



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 2, 2021

Scott A. Surovell
4010 University Drive, Second Floor
Fairfax, VA 22030

Micah E. Ticatch
ISLER DARE, P.C.
1945 Old Gallows Road, Suite 650
Vienna, VA 22182

Re: *Vdart, Inc. v. Arthur Grand Technologies, Inc., et al.*, CL 2018-13745

Dear Mr. Surovell and Mr. Ticatch:

This matter is before the court on Plaintiff's motion to strike Defendants' Pleas In Bar.

By way of background, Plaintiff's First Amended Complaint makes four (4) claims: conversion (Count I), violation of the Computer Crimes Act (Count II), violation of the Uniform Trade Secrets Act (Count III), and conspiracy (Count IV). Defendants filed pleas in bar to all four claims and Plaintiff filed a motion to strike the pleas in bar. The court heard oral argument on Plaintiff's motion on December 11, 2020, during which the court requested Defendants to file a supplemental memorandum by December 28, 2020; the court gave Plaintiff leave to file a response by January 11, 2021. Both parties timely filed supplemental memoranda.

For the reasons discussed below, Plaintiff's motion is GRANTED.

The Parties' Contentions

Defendants asserted five (5) pleas in bar to Plaintiff's four claims:

(1) All counts should be dismissed because Indian law rather than Virginia law applies under Virginia conflict of law principles.

(2) All counts should be dismissed against AGT because it is not the

employer of the India Workers.

(3) All counts should be dismissed because Plaintiff is not the former employer of any of the Indian Workers, and lacks standing to bring this action.

(4) To the extent any count is based on the Indian Workers' breach of contract those claims should be dismissed because the India Workers' employment contracts attached to the First Amended Complaint are: (i) not enforceable under India law; (ii) violate Virginia's public policy; and (iii) Plaintiff does not have a contractual relationship with the India Workers.

(5) Count IV¹ should be dismissed because AGT is incapable of conspiring with its own employees under the intra corporate immunity doctrine.

Plaintiff responds in his motion to strike that each of these purported pleas in bar is actually a plea of the general issue, which is not permitted by Va. Sup. Ct. Rule 3:8(a) ("plea of the general issue shall not be permitted"), and is thus not a proper plea in bar. See *Baltimore & O.R. Co. v. Polly, Woods & Co.*, 55 Va. 447, 453 (1858) ("A plea amounts to the general issue when it traverses matter which the plaintiff avers, or must prove, to sustain his action; whether such traverse be direct or argumentative.").

In contrast to a plea of the general issue, a plea in bar:

does not address the merits of the issues raised by the bill of complaint or the motion for judgment. Yet, a plea is a pleading which alleges a single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim.

Familiar illustrations of the use of a plea would be: The statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc. (citation omitted).

Nelms v. Nelms, 236 Va. 281, 289 (1988).

Further, a plea in bar must:

aver with sufficient certainty such facts as amount to a legal bar. The facts must be set out with such particularity in the plea as to inform the plaintiff of the nature of the defence intended to be relied on, and thus to enable him to reply to it, to make up the issue thereon, and prepare for trial.

Richardson v. Ins. Co. of Valley of Virginia, 68 Va. 749, 752 (1876).

¹ In Defendants' fifth plea in bar, they refer to Count V. At oral argument, Defendants' counsel indicated that the plea in bar actually referred to Count IV.

Analysis

The court will analyze each of Defendants' purported pleas in bar in turn.

(1) All counts should be dismissed because Indian law rather than Virginia law applies under Virginia conflict of law principles.

In the first place, this purported plea in bar does not set out any facts, let alone set out facts with particularity. Moreover, the court finds that this is not a plea in bar because it does not assert a "single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms*, 236 Va. at 289. Rather, the contention is a mixed issue of law and fact. To determine the issue of law, the court would first have to determine whether Plaintiff's claims sounded in contract or tort because, under Virginia conflict of law principles, the choice of law is dependent upon whether the case is a tort or contract; for tort liability, Virginia applies:

the doctrine of *lex loci delicti*, meaning the law of the place of the wrong governs all matters related to the basis of the right of action. (Citations omitted). If, however, . . . liability is a matter of contract, the law of the place where the contract was formed applies

Dreher v. Budget Rent-A-Car System, Inc., 272 Va. 390, 395 (2006).

Assuming that Plaintiff's claims sound in tort,² the court would next have to determine the fact question of the place of the wrong. Plaintiff has alleged, however, that "Defendant AGT operates from a virtual office at its corporate address in Ashburn, Virginia, the personal home of its sole owner and principal, Defendant Rahmathullah" (First Amended Complaint ¶ 3) and that Defendants "are both Virginia residents and Defendants directed the unlawful actions giving rise to this suit from Defendant AGT's headquarters in Virginia." First Amended Complaint ("FAC") ¶ 4.³ Because Plaintiff has thus alleged that Virginia is the place of the wrong, Defendants' plea in bar is tantamount to a denial of the facts alleged in ¶ 3 and ¶ 4 of the First Amended Complaint and is thus a plea of the general issue. If Defendants contest these factual allegations, *i.e.*, that the "place of the wrong" is India, not Virginia, a plea in bar asserting that Indian law applies does not achieve that goal.⁴

(2) All counts should be dismissed against AGT because it is not the employer of the India Workers.

The court finds that this is not a plea in bar because it does not assert a "single state of facts or circumstances (usually not disclosed or disclosed

² None of Plaintiff's claims sound in contract.

³ For the purpose of a plea in bar, the "facts as stated in the plaintiff's pleadings are taken as true" *Lee v. City of Norfolk*, 281 Va. 423, 427 (2011).

⁴ Although the court requested the parties to address what, if anything, in Indian law would bar Plaintiff's claims, the court does not address that question because that is an issue for trial in light of Plaintiff's allegations in ¶ 3 and ¶ 4 of the First Amended Complaint, and the facts must first be developed in discovery.

only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms*, 236 Va. at 289. Moreover, Plaintiff has alleged that Defendants "hired at least ten VDart employees" (FAC ¶7), that "Marudhai and Parvez began to secretly work for Defendants" (FAC ¶14), that Vijaykumar and Saraswathi also began working secretly for Defendants" (FAC ¶15), that "Rajkumar began secretly working for Defendants" (FAC ¶17), that "Defendants poached the remainder of the VDart Employees" (FAC ¶19), and that Defendants "still employ the VDart Employees" (FAC ¶24). Defendants' plea in bar is thus tantamount to a denial of the facts alleged in ¶7, ¶14, ¶15, ¶17, ¶19, and ¶24 of the First Amended Complaint and is thus a plea of the general issue. If Defendants contest these factual allegations, a plea in bar is not the means to do so.

(3) All counts should be dismissed because Plaintiff is not the former employer of any of the Indian Workers, and lacks standing to bring this action.

The court finds that this is not a plea in bar because it does not assert a "single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms*, 236 Va. at 289. Moreover, Plaintiff has alleged that Defendants "hired at least ten VDart employees" (FAC ¶7) and that "Defendants poached the remainder of the VDart Employees" (FAC ¶19). Defendants' plea in bar is thus tantamount to a denial of the facts alleged in ¶7 and ¶19 of the First Amended Complaint and is thus a plea of the general issue. If Defendants contest these factual allegations, a plea in bar is not the means to do so.

(4) To the extent any count is based on the Indian Workers' breach of contract those claims should be dismissed because the India Workers' employment contracts attached to the First Amended Complaint are: (i) not enforceable under India law; (ii) violate Virginia's public policy; and (iii) Plaintiff does not have a contractual relationship with the India Workers.

The only allegation in the FAC related to a claim for breach of contract is ¶ 59, which is in Count IV (*Statutory & Civil Conspiracy*), and states:

Defendants and VDart Employees willfully, intentionally and maliciously breached the employment agreements, converted the VDart Property, and misappropriated the VDart Trade Secrets, without a legal right to take such actions in direct violation of Section 18.2-499 of the Code of Virginia.⁵

At oral argument, however, Plaintiff's counsel conceded that the allegation that "Defendants and VDart Employees" "breached the employment agreements" could not be correct because the employment agreements were between Plaintiff and the VDart Employees and that ¶ 59 should probably not have been a part of the First

⁵ Code § 18.2-499(A) (i) provides:

Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . . shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Amended Complaint.⁶ Plaintiff's counsel also acknowledged that, with regard to the employment agreements, ¶ 57 was the operative allegation. ¶ 57 states:

Defendants and VDart Employees combined with one another and **conspired to breach the employment agreements**, convert the VDart Property, and misappropriate the VDart Trade Secrets, by concerted action between them. (Emphasis added).

Thus, consistent with the title of Count IV -- *Statutory & Civil Conspiracy* -- ¶ 57 asserts a claim for conspiracy. To resolve Plea In Bar (4), the court will consider ¶ 57 as the operative allegation.

Defendants do not dispute that no VDart Employee is a party to this case. Accordingly, as ¶ 57 is the operative allegation, and alleges a conspiracy, none of the counts is based on the Indian Workers' breach of contract. It follows, because Defendants' purported plea in bar is premised on the extent to which any count is based on the Indian Workers' breach of contract, that there is nothing to which Defendants' purported plea in bar applies.⁷


(5) *Count IV should be dismissed because AGT is incapable of conspiring with its own employees under the intra corporate immunity doctrine.*

The court finds that this is not a plea in bar because it does not assert a "single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms*, 236 Va. at 289. Rather, this purported plea in bar is in the nature of a motion to dismiss for failure to state a claim upon which relief can be granted. It thus must be addressed as a demurrer. See Code § 8.01-273 ("the contention that a pleading does not state a cause of action . . . may be made by demurrer").

In view of the above, the court GRANTS Plaintiff's motion to strike Defendants' pleas in bar.

An appropriate order will enter.

Sincerely yours,


Richard E. Gardiner
Judge

⁶ Plaintiff's counsel believed that ¶ 59 was unintentionally not removed when the original complaint was redrafted into the FAC. This is consistent with Count IV being a claim for *Statutory & Civil Conspiracy*.

⁷ Defendants' *Opposition* argues that Plea In Bar (4) asserts that the Indian Workers' employment contracts are not enforceable and that a plea in bar raising the unenforceability of an employment contract is proper. But Defendants' plea in bar actually asserts that the employment contracts are not enforceable "under India law." Because that assertion requires the court to determine the mixed factual and legal question of which law applies, which the court cannot do for the reasons set forth with respect to Plea In Bar (1), Defendants' plea in bar is not proper.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VDART INC.)
)
Plaintiff)
)
v.) CL 2018-13745
)
ARTHUR GRAND TECHNOLOGIES INC.,)
et al.)
)
Defendants)

ORDER

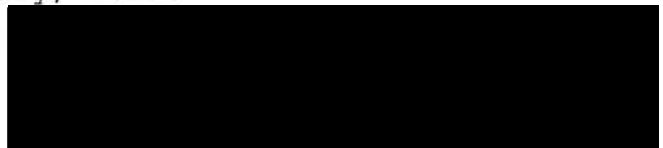
THIS MATTER came before the court on Plaintiff's motion to strike Defendants' Pleas In Bar.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby GRANTS Plaintiff's motion, and it is hereby

ORDERED that Defendants' Pleas In Bar are STRICKEN, and it is further

ORDERED that the evidentiary hearing scheduled for March 3, 2021 is REMOVED FROM THE DOCKET.

ENTERED this 2nd day of February, 2021.



Richard E. Gardiner
Judge

Copies to:

Scott A. Surovell
Counsel for Plaintiff

Micah E. Ticatch
Counsel for Defendants