, 2021 from a New York law firm ("the Letter").[4] Citing the Contract, the Letter demanded that Macaroco not practice her profession as a new business. It reminded Macaroco of her non-solicitation and confidentiality agreements. The Letter also asserted that Vanity Lab would pursue its available legal remedies in the event of Macaroco's breach of any of the Contract's provisions.

## DISCUSSION

I. Standard of Review

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well-pleaded factual allegations of the complaint, as well as any inferences that can be drawn in the plaintiff's favor. *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). Those alleged facts, and reasonable inferences drawn therefrom, must plausibly suggest an entitlement to relief. *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008). The facts, therefore, "must be enough to raise a right to relief above the speculative level." *Id.* (quotation and citation omitted). The court will not accept "legal conclusions cast in the form of factual allegations," or allow the plaintiff "to rest on subjective characterizations or conclusory descriptions." *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477-478 (2000) (quotation and citation omitted).

3 Vanity Lab did not sign the Contact.

4 Attached to the Amended Complaint as Exhibit B.

II. Tortious Interference with Advantageous Business Relations (Count III)

The Defendants contend that their motion should be allowed as to Count III because the Amended Complaint fails to identify any person that would not conduct business with Macaroco based upon Defendants' alleged interference and fails to plead that the Defendants knowingly interfered with any third parties or caused any financial harm. The court disagrees.

In order to state a claim for tortious interference with advantageous business relations, Macaroco must allege facts sufficient to suggest (1) a business relationship from which the plaintiff might benefit existed; (2) the defendant knew of the relationship; (3) the defendant intentionally interfered with the relationship for an improper purpose or by improper means; and (4) the plaintiff was damaged by that interference. *Pembroke Country Club, Inc.* v. *Regency Sav. Bank, F.S.B.*, 62 Mass. App. Ct. 34, 38 (2004).

In the Amended Complaint, Macaroco alleges that on May 26, 2021, she began establishing a business to provide aesthetician services. Am. Compl. par. 36. It is reasonable for the court to infer that, in doing so, Macaroco began to establish business relationships from which she might benefit, such as with clients. In addition, the Amended Complaint states that the Defendants "contact[ed] third parties and claim[ed] that a restrictive covenant restricted [Macaroco's] ability to practice her profession." Am. Compl. par. 67. The court can reasonably draw from this allegation that Macaroco had potential business relationships with these "third parties"; the Defendants knew that; and the Defendants contacted the third parties for the purpose of interfering with Macaroco's ability to do business with them. Another way Macaroco alleges that the Defendants improperly interfered with these potential business relationships is by sending her the Letter, the purpose of which was to gain a business advantage over her, i.e., to prevent her from establishing these business relationships. Am. Compl. pars. 42, 67. Macaroco

further alleges that the Defendants contacted the third parties and sent the Letter knowing that the Contract and the restrictive covenants therein violated Massachusetts law. Am. Compl. par. 67. Finally, Macaroco alleges that she suffered damages as a result of the Defendants' interference. *Id.* For these reasons, the Amended Complaint sufficiently states a claim for tortious interference with advantageous business relations. Accordingly, the Defendants' motion as to Count III is **DENIED**.

III. Trade Libel (Commercial Disparagement) (Count IV)

The Defendants contend that Count IV must be dismissed where any allegation related to Macaroco's trade libel claim amounts only to legal conclusions. The tort of trade libel is also known as "commercial disparagement." *HipSaver, Inc.* v. *Kiel*, 464 Mass. 517, 518 n.1 (2013). In order to state a claim of commercial disparagement, a plaintiff must state facts sufficient to suggest that a defendant: "(1) published a false statement to a person other than the plaintiff; (2) 'of and concerning' the plaintiff's products or services; (3) with knowledge of the statement's falsity or with reckless disregard of its truth or falsity; (4) where pecuniary harm to the plaintiff's interests was intended or foreseeable; and (5) such publication resulted in special damages in the form of pecuniary loss." See *id.* at 523, citing *Dulgarian* v. *Stone*, 420 Mass. 843, 852 (1995).

In the Amended Complaint, Macaroco alleges that the Defendants published false and derogatory statements about the quality of Macaroco's services to at least one third party. Am. Compl. pars. 72-74. Specifically, paragraph 48 of the Amended Complaint states, "[s]ince May 25, 2021, [Macaroco] has been informed from members of the public that Vanity Lab is defaming her in text messages and telephone calls." She also alleges that these statements were calculated to prevent others from dealing in trade with her, suggesting Defendants' knowledge of their falsity (or reckless disregard for their truth) and intent to harm Macaroco's pecuniary

interests. Am. Compl. par. 75. She also alleges that the statements caused her damage. Am. Compl. par. 76. While thin, these allegations are sufficient to state a claim for commercial disparagement/trade libel and survive the present motion. For this reason, the Defendants' motion as to Count IV is **DENIED**.

IV. Violation of Chapter 93A (Count VII)

The Defendants argue that Count VII must be dismissed where it is based on the contractual obligations that arose from Macaroco's employment relationship with the Defendants and where employment agreements do not constitute "trade or commerce" as defined by Chapter 93A. In opposition, Macaroco contends that the basis of her Chapter 93A claim is the Defendants' sending of the Letter itself, with the aim of gaining a business advantage over her and knowing that the Contract's restrictive covenants referenced therein were unenforceable. The court agrees with Macaroco.

Chapter 93A proscribes "unfair or deceptive acts or practices in the conduct of any trade or commerce." G. L. c. 93A, § 2(a). While employment agreements do not constitute "trade or commerce," *Manning* v. *Zuckerman*, 388 Mass. 8, 13-14 (1983), Macaroco's Chapter 93A claim, when read in her favor, does not arise out of an employment agreement between herself and the Defendants. Rather, it alleges that the Defendants sent the Letter for the purpose of intimidating her into ceasing her competing business activities while knowing that the basis for their demand —the Contract's restrictive covenants—was unenforceable. Am. Compl. pars. 103-106. Cf. *G.S. Enterprises, Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 273-274, 277 (1991) (commencing lawsuit in bad faith and without probable cause to believe action would succeed, rather than to assert legitimate rights, could violate Chapter 93A); *Brooks Automation, Inc.* v. *Blueshift Techs., Inc.*, 20 Mass. L. Rptr. 541, 547 (Mass. Super. 2006), aff'd, 69 Mass. App. Ct.

1107 (2007) (filing frivolous complaint against former employee for breach of non-compete and non-disclosure agreements "becomes an act done in the conduct of trade or commerce when . . . it is motivated by an intent to interfere with a competitor's contractual relationship with a key and much coveted customer."). For these reasons, the Defendants' motion as to Count VII is **DENIED**.

V. Intentional Infliction of Emotional Distress (Count IX)

The Defendants contend that Count IX must be dismissed because the Amended Complaint fails to state factual allegations that are sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress ("IIED"). The court agrees.

To state an IIED claim, a plaintiff is required to allege: (1) that the defendant intended, knew, or should have known that its conduct would cause emotional distress; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress; and (4) that the emotional distress was severe. See *Polay* v. *McMahon*, 468 Mass. 379, 385 (2014). Conduct is extreme and outrageous only if it "go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 386 (quotation and citation omitted; modifications in original). "A judge may grant a motion to dismiss where the conduct alleged in the complaint does not rise to this level." *Id.*

Macaroco alleges that the Defendants subjected her to "threatening letters and threats of lawsuit, [injunctive] relief, and damages that were unavailable to Defendants under Massachusetts law." Am. Compl. par. 117. In other words, Macaroco alleges that the Defendants acted in an extreme and outrageous manner by sending her the Letter in an attempt to prevent her from engaging in her livelihood and despite knowing that the restrictive covenants referenced therein were unenforceable. This conduct, without more, is insufficient to constitute

the extreme and outrageous conduct required to state a claim for IIED.[5] See *Polay*, 468 Mass. at 385 ("Liability cannot be predicated on mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." [quotation and citation omitted]). Cf. *Beecy* v. *Pucciarelli*, 387 Mass. 589, 591-592, 596 (1982) (affirming dismissal where filing of erroneous lawsuit insufficient to state extreme and outrageous conduct). For this reason, the Defendants' motion to dismiss Count IX is **ALLOWED**.

VI. Negligent Infliction of Emotional Distress (Count X)

The Defendants also contend that Count X must be dismissed where Macaroco fails to plead facts sufficient to state a physical harm manifested by objective symptomatology, one of the required elements of negligent infliction of emotional distress. The court agrees. The Amended Complaint fails to allege any facts related to physical harm as manifested by objective symptomatology; rather, it merely alleges that Macaroco suffered "emotional distress." Am. Compl. par. 126. See *Rodriguez* v. *Cambridge Hous. Auth.*, 443 Mass. 697, 701-702 (2005) ("[A] successful negligent infliction of emotional distress claim . . . must do more than allege mere upset, dismay, humiliation, grief [or] anger [as to the physical harm requirement]." [quotation and citation omitted]). For that reason, the Defendants' motion as to Count X is **ALLOWED**.

5 In the Amended Complaint, Macaroco also alleges that Defendants acted in an extreme and outrageous manner by subjecting her to "a hostile and abusive work environment." Am. Compl. pars. 115-116. Neither party proffered argument regarding this allegation in their briefs or at hearing, and so the court does not address it.

("[A] successful negligent infliction of emotional distress claim . . . must do more than allege mere upset, dismay, humiliation, grief [or] anger [as to the physical harm requirement]." [quotation and citation omitted]). For that reason, the Defendants' motion as to Count X is **ALLOWED**.

**ORDER**

For the foregoing reasons, the Defendants' Motion to Dismiss is **ALLOWED** as to Counts IX and X and **DENIED** as to Counts III, IV, and VII.

William M. White, Jr.
Justice of the Superior Court

May 31, 2022