2005 WL 8155961
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United States District Court, S.D. Florida,
Miami Division.

OKEDA DE MEXICO, S.A. DE C.V. Mitory S.A. de C.V. and Prestadora de Servicios de Administracion S.A. de C.V., Plaintiffs,
v.
Joaquin HERAS and Corinna Keller, Defendants.

Case No. 04-23168-CIV-GRAHAM
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Signed 05/04/2005
|
Entered 05/05/2005

Attorneys and Law Firms

Brian S. Dervishi, John Robert Borgo, Jonathan Israel Bakalarz Trujillo, Weissman Dervishi Borgo & Nordlund, Miami, FL, for Plaintiffs.

Dario Antonio Perez, Jr., Maria Angeles Gralia, Shutts & Bowen, Miami, FL, for Defendants.

ORDER

DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** came before the Court upon Defendants' Motion to Dismiss (D.E. 12).

THE COURT has reviewed the Motion, the pertinent portions of the record and is otherwise duly advised in the premises.

This lawsuit arises from an alleged scheme to gain unauthorized access to confidential e-mail communications. Plaintiff, Okeda de Mexico is a Mexican corporation engaged in the business of importation and distribution of toys throughout Mexico. Okeda's owner is Eduardo Garcia-Tapetado, a resident of Mexico. Okeda alleges that defendant, Joaquin Heras, worked as Okeda's General Manager from 1997 through 2002, when he resigned and moved to Miami Beach, Florida. Okeda also alleges that following Heras' separation from Okeda, Garcia-Tapetado discovered that Heras and his wife, Corinna Keller, had misappropriated funds, stolen customers and supplies and destroyed Okeda as a going concern. Moreover, Okeda alleges that, through investigation, it was discovered that defendants gained unauthorized access to Garcia-Tapetado's email account from their Miami Beach house without Garcia-Tapetado's knowledge or consent.

Okeda filed a five-count complaint against Heras and Keller. Defendants moved to dismiss the complaint for failure to join an indispensable party and for failure to state a claim as to each of the five counts. For the reasons stated below, the Court will not dismiss plaintiffs' claims, but will require plaintiffs to join Eduardo Garcia-Tapetado as a party plaintiff and also amend paragraph 44 of their complaint.

II. DISCUSSION

A. Joinder of Indispensable Party

Defendants allege that the complaint should be dismissed, pursuant to Federal Rule 12(b)(7), because Garcia-Tapetado is an indispensable party who must be joined as a plaintiff. Federal Rule of Civil Procedure 19(a) sets forth the criteria for joinder of indispensable parties as follows:

> **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

> obligations by reason of the claimed interest.

Thus, under Rule 19(a), the Court must first ascertain whether the person in question should be joined if feasible. See Challenge Homes, Inc., v. Greater Naples Care Center, Inc., 669 F.2d 667, 669 (11th Cir. 1982). "In making this decision, pragmatic concerns, especially the effect on the parties and the litigation control." See id. (internal quotation marks omitted). The second part of Rule 19(a) focuses on possible prejudice either to the absent party, or the present litigants. Id. at 669.

***2** In this case, defendants contend that Garcia-Tapetado must be joined because the complaint alleges that he received both personal and business communications through the e-mail account. As such, the defendants claim that they bear a substantial risk of incurring multiple liability because Garcia-Tapetado might bring future claims against them in his personal capacity. Okeda, on the other hand, argues that defendants have not met their burden of establishing a substantial likelihood of multiple obligations under Rule 19(a)(ii). Okeda, however, does not dispute that Garcia Tapetado has viable personal claims against defendants for the same conduct giving rise to Okeda's claims. Moreover, Okeda acknowledges that it is feasible for Garcia Tapetado to be joined to the action, and that such joinder will not defeat this Court's jurisdiction. This being the case, the Court concludes that if Garcia-Tapetado has personal claims against defendants for the misconduct alleged in the complaint, then he should be joined as a party plaintiff so that those personal claims can be adjudicated. Accordingly, within ten (10) days from the date of this Order, plaintiff should file an amended complaint to add Garcia-Tapetado as a party plaintiff.

B. Failure to State a Claim

Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiff give notice of his claim by including in the complaint a "short and plain statement of the claim showing that the pleader is entitled to relief." See Fed.R.Civ.Proc. (8)(a)(2); Swierkiewicz v. Soreman, N.A., 534 U.S. 506. 512 (2002). Thus, a complaint shall not be dismissed for "failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove a set of facts which will entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In ruling on a motion to dismiss, the Court must view the complaint in the light most favorable to plaintiff and accept its allegations as true. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Beck v. Deloitte & Touche, 144 F.3d 732 (11th Cir. 1998). Thus, in the context of a motion to dismiss, the issue is not whether plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims," as pled. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

(i) Count One

In Count One of the complaint, Okeda brings a claim for violation of section 2701(a) of the Electronic Communications Privacy Act, 18 U.S.C.A. § 2701. That section provides, in part, that:

> whoever
>
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished ...

The Court concludes that plaintiffs have sufficiently stated a claim under section 2701(a)(1) because the complaint alleges that defendants "intentionally and repeatedly obtained access, without authorization, to a computer server through which e-mail services were provided to the plaintiffs and where the Okeda account was maintained." Compl. at ¶ 28. Plaintiffs allege further that "defendants' unauthorized access to the computer server was done knowingly and with the intent to obtain electronic communications consisting of confidential and privileged information contained in Okeda's account and relevant to plaintiffs' investigation of the defendants' conspiracy and the ensuing litigation." Id. at ¶ 30. These allegations meet the elements of section 2701(a)(1) and, if proven, will entitle plaintiffs to relief.

(ii) Count Two

Defendants also argue that Count Two of the complaint should be dismissed because defendants have failed to plead a violation of section 1030 of the Computer Fraud and Abuse Act with particularity. The Computer Fraud and Abuse Act prohibits anyone from intentionally accessing a protected computer without authorization. See 18 U.S.C. § 1030(a)(4). A person violates 18 U.S.C. § 1030(a)(4) if he or she:

> knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period.

***3** By its own terms, section § 1030(a)(4) prohibits anyone from intentionally accessing a protected computer without authorization knowingly and with the intent to defraud. See 18 U.S.C. § 1030(a)(4). As such, to state a claim under section 1030(a)(4), plaintiffs need only allege conduct tending to show that the defendants intentionally and without authorization gained access to a private computer, and that defendants did so knowingly and with the intent to defraud. Contrary to defendants' contention, plaintiffs need not allege the common elements of fraud, and certainly need not plead the elements of section 2701(a) with the particularity required by Federal Rule of Civil Procedure 9(b) because fraud itself is not an element of the claim.

Construing the complaint in the light most favorable to the plaintiffs, the Court concludes that plaintiffs sufficiently state a claim under section 2701(a)(4) and (5) because they allege that the computer server where the Okeda account was maintained is a "protected computer," that defendants "knowingly and with intent to defraud the plaintiffs accessed the computer without authorization and by means of such conduct obtained valuable, confidential and privileged information" in violation of 18 U.S.C. § 1030(a)(4) and (5) See Compt. at ¶ 34-37.

(iii) Count Three

In Count Three, Okeda alleges violations of sections 934.03 and 934.21, Florida Statutes and seeks damages under the remedial provisions of section 934.27. Defendants point out that section 934.27 only provides relief from violation of section 934.21. Plaintiffs concede this point and request leave to amend paragraph 44 of their complaint to request the relief set forth in sections 934.10 and 934.27. The request to amend is granted. Accordingly, within ten (10) days from the date of this Order, plaintiffs must amend paragraph 44 of the complaint to reflect a proper request for damages.

(iv) Count Four

Defendants seek dismissal of Count Four of the complaint, which purports to assert a claim for invasion of privacy, because only natural persons can sue under the general tort of invasion of privacy. Plaintiffs concede that the claim for invasion of privacy cannot be maintained by corporate entities. Plaintiffs, however, point out that the joinder of Garcia-Tapetado in his individual capacity provides the necessary element for the survival of the claim. Accordingly, because of the impending joinder of Garcia-Tapetado as a party plaintiff, the motion to dismiss Count Four of the complaint must be denied as moot.

(v) Count Five

Defendants next seek dismissal of plaintiffs' claim for civil conspiracy for failure to state a claim. The elements to a claim for civil conspiracy are: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damages to the plaintiff as a result of the conspiracy. See Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997). The basis of a civil conspiracy action cannot be

the conspiracy itself but the civil wrong which is done through the conspiracy resulting in injury to the plaintiff. See e.g. Buckner v. Lower Florida Keys Hospital District, 403 So. 2d 463 (Fla. 3d DCA 1982). In their complaint, plaintiffs allege that Heras and Keller "entered into an agreement among themselves to commit the wrongs alleged in Counts 1, 2, 3 and 4" of the complaint, (2) that "one or both" of them "committed an overt act designed to accomplish the agreement," that "at least one overt act occurred in Miami-Dade County, and (4) that Okeda suffered harm "as a direct and approximate result of the defendants' wrongdoing. Contrary to defendants' assertion, the pleading standard for a civil conspiracy claim is the low "notice" standard set forth in Federal Rule of Civil Procedure 8(a) and, hence, the claim need not be plead with particularity. Of course, if the civil wrong alleged is fraud, then the facts constituting fraud must meet the requirements of Federal Rule of Civil Procedure 9(b). See Carlson v. Armstrong World Industries, Inc., 693 F.Supp. 1073, 1078 (S.D. Fla. 1987). But in this case, plaintiffs are not alleging fraud as a basis for their civil conspiracy claim.

III. CONCLUSION

***4** For the forgoing reasons it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (D.E. 12) is **DENIED.** It is further

ORDERED AND ADJUDGED that within ten (10) days from the date of this Order, plaintiffs shall amend their complaint in accordance with the dictates of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of May, 2005.

All Citations

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