SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

January 26, 2010

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Re: ***James C. Eaton v. Raven Transport, Inc. and FleetMasters Express, Inc.***
C.A. No. S08C-07-033-RFS

Dear Mr. Eaton and Counsel:

Pending before me are several motions in the above-referenced case. Upon careful consideration of the pleadings, the motions and the record as a whole, I have reached the following conclusions. Plaintiff James C. Eaton's Motions for Summary Judgment against Defendant Raven Transport Inc.[1] ("Raven") and Defendant FleetMaster Express

[1]The Court understands that the proper name of this Defendant is Raven Transport Holding, Inc. The Court refers to this entity as "Raven" throughout this Opinion.

("FleetMaster") based on discovery issues are Denied. Plaintiff's letter dated September 26, 2009, is Denied to the extent that it is an untimely attempt to amend the Complaint. Defendant FleetMaster's Motion to Dismiss for Failure to State a Claim is Granted, including costs and fees. Defendant FleetMaster's motion for sanctions under Rule 11(c)(1)(B) is Denied. Plaintiff's Motion to Dismiss Connolly Bove from representing FleetMaster is Denied. Plaintiff's Motion for Summary Judgment on the defamation claim against Raven is deferred pending the outcome of the Defendant Raven's Motion to Compel, which will be scheduled for oral argument if the parties are unable to reach an agreement on their discovery issues.

In July 2008, Plaintiff filed suit against Raven, Miller Brewing Company ("Miller") and FleetMaster, alleging, as Plaintiff put it, character assassination, defamation of character, time lost, libel and distortion of his work record. To be more exact, the Complaint alleges that Plaintiff worked as a truck driver for Raven and that Defendants were aware of problems with the trucks that they chose to ignore, thereby putting Plaintiff and the public at risk of harm. The Complaint alleges that Defendants defamed his good name and professional reputation, falsely reported poor performance to potential employers, and made false statements to the Delaware Department of Labor ("DOL") and the Equal Employment Opportunity Commission ("EEOC"). The Complaint seeks $60,000 in damages for every year Plaintiff is unemployed, plus $10 million punitive damages, plus costs, fees and interest.

Plaintiff was hired by Raven in late January 2007 as a long-haul truck driver transporting beer from one destination to another. Plaintiff made three trips between February 3, 2007 and March 9, 2007, departing from the Miller Brewery in Eden, North Carolina, and arriving in Rockville, Maryland; Elizabeth, New Jersey; and Baltimore, Maryland. It is uncontested that some of the cargo on each of these trips was spilled or otherwise damaged when it arrived at its destination. Plaintiff made other runs that did not result in spillage. Miller allegedly asked Plaintiff about repayment to restack the cases of beer, but Plaintiff maintains that he had informed all three Defendants he could not pick up such heavy loads because of his pacemaker.

On March 22, 2007, Plaintiff met with two of Raven's managers and was terminated from his employment for poor performance because of the spilled beer. Plaintiff alleges that the spills occurred because of Defendants' inadequate loading practices and that Raven blamed Plaintiff for the spills in order to keep the Miller account in Eden, North Carolina. Plaintiff filed a claim with the EEOC, which was denied. He prevailed on his claim for unemployment benefits with the Delaware DOL. In both cases, Defendant Raven was asked to provide written documentation regarding Plaintiff's performance, and it complied with those requests, stating that Plaintiff was discharged for "poor performance." Plaintiff subsequently filed this action.

In February 2009, this Court granted Miller Brewing Company's Motion to Dismiss. In April 2009, the Court denied Raven's Motion to Dismiss based on lack of

personal jurisdiction. The Court granted FleetMaster's motion for a protective order as to discovery regarding loading practices, which the Court found to be irrelevant to an action for defamation. Further discovery has been stayed pending resolution of FleetMaster's Motion to Dismiss, which is addressed below.

Plaintiff alleges that the spills occurred because of Defendants' inadequate loading practices and that Raven blamed Plaintiff for the spills in order to keep the Miller Brewing account in Eden, North Carolina. Raven asserts that Plaintiff was properly terminated in March 2007 within his 90-day probationary period and that no defamatory statements were made. Following Plaintiff's termination, Raven responded in writing to requests for information about Plaintiff's employment from D. Krutiak, Trucking ("Krutiak"), from the Department of Labor ("DOL") in Delaware, and from the EEOC in Pennsylvania. In addition, Raven maintained information about Plaintiff's employment in a public database for motor carriers known as a "DAC Report."[2] (*See* Raven's Motion to Dismiss, Ex. A – D.) In a letter to the EEOC, Raven Vice President of Fleet Services, William A. Wiese, Sr., stated that Plaintiff refused to handle any freight, that is, to move any of the beer cargo, even after reading the job description. (Pl. Rebut to Raven's Motion to Dismiss, Ex. N.) In another letter to the EEOC, Mr. Wiese stated that Plaintiff was terminated because of poor performance and disregard of company policy. (Pl. Rebuttal to Raven's Motion to Dismiss, Ex. E.) When Plaintiff filed for unemployment

[2]Drive-A-Check-Services.

benefits with the Delaware Department of Labor, Raven stated that the reason for his discharge was "poor performance within 90 days," that is, within his 90-day probationary period. (Pl. Rebuttal to Raven's Motion to Dismiss, Ex. D.)

In his Rebuttal to Raven's Motion to Dismiss, Plaintiff represented that he had withdrawn any defamation claims regarding submissions to either the EEOC or the Delaware DOL.[3] The Court accepted that representation, and Plaintiff's defamation claims as to statements made or provided by Raven to the EEOC and the Delaware DOL are therefore **Dismissed.**

Thus remaining for analysis on Plaintiff's defamation against Raven are the statements provided to Krutiak and contained in the DAC Report. Plaintiff has filed a Motion for Summary Judgment on this issue, arguing that his performance was satisfactory and that it was therefore defamatory for Raven to indicate to Krutiak and in the DAC Report that Plaintiff was terminated because his performance was unsatisfactory. The issues on summary judgment will be addressed in relation to discovery issues, which is discussed below.

Plaintiff has also filed Motions for Summary Judgment against Raven and FleetMaster on the issue of interrogatories. FleetMaster argues that it has performed its duty under the rules of discovery, which permit a party to file a motion for a protective order rather than respond to discovery. The Court granted the motion to stay in January

[3] *Eaton v. Miller Brewing Co.*, 2009 WL 1277991 (Del. Super. Ct).

2009, pending the outcome of Fleetmaster's motion to dismiss, which is resolved herein. When there are facts in dispute, that is, awaiting the completion of discovery, summary judgment is not properly granted.[4] Nor is summary judgment is the appropriate vehicle for settling discovery requests, and Plaintiff's motion is **Denied** as to FleetMaster.

Raven responds to the summary judgment motion on discovery by asserting that it answered Plaintiff's first set of interrogatories on June 25, 2009, and that because discovery between these parties is in its early stages summary judgment should be denied. The case is hardly in its early stages. As stated previously, summary judgment is not the appropriate means of settling discovery disputes. Plaintiff's summary judgment motion on the basis of discovery issues is **Denied** as to Raven. By this time, the parties may have come to agreement as to discovery, and, if not, the Court will address this matter as explained below.

In August 2009, FleetMaster filed a Motion to Dismiss for Failure to State a Claim, which is converted to a Motion for Summary Judgment by way of the materials outside the pleadings appended to Plaintiff's response.[5] FleetMaster argues that because Plaintiff was never in its employ a wrongful termination claim against it cannot stand. When considering a motion for summary judgment, the Court must view the facts in the

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[4] *Levy v. Stern*, 1996 WL 742818 (Del.).

[5] *See, e.g., Mell v. New Castle County*, 835 A.2d 141 (Del. Super. Ct.).

light most favorable to the non-moving party.[6] Summary judgment is to be granted when the moving party is entitled to judgment as a matter of law.[7] Summary judgment is not appropriate when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts to clarify the application of law to the circumstances.[8] The Court notes first that the Complaint does not allege wrongful termination, a fact which Plaintiff acknowledges in his January 2009 Rebuttal to FleetMaster's Motion to Dismiss: "[t]he Complaint does not include any reference to 'wrongful termination' and the Complaint never inferred that the Plaintiff was employed by Fleet Masters Express [sic]." Nine months later, in September 2009, Plaintiff responded to FleetMaster's Motion to Dismiss by raising a new claim--a breach of employment contract. Plaintiff alleges that FleetMaster and Raven entered into a so-called Spotting Agreement whereby FleetMaster agreed to perform pick-up and delivery services for Raven. Plaintiff further avers that FleetMaster, as a co-employer, breached this agreement by inadequately securing the three loads of beer that spilled while Plaintiff was driving. He seeks $4.5 million in damages for this alleged breach. This claim fails for three reasons. First, the breach of employment is a new allegation and therefore can only be seen as an untimely effort to amend the Complaint. Super. Ct. Civ. Rule 15(a).

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[6] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del 1996).

[7] Super. Ct. Civ. R. 56(c).

[8] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *1 (Del. Super.).

Second, Plaintiff is not a party to the Spotting Agreement and cannot sue for an alleged breach of that agreement. Third, the Spotting Agreement did not convert FleetMaster into Plaintiff's co-employer. The record indicates that Plaintiff's schedule and duties were overseen by Raven, whereas a co-employer generally has authority and the right to control, hire, terminate and supervise employees.[9] FleetMaster played a role in the operation of the trucks and preparations for shipment, but it did not manage or oversee, hire or fire Plaintiff. For all these reasons, FleetMaster's motion as to a wrongful termination is **Granted** and Plaintiff's breach of employment contract is **Dismissed**. FleetMaster filed a motion for attorneys fees based its view that the motion for summary judgment is in fact a veiled Rule 37 motion for sanctions for alleged discovery sanctions and for the fact that it prevailed on Plaintiff's earlier Motion to Restore Discovery. At the conclusion of the case, the Court will entertain motions and affidavits for fees.

Defendant FleetMaster argues for dismissal of the defamation claim because the Complaint does not allege any specific fact indicating that FleetMaster made or published any defamatory statement about Plaintiff. This issue need not be addressed any further than to say that Plaintiff has conceded that FleetMaster did not defame him: "Defendant FleetMaster has been on the sidelines as a spectator; acknowledged and stipulated by Plaintiff as not contributing to defamation."[10] Thus FleetMaster's Motion to Dismiss

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[9]*See Professional Staff Leasing Corporation v. Director of Revenue*, 2005 WL 2158711 (Del. Super.)(co-employer status a contractual matter entailing authority over employees).

[10]Plaintiff's Letter Response to FleetMaster's Motion to Dismiss (Sept. 26, 2009) at 2.

Plaintiff's defamation claim is **Granted,** and Plaintiff's defamation claim as to FleetMaster is **Dismissed.**

In his (January 2009) Response to FleetMaster's Motion to Dismiss, Plaintiff raises a new claim. He alleges reckless endangerment, by which he means that FleetMaster assigned Plaintiff to haul illegal loads of cargo, thereby putting him and others in harm's way. He seeks $5.5 million in damages. Plaintiff acknowledges reckless endangerment to be a criminal claim. FleetMaster argues that this is an improperly pled attempt to amend the Complaint, and the Court agrees. Pursuant to Rule 15, a complaint may be amended after a responsive pleading is filed only by leave of court or written consent by opposing counsel. FleetMaster correctly asserts that its Motion to Dismiss is a responsive pleading and opposes Plaintiff's efforts to introduce new claims because Plaintiff has not sought leave to amend.[11] Nor does Plaintiff have a private right of action on a criminal charge or a right to convert a criminal charge into a civil cause of action.[12] The claim of reckless endangerment is **Denied.**

Plaintiff rests his defamation claim against Raven on the fact that Raven has twice stipulated to the Court that the beer spillage was not Plaintiff's fault, in contradiction fo

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[11]As the Court has previously found, the record is devoid of evidence that Plaintiff was employed by FleetMaster. Even assuming, *arguendo,* that there was a contractual employment duty and a breach of that duty, Plaintiff has not shown any injury approaching the $4.5 million in damages he seeks. As to the reckless endangering claim, Plaintiff is not vested with any right to bring criminal claims. *In re Tenenbaum*, 918 A.2d 1109, 1119 n. 26 (Del. 2007).

[12]*Brett v. Berkowitz*, 706 A.2d 509 (Del. 1998).

Raven's representations to the EEOC and the Delaware DOL that Plaintiff was discharged for poor performance. In its June 26, 2009 Motion for Protective Order, Raven stipulated that the spillage in three of Plaintiff's runs was not his fault. Plaintiff has dropped his defamation claims pertaining to the EEOC and the Delaware DOL. His remaining claims of defamation against Raven pertain to information relayed to Krutiak, a potential employer, and information contained in the DAC Report, an employment information database.

Defamation is defined as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held." Plaintiff correctly states that in order to establish a claim for defamation the plaintiff must plead: (1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury.[13]

The file in its current does not contain a response from Raven to Plaintiff's motion for summary judgment on the issue of defamation. At oral argument, the Court will give Raven the opportunity to show good cause for the failure to file a Response. The final matter is Defendant Raven's Motion to Compel Discovery. Raven asserts that 12 of the total 36 interrogatories are either incomplete or unresponsive and asks for an order compelling Plaintiff to answer fully all Interrogatories and Requests for Production.

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[13] *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super.).

Raven served Plaintiff with Interrogatories as well as medical and employment authorizations on July 9, 2009. Raven asserts that the authorizations are necessary to determine whether Plaintiff's pacemaker affected his ability to fulfill his job duties and the nature of his past and present job performance. These matters will be resolved at oral argument.

Plaintiff has moved to dismiss Connolly Bove Lodge & Hutz LLP as FleetMaster's counsel in this case. Plaintiff asserts a conflict of interest based on a bare assertion that Connolly Bove has represented himself and his wife for five years in some unidentified action or capacity. In response, FleetMaster states that Connolly Bove verified through its electronic mail distribution system that its firm has never represented Plaintiff or his wife. Counsel also telephoned Plaintiff, who indicated that he had no documentation to support his claim. The Court finds no evidence of a conflict of interest, and Plaintiff's motion is **Denied.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary