INTERNATIONAL HOBBY CORP.
v.
RIVAROSSI S.p.A. and James M. Conway Corp.

No. CIV. A. 96-3082.

United States District Court, E.D. Pennsylvania.

June 29, 1998.

MEMORANDUM

I. INTRODUCTION

WALDMAN, J.

***1** The parties in this case are companies engaged in the international production, marketing and distribution of model railroad trains and accessories. Plaintiff alleges that defendants conspired to deprive it of contractual rights it possessed, defamed it in trade publications, illegally refused to do business with it and engaged in unfair competition.

Subject matter jurisdiction is predicated on diversity of citizenship. See 28 U.S.C. § 1332. The parties agree that Pennsylvania law applies to the substantive issues in the case. Presently before the court are defendants' Motions for Summary Judgment.

II. LEGAL STANDARD

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir.1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir.1990), cert. denied, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 246 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

III. FACTUAL BACKGROUND

From the record as uncontroverted or viewed most favorably to plaintiff, the pertinent facts are as follow.

Plaintiff International Hobby Corporation ("IHC") is a Pennsylvania corporation that designs, imports, markets and distributes model railroad trains and accessories. Defendant Rivarossi S.p.A. ("Rivarossi") is an Italian company that manufactures model trains and accessories. Defendant James M. Conway Corporation ("JMC") is an Illinois corporation that imports and distributes model trains and accessories.

Bernard Paul is the CEO of IHC. On December 2, 1982, Mr. Paul and Regal Way, Inc. ("Regal Way") executed a lease agreement (the "Lease Agreement") covering specific tooling equipment soon to be owned by Regal Way and used to make model trains and model train components. The tooling equipment was located in Italy and operated by defendant Rivarossi. In the Lease Agreement, Regal Way granted Mr. Paul the exclusive right to distribute throughout the United States and Canada products manufactured using the tooling equipment. In exchange, Mr. Paul agreed to pay Regal Way a royalty equal to five percent of the price of the products covered by the Lease Agreement and shipped by Rivarossi. Under the terms of the Lease Agreement, Regal Way retained the rights to lease the tooling equipment to other parties provided that no other lease conflicted with Mr. Paul's rights. Plaintiff IHC subsequently acquired Mr. Paul's interest in the Lease Agreement.

***2** Paragraph 3 of the Lease Agreement provided for the contract's duration:

> The term of the lease set forth in this Agreement (the "Term") shall commence on the date that Lessor obtains title to the Tooling and shall continue for a period of one (1) year thereafter. The Term and this Agreement shall automatically continue for an additional Term of one (1) year and thereafter from year to year unless either Lessor or Lessee shall give notice to the other not less than sixty (60) days prior to the end of the then current Term of its election to terminate this Agreement at the end of said Term, provided however, that Licensor agrees that it will elect so to terminate only by the exercise of reasonable commercial judgment that Licensee is not using his best efforts in a good and businesslike manner to market, sell, advertise and distribute the products or has otherwise breached the provisions of the Agreement.

Regal Way maintained ownership of the leased tooling equipment from December 1982 through June 1985. During that time, IHC placed orders with Rivarossi for products manufactured using the leased tooling equipment as contemplated in the Lease Agreement. In months that it received shipments from Rivarossi, IHC would remit a royalty check to Regal Way. In months that IHC received no merchandise produced using leased tooling equipment, it would send Regal Way a letter advising that no royalties were due.

On or about June 26, 1985, Regal Way sold its ownership interest in the tooling equipment to defendant JMC. The sale was subject to the terms of the Lease Agreement. Both JMC and IHC notified Rivarossi of the ownership change.

After June 1985, IHC continued to order from Rivarossi products manufactured using the leased tooling equipment. Beginning in July 1985, IHC sent its monthly reports to JMC including royalty payments when appropriate. JMC received approximately $1,700 in royalties between July 1985 and April 1987. During the last five months of that period, IHC purchased no Rivarossi products produced with leased equipment and paid JMC no royalties.

On April 23, 1987, James M. Conway, president of JMC, sent Mr. Paul a letter stating in part:

> Under the terms and conditions set forth in the original "Lease" agreement between yourself and Regal Way Inc. concerning the various Rivarossi HO and O items; and the subsequent sale of the tooling covered by that Lease to the James M. Conway Corporation on the 28th of June 1985, we hereby notify you that said Lease will be terminated at its expiration on the 2nd day of December 1987 and not renewed.

Mr. Conway continued that his decision was based on the sparse royalties JMC had received since purchasing the leased equipment. Mr. Conway also stated in the letter that JMC was willing to allow IHC to import products covered under the Lease Agreement "on the same royalty rates of 5%, as long as [IHC's] orders meet Rivarossi's minimum order terms, on a non-exclusive basis."

***3** IHC's attorney, Leonard Sarner, responded to Mr. Conway's letter on June 17, 1987 asserting:

> I am sure that you know that under Paragraph 3 of the Lease Agreement, you, in exercising your rights as Licensor, cannot elect to terminate the Agreement merely because royalties derived from the purchase of the Rivarossi trains and components are considerably less than what you would like to receive. Instead, termination can only be triggered by your exercise of reasonable commercial judgment that Mr. Paul is not using his best efforts in a good and businesslike manner to market, sell, advertise and distribute the products.
>
> In brief, your Notice of Termination is rejected and I have been authorized to take whatever legal action the facts warrant to protect and continue the vested rights Mr. Paul has in the lease Agreement should you pursue your efforts to terminate his rights therein. The choice is up to you.

In a letter of July 24, 1987 to Mr. Paul, Mr. Conway responded that:

> Nothing that was contained in Mr. Sarner's letter, nor any of your actions since that letter of April 23rd have added anything new to influence me to change the decision.

Mr. Conway concluded, "My letter of April 23 stands."

IHC continued to send monthly reports to JMC, including royalty checks in June, July, October and November of 1987. JMC deposited these four checks.

After December 2, 1987, IHC, JMC and Rivarossi continued doing business with one another. IHC continued to send monthly reports to JMC through June 1996. IHC sent royalty checks to JMC in August 1988, May 1989, January, February and June, 1990, November 1991, and April and May 1994 for purchases from Rivarossi of products manufactured using the tooling equipment. JMC cashed the checks sent in May 1989, April 1994 and May 1994.

Rivarossi's opinion regarding the continuing validity of the Lease Agreement between IHC and JMC apparently changed over time. On June 14, 1989, a Rivarossi agent wrote to Mr. Paul stating:

> [W]e have to inform you that [Mr. Conway] ... has asked us to send [certain tooling equipment covered by the Lease Agreement] back to him.
>
> As we think that you have the exclusive use on them, we deem right [sic] to inform you about this matter.

Rivarossi's letter sparked several responses from both IHC and JMC concerning their opposing legal positions regarding the status of the Lease Agreement. Rivarossi subsequently consulted its own legal counsel, and while as late as September 1994 Rivarossi considered the legal aspects "unclear," it continued to fill IHC orders for products

manufactured with tooling equipment covered by the Lease Agreement.

The business relationship between IHC and Rivarossi was not limited to IHC's purchases of products manufactured with tooling equipment covered by the Lease Agreement. IHC also imported and distributed products produced using Rivarossi's own tooling equipment. Additionally, IHC and Rivarossi in 1987 executed two agreements (the "1987 Agreements") pursuant to which IHC purchased tooling equipment that Rivarossi used to manufacture products which IHC maintained the exclusive right to sell in the United States and Canada. Under the 1987 Agreements, Rivarossi retained the right to sell products from that tooling equipment in other parts of the world, paying IHC a royalty for those sales. [FN1]

> FN1. While plaintiff suggests in a brief that it may be entitled to damages for a breach of the 1987 Agreements, these agreements are nowhere even mentioned in plaintiff's complaint.

***4** Beginning in 1988 and continuing for several years, IHC and Rivarossi discussed a production arrangement whereby Mehano Technika ("Mehano"), a manufacturer based in Yugoslavia (now Slovenia), would receive from Rivarossi shipments of train components. Mehano would assemble and package the components before shipping the finished goods to IHC. Components manufactured using the tooling equipment covered by the Lease Agreement were among the products Rivarossi would ship to Mehano. There is no evidence that these discussions resulted in a contract for any fixed term. Mehano, however, did produce some prototypes and products, including products manufactured using the tooling equipment covered by the Lease Agreement. IHC purchased and paid royalties on some of these products.

Sometime before January 1993, Rivarossi delivered to JMC part of the tooling equipment covered by the Lease Agreement. On January 25, 1993, Mr. Paul asked Rivarossi's Managing Director, Giuseppe Cafieri, whether such tooling equipment had been transferred to JMC and opined that any transfer "would be in violation of the agreements on which [JMC] bought that tooling and I would want to proceed with proper legal action[.]" Dr. Cafieri informed Mr. Paul that the transfer had, in fact, taken place.

In 1994, JMC and Rivarossi began negotiating the sale of JMC's tooling equipment to Rivarossi. The two companies executed a contract in June of that year establishing the transfer of certain JMC property, including the equipment covered by the Lease Agreement. In contracting with Rivarossi, JMC represented that it owned the tooling equipment "free and clear of any lien, pledge, encumbrance, option, charge or claim of any kind whatsoever."

In October 1994, Rivarossi demanded that IHC renounce all rights it claimed under the Lease Agreement. With JMC's knowledge, Rivarossi refused to sell any products thereafter to IHC until it renounced its claims. IHC and Rivarossi attempted unsuccessfully to resolve their dispute, but Rivarossi continued to insist that IHC acknowledge that the Lease Agreement had been terminated in 1987.

In 1993, Model Expo, Inc. ("Model Expo") became a distributor for Rivarossi in North America. In November 1995, Model Expo advertised for sale Rivarossi products manufactured with tooling equipment covered by the Lease Agreement. Model Expo, on behalf of Rivarossi, identified itself as Rivarossi's "exclusive importer" of those products.

IHC filed this action on April 18, 1996. In Count I of its complaint, plaintiff claims that JMC and Rivarossi are liable for tortiously interfering with its contractual rights under the Lease Agreement. While Count II is captioned as a claim against defendants for disparagement of property, plaintiff has throughout this litigation construed the claim as one for defamation premised on statements suggesting that IHC had no rights under the Lease Agreement. Defendants have properly responded to the claim in Count II as one for defamation. In Count III, plaintiff claims that Rivarossi refused to deal with plaintiff as part of a conspiracy by defendants to coerce IHC to renounce its rights under the Lease Agreement. In Count IV, plaintiff claims that defendants engaged in "unfair competition" in violation of "Pennsylvania common law."

IV. DISCUSSION

A. Plaintiff's Claims for Tortious Interference with Contract, Defamation and Unfair Competition

***5** Defendants contend and plaintiff "acknowledges that its claims for tortious interference, defamation and unfair competition are dependent upon the existence of a valid Lease" in 1994 and 1995 despite JMC's 1987 termination letter. [FN2]

> FN2. All parties devote considerable effort

in their briefs to the application of the statutes of limitations to plaintiff's claims. Defendants argue that plaintiff's claims based on the Lease Agreement are time-barred because plaintiff failed to challenge JMC's termination of the contract within the four year limitations period. See 42 Pa.C.S.A. § 5525. Plaintiff, however, has not pled a claim for breach of contract. Rather, plaintiff assumes that the Lease Agreement survived the 1987 termination letter and predicates its claims for tortious interference and unfair competition on defendants' actions beginning in June 1994. Similarly, IHC bases its claim for defamation on statements made by Model Expo in November 1995. These claims are not time-barred. See 42 Pa.C.S.A. §§ 5523, 5524.

Plaintiff contends that JMC's 1987 notice of termination was ineffective. IHC argues that the contract language regarding reasonable judgment about the use of best efforts constrained JMC's ability to terminate the Lease Agreement and as a result of its immediate rejection of the termination notice, the Lease Agreement remained in effect. Plaintiff argues that JMC acquiesced in IHC's rejection of the notice by failing to bring a court action to enforce the termination and by subsequent conduct consistent with the obligations under the Lease Agreement. [FN3] Defendants both respond that JMC's notice of termination effectively ended the Lease Agreement in December 1987.

FN3. While the Lease Agreement references an agreement between Rivarossi and IHC, it is undisputed that Rivarossi never executed the Lease Agreement. Additionally, paragraph 8.2 of the contract explicitly states, "Lessee acknowledges that Lessor and Rivarossi are parties independent of each other and that during the Term, Lessor shall have no ability to control the actions of Rivarossi whether the same relate to the Tooling or otherwise." Nevertheless, plaintiff repeatedly refers to Rivarossi as a party to the Lease Agreement and imputes actions by Rivarossi to JMC without ever explaining the legal theory on which it does so.

Where a contract prescribes a mode in which a right of termination shall be exercised or specifies an act to be done as a condition to the right to terminate, such provisions must be strictly followed. See Massachusetts Bonding & Ins. Co. v. Johnston & Harder, 340 Pa. 253, 16 A.2d 444, 448 (Pa.1940); Wright v. Bristol Patent Leather, Co., 257 Pa. 552, 101 A. 844, 845 (Pa.1917); Accu-Weather, Inc. v. Prospect Comms., Inc., 435 Pa.Super. 93, 644 A.2d 1251, 1254 (Pa.Super.Ct.1994); Virginia Heart Institute Ltd. v. Northwest Pennsylvania Bank & Trust Co., 448 F.Supp. 215, 220 (W.D.Pa.1978). Notices of termination must be clear and unambiguous. Maloney v. Madrid Motor Corp., 385 Pa. 224, 122 A.2d 694, 696 (Pa.1956); Wright, 101 A. at 845; Accu-Weather, Inc., 644 A.2d at 1254; EFCO Importers v. Halsobrunn, 500 F.Supp. 152, 154-55 (E.D.Pa.1980).

Plaintiff does not contest that the notice of termination was timely, clear and unambiguous. Plaintiff does not allege in its complaint or argue in its briefs that JMC could not reasonably conclude from receipt of only $1,700 in royalties, reflecting only $34,000 in purchases, over a two year period that IHC was failing to utilize its best efforts to market the covered products. Rather, plaintiff argues that because it "rejected" JMC's notice, JMC "was required to sue in order to test the sufficiency of its termination" and its "failure [to do so] rendered the termination ineffective."

Plaintiff cites two cases where parties terminating contracts did seek a declaration of their rights and duties after the termination. See Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202 (8th Cir.1995); Massachusetts Bonding & Ins. Co., 16 A.2d at 444. While a party terminating a contract may initiate a declaratory judgment or other appropriate action, the law imposes no obligation upon it to do so.

***6** A commercial judgment can be reasonable without necessarily being correct. The contract required JMC to make a judgment. It did not require JMC to explain it in terms satisfactory to IHC and did not permit IHC to prevent a termination simply by "rejecting" it. If IHC believed that JMC had breached the contract or exercised its discretion to act on a reasonable commercial judgment about IHC's marketing efforts in bad faith, it is IHC which could and should have initiated an action for breach of contract or of the contractual duty of good faith. It never timely initiated such an action.

Of course, ambiguous pre-termination conduct may undermine language intended to signal a contract termination. See Accu-Weather, Inc., 644 A.2d at 1254; Eastern Milk Producers Co-op. Ass'n, Inc. v.

Lehigh Valley Co-op. Farmers, 568 F.Supp. 1205, 1207 (E.D.Pa.1983). Plaintiff suggests that JMC's actions after IHC's June 17, 1987 letter were sufficiently ambiguous to evidence a withdrawal of the termination notice. Specifically, plaintiff points to JMC's acceptance of royalty checks in June, July, October and November of 1987 for products covered by the Lease Agreement and shipped by Rivarossi to IHC. Those checks, however, were undisputably owed to JMC under the terms of the Lease Agreement which all parties agree was effective until December 1987. Moreover, Mr. Conway responded to IHC's rejection with a letter categorically reiterating JMC's intent to terminate the Lease Agreement and unequivocally concluding, "My letter of April 23 stands." There is no evidence of ambiguous conduct by JMC between April 1987 and December 1987 inconsistent with its stated intent to terminate the lease in December 1987.

Plaintiff also contends that the sale of products by Rivarossi after December 1987 and the deposit by JMC of three of eight royalty checks, totaling $5,100, led IHC to believe the Lease Agreement was still in effect and JMC would continue to perform thereunder. Putting aside JMC's offer to permit further sales on a non-exclusive basis, post-termination conduct in conformity with pre-termination behavior does not result in a renewal of a contract in the face of a clear notice to terminate and does not suggest that the termination was ambiguous. See Maloney, 122 A.2d at 156; EFCO Importers, 500 F.Supp. at 156.

Plaintiff argues that EFCO Importers and Maloney are distinguishable because the termination notices in those cases were not formally rejected by the party upon whom they were served. These cases, however, did not hold that a rejection has the legal effect of nullifying a clear and unambiguous notice of termination. [FN4] In Accu-Weather, the case on which plaintiff relies, the Court found that the terminating party's pre-termination conduct was inconsistent with the notice of termination and thus rendered the notice ambiguous. See Accu-Weather, Inc., 644 A.2d at 1253-1255. The Court recognized that the terminating party's actions could have been an attempt to correct an anticipatory breach and a withdrawal of the termination notice. Id. at 1255. There is no evidence in the present case which would support such a finding.

FN4. Plaintiff also seeks to distinguish Maloney on the ground that it was not decided on summary judgment but after trial. There was a trial in Maloney. It ended in a hung jury. Thereafter, the Court entered judgment for defendant as a matter of law on the evidence presented.

***7** The Lease Agreement was clearly terminated on December 2, 1987. Plaintiff failed timely to bring a breach of contract action to challenge that termination. Plaintiff thus had no rights under the Lease Agreement at the time it alleges defendants tortiously interfered with those rights. [FN5] Similarly, defendant can not sustain its claim for defamation based on defendants' publication of information suggesting that plaintiff had no rights under the Lease Agreement. [FN6] Plaintiff has also failed to sustain its common law unfair competition claim. [FN7]

FN5. Even if the Lease Agreement survived JMC's 1987 notice of termination, plaintiff would have no claim for tortious interference against JMC. A party cannot be liable for tortious interference with a contract to which it is a party. See Michelson v. Exxon Research and Eng'g. Co., 808 F.2d 1005, 1007-08 (3d Cir.1987).

FN6. Plaintiff has only presented evidence of defamatory statements by Model Expo, purportedly on behalf of defendant Rivarossi. JMC is thus also entitled to summary judgment on this claim because of plaintiff's failure to present any evidence against JMC.

FN7. Plaintiff has not remotely shown how the evidence of record supports its claim of unfair competition. Unfair competition is "[a]nything done by a rival in the same business by imitation or otherwise designed or calculated to mislead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another manufacturer." B.V.D. Co. v. Kaufmann & Baer Co., 272 Pa. 240, 116 A. 508, 508-09 (Pa.1922). The elements of a claim for unfair competition are the same as those for claims under the Lanham Act except for the requirement of an affect on interstate commerce. A plaintiff must show the involvement of goods or services, a false description or designation of origin with respect to the goods or services involved and a reasonable basis for the belief that one has been injured. See Allen-Myland v.

International Bus. Mach. Corp., 746 F.Supp. 520, 553 (E.D.Pa.1990); Moore Push-Pin Co. v. Moore Business Forms, Inc., 678 F.Supp. 113, 116 (E.D.Pa.1987). Insofar as plaintiff predicated this claim on the continued existence of a valid lease agreement, of course, it also fails.

B. Plaintiff's Claim for Refusal to Deal

Plaintiff contends this is the one claim asserted which is not dependant on the survival of the Lease Agreement. Plaintiff's claim for refusal to deal is based on §§ 762(a),(c) and 765(1) of the Restatement (First) of Torts. [FN8] Plaintiff alleges that Rivarossi refused to sell products to IHC as part of a conspiracy by both defendants to coerce IHC to renounce the rights it claimed under the Lease Agreement.

FN8. Section 762 of the Restatement (First) of Torts states:
One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or (b) a means of accomplishing an illegal effect on competition, or (c) part of a concerted refusal by a combination of persons of which he is a member.
Restatement (First) of Torts § 762 (1939).
Section 765(1) of the Restatement (First) of Torts states:
Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.
Restatement (First) of Torts § 765(1).

Defendants argue that Pennsylvania has not recognized a claim for refusal to deal. Plaintiff cites no case and the court has found none in which a Pennsylvania court has expressly recognized a cause of action for refusal to deal. Pennsylvania courts, however, have cited to § 762 as authority in rejecting employment termination claims on the ground that a unilateral refusal to maintain a business relationship generally is not actionable. See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 176 (Pa.1974). See also Paul v. Lankenau Hosp., 524 Pa. 90, 569 A.2d 346, 348 (Pa.1990); Wells v. Thomas, 569 F.Supp. 426, 435-36 (E.D.Pa.1983); Keddie v. Pennsylvania State Univ., 412 F.Supp. 1264, 1278 (M.D.Pa.1976). In any event, because plaintiff could not sustain a claim under § 762 or § 765 on the record presented, the court need not predict whether the Supreme Court of Pennsylvania would actually adopt those provisions to sustain a claim.

Consistent with § 762, a person or entity is generally free to choose whether or not to do business with another. Plaintiff argues that defendants violated § 762(a) because they refused to deal with IHC in violation of a contractual obligation. Plaintiff's argument appears to be directed at defendant Rivarossi and premised on Rivarossi's refusal to sell plaintiff any products after October 1994. [FN9]

FN9. Plaintiff suggests in its briefs that as a result it is entitled to recover profits it could have realized under the 1987 Agreements and the Mehano arrangement had it continued. Plaintiff, however, has not pled a breach of contract claim predicated upon those agreements or that arrangement. It is conceivable that plaintiff could plead such a claim. The place to do so, however, is in a complaint and not in a brief opposing summary judgment. A plaintiff may not plead four tort claims and then effectively spawn a contract claim with references in a brief to the measure of damages claimed, whether or not it would correspond to that available for breach of an unpled contract.

The duty imposed upon a party by § 762(a) is a limited one which arises only "from the nature of the actor's business or from a legislative enactment." This subsection contemplates businesses such as public utilities or others charged with a public interest which have a duty to serve without discrimination and on proper terms all who request its service. See Restatement (First) of Torts §§ 762(a), 763, 763 cmt. a; Geary, 319 A.2d at 176 n. 5; Zicos v. Telefood, Inc., 45 Misc.2d 64, 256 N.Y.S.2d 152, 154 (N.Y.Sup.Ct.1965). It does not apply to obligations imposed privately between parties. Section 762(a) of the Restatement is simply inapplicable to the facts of this case.

***8** Plaintiff also contends that defendants contravened § 762(c) and § 765 which prohibit a concerted refuse to deal. Plaintiff, however, is not

complaining about a concerted refusal to deal. Rather, plaintiff is alleging that Rivarossi and JMC agreed that Rivarossi would refuse to deal with IHC. Only Rivarossi has refused to deal with IHC. That one party with the acquiescence or encouragement of a second party refuses to deal with a third party is not a "concerted refusal by a combination of persons." A refusal by one party to deal with another is not actionable under the Restatement regardless of the motive or precipitating cause. See Fulton v. Hecht, 580 F.2d 1243, 1250 (5th Cir.1978); Circo v. Spanish Gardens Food Mfg. Co., 643 F.Supp. 51, 56 (W.D.Mo.1985). See also House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 872 n. 14 (2d Cir.1962) (explaining that "concerted refusal to deal" contemplated by the Restatement is "a boycott"). [FN10]

FN10. The court does not suggest that plaintiff has otherwise presented evidence sufficient to support a finding that the defendants did enter into a conspiracy. Plaintiff points to two things. The first is JMC's agreement in June 1994 to sell "free and clear" the tooling equipment to Rivarossi. The second is JMC's letter to IHC six months later stating that Dr. Cafieri had become so aggravated by IHC's refusal to acknowledge the 1987 termination that he may be unwilling to continue to sell any products to IHC. To characterize this evidence as sparse and tenuous would be charitable.

V. CONCLUSION

One cannot reasonably find from the record presented that defendants are liable on plaintiff's claims. Accordingly, defendants' motions will be granted. An appropriate order will be entered.

ORDER

AND NOW, this day of June, 1998, upon consideration of defendants Motions for Summary Judgment (Docs. 25 & 26), and plaintiffs' response thereto, consistent with the accompanying memorandum, IT IS HEREBY ORDERED that said Motions are GRANTED and accordingly JUDGMENT is ENTERED in the above action for defendants and against plaintiff on the claims asserted in each of the counts of plaintiff's complaint.