

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

PIOTR NOWAK
Plaintiff,

vs.

MAJOR LEAGUE SOCCER, LLC and
MAJOR LEAGUE SOCCER PLAYERS
UNION,
Defendants.

: CIVIL ACTION
:
:
: NO.: 2:14-cv-03503
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:
:

AND NOW, this _____ day of _____, 2015 it is hereby **ORDERED** that Defendant Major League Soccer, LLC's Motion to Dismiss the Claims asserted by Plaintiff, Piotr Nowak is **DENIED**.

Mary A. McLaughlin, U.S.D.J

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.....2

III. ARGUMENT.....4

A. Legal Standard.....4

B. This Court has Jurisdiction over Nowak’s Claims Against MLS6

C. Nowak’s Tortious Interference Claims against MLS are Unique from his Breach Contract Claim Against the Team.....7

D. MLS Did Not Have Justification to Interfere with Nowak’s Contract with the Team or with Other Prospective Employers.....10

IV. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Acumed LLC v. Advanced Surgical Services, Inc., 561 F.3d 199 (3d Cir. 2009)..... 11

American Needle, Inc. v. National Football League, 560 U.S. 183 (2010)..... 6

Bell Atlantic v. Twombly, 550 U.S. 544 (2007)..... 5

Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3d Cir. 2001)..... 8

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3d Cir.1998)..... 12

Cloverleaf Dev., Inc. v. Horizon Fin., F.A., 500 A.2d 163, 167 (Pa. Super. 1985)..... 11

eToll, Inc. v. Elias/Savion Advertising Inc., 811 A.2d 10 (Pa. Super. 2002), 8

Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000) 4

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)..... 4

Mortensen v. First. Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)..... 4

Moyer Packing Co. v. United States, 567 F.Supp.2d 737 (E.D. Pa. 2008)..... 5

Palco Linings, Inc. v. Pavex, Inc., 755 F.Supp. 1269, 1271 (M.D. Pa. 1990)..... 9

Reardon v. Allegheny College, 926 A.2d 477 (Pa. Super. Ct. 2007). 7

Ruffing v. 84 Lumber Co., 600 A.2d 545, 548 (Pa. Super. 1992)..... 11

Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 418 (3d Cir. 2010). 6

Statutes

28 U.S.C. § 1332(a)(1). 6

Rules

Fed. R. Civ. P. 12(b)(1) 1,4

Fed. R. Civ. P. 12(b)(6) 2,4,5,6,12

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<i>Plaintiff,</i>	:	
	:	NO.: 2:14-cv-03503
vs.	:	
	:	
MAJOR LEAGUE SOCCER, LLC and	:	
MAJOR LEAGUE SOCCER PLAYERS	:	
UNION,	:	
<i>Defendants.</i>	:	

**PLAINTIFF, PIOTR NOWAK’S MEMORANDUM OF LAW IN OPPOSITION TO
MAJOR LEAGUE SOCCER, LLC’S MOTION TO DISMISS**

Plaintiff, Piotr Nowak submits the following memorandum of law in opposition to the Motion to Dismiss filed by Defendant, Major League Soccer, LLC (“MLS”). For reasons set forth below, Plaintiff respectfully requests that this Honorable Court deny the Defendant’s Motion to Dismiss.

I. INTRODUCTION

Plaintiff, Piotr Nowak is an accomplished and internationally renowned professional soccer coach, who has had his career destroyed by the haphazard and wrongful conduct of Major League Soccer. After several disgruntled players from the Philadelphia Union Soccer Club (“the Team”) complained about training exercises and coaching tactics of Mr. Nowak, MLS recklessly relied on the players’ allegations, without giving Nowak an opportunity to address the players’ representations, issued a one-sided “report” describing Nowak’s alleged conduct and wrongfully exerted pressure on the Team to terminate Nowak’s employment and destroyed Nowak’s other opportunities to coach for other MLS soccer clubs.

Major League Soccer seeks to dismiss Nowak’s tortious interference with contractual relations claims under Fed. R. Civ. P. 12(b)(1) on the grounds that this Court lacks subject-matter

jurisdiction because an MLS team is based in Pennsylvania. MLS also moves to dismiss Nowak's claims under Fed. R. Civ. P. 12(b)(6) on the grounds that Nowak's tortious interference claim is simply a breach of contract claim couched as a tort. Additionally, MLS seeks dismissal of Nowak's Complaint on the grounds that MLS was purportedly "privileged" to interfere with Nowak's contract with the Philadelphia Union ("the Team"). Finally, MLS seeks to dismiss Nowak's tortious interference with a prospective contract claim on the basis that Nowak has not established that any prospective contract would materialize.

MLS' arguments are both meritless and premature. MLS' claim that it is a Pennsylvania citizen is unavailing because its citizenship is in New York and it is a legal entity that is distinct from the team. Accordingly, diversity jurisdiction exists in this matter. Additionally, the motion to dismiss should be denied because MLS was not privileged to interfere with Nowak's business relationships in the manner that it did. MLS conducted an incomplete and one-sided investigation of Nowak's alleged conduct and terminated Nowak, without first giving him an opportunity to defend himself against the allegations and without a genuine inquiry for the truth. Therefore, MLS' publication of the Report and exertion of pressure on the Team to terminate Nowak is actionable. Finally, Nowak had real and demonstrable opportunities of employment with other teams in the MLS; and therefore, MLS' motion to dismiss Nowak's claims of tortious interference with prospective contractual must also be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Piotr Nowak, a resident of Chadds Ford, Pennsylvania, is an internationally renowned professional soccer coach, who was selected to coach the United States Olympic team in 2008. *Nowak's Complaint*, at ¶ 9. On or about June 1, 2009, the Philadelphia Union Soccer Club ("Team") and Mr. Nowak entered into a contract, which employed Mr. Nowak as the Team

Manager through December 31, 2012. *Complaint*, ¶ 10. The employment contract provided that his termination must be done in “good faith” and only “for cause,” and if the cause for termination is curable, Nowak was to be provided an opportunity to cure the defect. (*Id.*, ¶¶ 10-12; *See Exhibit “A,”* Nowak’s Employment Agreement.) On or about June 13, 2012, Mr. Nowak was notified by the Team that he was being terminated for various reasons, including “inappropriate hazing activities,” “engaging in behavior that put the health and safety of Team players at risk,” engaging in discussions regarding and otherwise seeking employment by other professional soccer teams in Europe;” “not allowing players to have water during such activities despite temperatures in excess of 80 degrees;” and “insubordination.” *See Exhibit “B,”* Nowak’s Termination Letter.” The purported justifications for the termination were inaccurate and one-sided. *Complaint*, ¶ 21.

Nowak brought an action in this court, *Piotr Nowak v. Pennsylvania Professional Sports, LLC and Keystone Sports & Entertainment LLC*, No. 2:12-cv-04165-MAM, alleging that the Team breached the terms of its contract (“Team Action”). Nowak’s Team Action was remanded to AAA arbitration. During the discovery phase the AAA Team Action, Nowak learned that his termination was precipitated by an investigation demanded by the Players Union, that the Players Union made uncorroborated and inaccurate representations about Nowak, which were accepted at face value by co-defendant Major League Soccer, LLC (“the League”). *Complaint*, ¶¶ 26-29. In addition, Nowak learned that the Players Union demanded that Nowak be fired. *Complaint*, ¶¶ 26-29.

Upon learning of MLS and the Players Union’s involvement in Nowak’s termination, Nowak filed this lawsuit against these parties on June 12, 2014, alleging tortious interference with contractual relations. *See Complaint*. On February 5, 2015, this Court granted the Players

Union's motion to dismiss on the grounds that Nowak's claims against the Players Union are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* See Docket Entry 13. In the Team Action, the AAA Arbitrator entered an award for the Team on April 21, 2015.

On April 20, 2015, MLS filed the instant Motion to Dismiss, in which MLS argues that this Court lacks jurisdiction over Nowak's claims because MLS is a citizen of Pennsylvania. MLS also argues that Nowak's tort claims are just disguised breach of contract claims and that they should therefore, be dismissed under the gist of the action doctrine. MLS further contends that it was "privileged" to interfere with Nowak's contract with the Team and that Nowak's opportunities to coach other MLS teams were not substantial, but "mere hopes." Contrary to MLS' contentions, MLS is not a citizen of Pennsylvania- there is complete diversity here. Finally, MLS did not have "privilege" to interfere with Nowak's contract with the Team and through discovery, Nowak will demonstrate substantial and real opportunities for future employment that were destroyed by the League. Therefore, the Motion to Dismiss should be denied.

III. ARGUMENT

A. Legal Standard

Dismissal is only warranted under Rule 12(b)(1) if the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)). Challenges to subject matter jurisdiction under Rule 12(b)(1) may be facial or factual in form. *Id.* at 176; *Mortensen v. First. Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial challenge attacks the complaint on its face and, for such a challenge, the court must consider only the complaint's

allegations and must do so in the light most favorable to the plaintiff. *Id.*; *Moyer Packing Co. v. United States*, 567 F.Supp.2d 737 (E.D. Pa. 2008).

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff is required to plead “only enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not “impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of” the alleged wrongdoing. *Id.* at 556. Even after *Twombly*, however, the standard remains that courts must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. County of Allegheny*, 515 F. 3d 224, 233 (3d Cir. 2008).

In *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009), the Court clarified the *Twombly* inquiry as a two-pronged test. First, the Court should consider the sufficiency of the complaint, identifying the factual allegations that are to be accepted as true and those allegations that are legal conclusions and are not entitled to the assumption of truth. *Id.* Second, the court must consider whether the factual allegations plausibly suggest the plaintiff is entitled to relief. *Id.* To determine plausibility, the court should be “context-specific” and “draw on its judicial experience and common sense.” *Id.* A complaint may not be dismissed merely when it “strikes a savvy judge that actual proof of those facts is improbable.” *Twombly*, 544 U.S. at 556.

A complaint is sufficient if it complies with Rule 8(a)(2), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2) does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. *White v. Brommer*, 747 F.Supp.2d 447 (E.D. Pa. 2010) (quoting *Twombly*,

550 U.S. at 570. To survive a 12(b)(6) motion, the complaint must provide enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Id.* (quoting *Twombly*, 550 U.S. at 556 (internal quotations omitted)).

B. This Court has Jurisdiction over Nowak's Claims Against the League.

Federal courts have jurisdiction over civil actions between citizens of different states, if the amount in controversy exceeds \$75,000.00. 28 U.S.C. § 1332(a)(1). Mr. Nowak is a citizen of Pennsylvania seeking damages in excess of \$75,000.00 from MLS, which is an LLC formed in Delaware, with a primary place of business in New York. *See* Complaint, ¶ 2; *See* MLS' Exhibit A, p. 2. The long-established rule regarding corporate citizenship is that a corporation is a citizen of its state of incorporation and the state in which it maintains its principal place of business. 28 U.S.C. § 1332(c)(1); *see also Hertz Corp. v. Friend*, 559 U.S. 77 (2010). The question of citizenship of an LLC had not been addressed until recent years.

In 2010, in a matter of first impression, for the purpose of determining whether diversity jurisdiction existed, the Third Circuit was asked to determine the citizenship of a Louisiana LLC that was managed by an individual residing in New Castle, Pennsylvania. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010). The Third Circuit held the LLC was a Pennsylvania citizen because of the Pennsylvania citizenship of one of its member. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 418 (3d Cir. 2010). In support of its position that there is no diversity jurisdiction, not surprisingly, MLS relies on the *Zambelli* decision. *See* MLS' Motion to Dismiss, pp. 7-8. However, MLS ignores the precedent set by the US Supreme Court that in the context of athletic leagues, a league should be viewed as a distinct business entity from its teams, regardless of the league's corporate structure. *See American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). In *American Needle*, the Supreme Court found

that despite the fact that the NFL is an unincorporated entity with “member” teams, because each team has its own directors, managers, employees, objectives and goals unique from the NFL, the league and the teams should be viewed as unique business entities, rather than a single “joint-venture:”

Thirty-two teams operating independ-ently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being.

See Id., at 201.

Based on the facts at issue, this Court should apply the reasoning of *American Needle* rather than that of *Zambelli*. Unlike the managing member of the Louisiana-formed LLC in *Zambelli*, the Philadelphia Union never exercised control over the MLS, and the Team is a distinct business entity, with its own directors, managers, employees and objectives from those of the League.

MLS is a legally distinct entity from the Team, with distinct management, directors, finances and organizational objectives. Since Nowak is a citizen of Pennsylvania and MLS is a Delaware LLC that maintains its primary place of business in New York, diversity jurisdiction exists.¹

C. Nowak’s Tortious Interference Claims against MLS are Unique from his Breach of Contract Claim Against the Team.

Nowak’s tortious interference claim against MLS is predicated upon MLS’ blind reliance on the representation of disgruntled players when compiling a “report” about Nowak’s conduct, the absence of a good-faith investigation into the players’ allegations, and the fact that the MLS

¹ In the event that the Court finds that there is no diversity jurisdiction, Nowak respectfully requests that this matter be remanded to Pennsylvania state court.

exerted pressure on the Team to terminate Nowak's employment and on other MLS soccer clubs not to employ Nowak. *See* Complaint, ¶¶ 25-28, 38-43. Nowak's claims against MLS do not relate to the terms of his employment contract with the Team, nor does Nowak allege that MLS' duties or liability to Nowak were created his employment contract with the Team. Despite this, in its Motion to Dismiss, MLS argues that Nowak's tortious interference claim against MLS is merely a couched breach of contract claim and that the tortious interference claim should be dismissed due to the gist of the action doctrine. *See* MLS' Motion to Dismiss, pp. 8-11.

The gist of the action doctrine acts to foreclose tort claims where the *only* duty owed by the defendant to the plaintiff is one arising out of a contractual relationship. *See Reardon v. Allegheny College*, 926 A.2d 477, 486-87 (Pa. Super. Ct. 2007). A breach of contract can nevertheless give rise to an actionable tort when the wrong alleged is the "gist of the action," and the contract is merely collateral. *eToll, Inc. v. Elias/Savion Advertising Inc.*, 2002 PA Super 347, 811 A.2d 10, 14 (Pa. Super. 2002). Plaintiffs are limited to their contract claims only when the obligations of the parties are defined *solely* by the terms of the contract, and not by larger social policies embodied in the law of torts. *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 104 (3d Cir. 2001).

The gist of the action doctrine was designed to preserve the distinction between contract and tort causes of action and to preclude a plaintiff from converting a contract action into a tort claim. Tort actions involve breaches of common law duties imposed by social policy, while contract actions involve breach of duties created by mutual agreement. *See, e.g., eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002). A breach of contract may give rise to an actionable tort when the wrong alleged is the "gist of the action" and the contract is

merely “collateral.” *Id.* See *Bohler-Uddeholm Am. Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 104 (3d Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002).

The gist of the action doctrine applies only (1) where the claims alleged arise *solely* from the contractual relationship between the parties; (2) where the duties breached were created and grounded in the contract; (3) where the liability stems from the contract; and (4) where the tort claim essentially duplicates the contract claim, or the success of which depends on the terms of the contract. *eToll*, 811 A.2d at 19. Similarly, the rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp. 1269, 1271 (M.D. Pa. 1990).

In *Mendelsohn Drucker v. Titan Atlas Mfg.*, this District found that a plaintiff’s claim for the tort of fraudulent inducement of contractual relations was not barred by the gist of the action doctrine since the act of fraudulent misrepresentation “constitutes a breach of duty of honesty imposed by society, and not contractual duties.” 885 F.Supp.2d 767, at 790 (E.D. Pa. 2012). Similarly, in *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme Court reversed a demurrer entered in favor of the defendant-insurance company on gist of the action grounds. In *Bruno*, the plaintiffs sued an insurance company for negligence when the insurer failed to remove mold from the plaintiffs’ property and affirmatively recommended that the plaintiffs continue renovating their property. *Bruno*, 106 A.3d 48. The Pennsylvania Supreme Court found that while the insurer had a contractual obligation to investigate mold on the plaintiffs’ property, the insurer’s representations and recommendations were affirmative acts, which gave rise to different duties and legal analyses than did the performance contract, and therefore, the gist of the action doctrine did not apply:

Consequently, these allegations of negligence **facially concern Erie's alleged breach of a general social duty, not a breach of any duty created by the insurance policy itself.** The policy in this instance merely served as the vehicle which established the relationship between the Brunos and Erie, during the existence of which Erie allegedly committed a tort. We, therefore, reverse the order of the Superior Court affirming the trial court's dismissal of the Brunos' negligence claim on the basis of its application of the gist of the action doctrine.

Bruno, 106 A.3d 48, at 66 (emphasis added).

In this matter, the gist of the action doctrine similarly does not apply because Nowak's claims against MLS relate to MLS' conduct when conducting the investigation of Nowak, issuing the report of Nowak's conduct and influencing the Team and other prospective soccer clubs not to employ Nowak. *See* Complaint, ¶¶ 27-29, 37-43. Nowak's claims do not turn on the rights and duties created by his employment contract with the Team. Rather, Nowak alleges in his Complaint that MLS did not conduct a good-faith investigation into Nowak's conduct, did not adequately scrutinize the players' allegations and improperly exerted pressure on the Team to terminate his employment, and later on other prospective teams not to employ him. Nowak's tortious interference claim and breach of contract claim involve different defendants, different facts, different duties and different legal analyses. Accordingly, the gist of the action doctrine is inapplicable.

D. MLS Did Not Have Justification to Interfere with Nowak's Contract with the Team or with Other Prospective Employers.

MLS tortiously interfered with Nowak's contract by conducting an inadequate investigation into Nowak's alleged conduct, during which Nowak was not questioned or given an opportunity to address the players' allegations, issuing an untruthful and incomplete report of

Nowak's alleged conduct, instructing the Team to terminate Nowak's employment and instructing other teams not to employ Nowak. *See* Complaint, ¶¶ 26-29, 37-43.

Under Pennsylvania law, to prevail on a claim for tortious interference with existing or prospective contractual relationships, a party must prove: (1) the existence of a contractual or prospective contractual or economic relationship between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm an existing relationship or intended to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) legal damage to the plaintiff as a result of the defendant's conduct. *Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199 (3d Cir. 2009); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir.1998).

Absence of privilege or justification means that the defendant's conduct was "improper." *Cloverleaf Dev., Inc. v. Horizon Fin., F.A.*, 500 A.2d 163, 167 (Pa. Super. 1985). The factors to be considered in determining whether conduct is "improper" are: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the proximity or remoteness of the actor's conduct to the interference; and (6) the relations between the parties. *Cloverleaf*, 500 A.2d 163, at 167 (citing Restatement (Second) of Torts § 767). An actor is privileged to interfere with another's performance of a contract when: (1) the actor has a legally protected interest; (2) he acts or threatens to act to protect the interest; and (3) the threat is to protect it by proper means. *Ruffing v. 84 Lumber Co.*, 600 A.2d 545, 548 (Pa. Super. 1992).

Through discovery, Nowak will establish that MLS wrongfully interfered with Nowak's contract with the Team. Specifically, Nowak will establish that the MLS published a report regarding Nowak's alleged misconduct, relying blindly on the players' contentions, without

allowing Nowak to present his side of the story and without engaging in a genuine fact-finding process. Additionally, Nowak will establish that the MLS wrongfully instructed the Team to terminate Nowak's employment. Nowak will also demonstrate that he had real and substantial opportunities to coach other MLS teams, including the Chicago Fire, that were destroyed by MLS. These issues are disputes of fact, which cannot be determined from the pleadings alone. Since Fed. R. Civ. P. 12(b)(6) requires the Court to accept the allegations as pleaded as being true, it would be premature to dismiss Nowak's claim before the fact-finding process has commenced.

IV. CONCLUSION

For the reasons stated in this memorandum, Nowak's claims are subject to the jurisdiction of this Court and Nowak has stated a viable claim for tortious interference against MLS. Accordingly, MLS' Motion to Dismiss Nowak's Claims must be denied.

Respectfully submitted,

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