

STATE OF NORTH CAROLINA
CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 3626

CALIBER PACKAGING AND
EQUIPMENT, LLC and CALIBER
PACKAGING GROUP, LLC,

Plaintiffs,

v.

CHERNELL SWARINGEN,

Defendant.

**ORDER ON MOTION TO AMEND
ANSWER TO ADD COUNTERCLAIM
FOR VIOLATION OF NORTH
CAROLINA'S ELECTRONIC
SURVEILLANCE ACT**

1. **THIS MATTER** is before the Court on Defendant Chernell Swaringen's ("Swaringen") Motion to Amend Answer to Add Counterclaim (the "Motion") pursuant to Rule 15 of the North Carolina Rules of Civil Procedure ("Rule(s)"), (ECF No. 41).

2. Having considered the Motion, the related briefing, the arguments of counsel at a hearing on the Motion held 24 October 2023, and other relevant matters of record, the Courts hereby **GRANTS** the Motion.

I. BACKGROUND

3. The following is a summary of facts that are relevant to the Motion before the Court.

4. Plaintiffs (together "Caliber") are national distributors of industrial packaging products and solutions. (Compl. p. 1, ECF No. 3.)¹ Chernell Swaringen ("Swaringen") is a former employee of Plaintiffs who is alleged to have

¹ Pages 1-2 of the Complaint contain unnumbered paragraphs. The Court refers to allegations on those pages by page number.

misappropriated trade secret and other confidential information. (*See* Compl. ¶¶ 4, 48-53)

5. Plaintiffs filed the Complaint on 14 November 2022, asserting claims for breach of contract, civil liability for theft by employee, computer trespass, misappropriation of trade secrets, conversion, unfair and deceptive trade practices, unjust enrichment, and civil conspiracy. (*See generally* Compl.) On 13 January 2023, Swaringen answered the Complaint, denying its essential allegations. (Answ., ECF No. 18.)²

6. Swaringen served her first set of discovery on Caliber on 26 January 2023. (Def.'s Br. Supp. of Mot. to Am. Answer ["Def.'s Br. Supp"] p. 1, ECF No. 42.) This discovery sought "documents, recordings, and other evidence that Caliber contended supported their claim that Swaringen had misappropriated their trade secrets." (Def.'s Br. Supp. pp. 1-2.) On 19 April 2023, Caliber produced two audio recordings. (Def.'s Br. Supp. p. 2; Swaringen's Counterclms against Caliber ["Proposed Counterclaim"] ¶ 9, ECF 41.1.)³

7. The first recording was made on 22 August 2022. In it, Swaringen is heard speaking on her personal cell phone with Clay Baggett ("Baggett"), a former employee of Caliber. (Proposed Counterclaim ¶¶ 11-12.) Only Swaringen's side of the conversation is heard on the recording. (Proposed Counterclaim ¶ 12.)

² Swaringen first moved to dismiss Plaintiffs' claims for theft by employee and unjust enrichment. (ECF No. 16.) In an Order and Opinion dated 31 May 2023, the Court dismissed the unjust enrichment claim. (ECF No. 34.)

³ Despite captioning the pleading "Chernell Swaringen's Counterclaims," Swaringen proposes only a single counterclaim.

8. The second recording was made on 28 August 2022. This time, Swaringen and Caitlyn Kostick (“Kostick”), an employee of Caliber at the time, are heard speaking face-to-face. (Proposed Counterclaim ¶10.)

9. According to Swaringen, on both occasions the recordings were made without any party to either conversation being aware that he or she was being recorded. Accordingly, she does not believe that Kostick or Baggett consented to being recorded, and she did not consent. (Proposed Counterclaim ¶ 14.) Swaringen alleges that the recordings were made while she was in her office with the door closed. (Proposed Counterclaim ¶ 15.)

10. Swaringen’s employment with Caliber ended on 31 August 2022. (Proposed Counterclaim ¶ 7.) While cleaning out her office, Swaringen discovered a device that was not hers and that she had never seen before. (Proposed Counterclaim ¶ 18.) Swaringen believes that the device was placed in her office to record her private conversations. (Proposed Counterclaim ¶ 18.)

11. Swaringen filed the present Motion on 28 August 2023, seeking to amend her Answer to add a counterclaim against Caliber for violation of North Carolina’s Electronic Surveillance Act, (the “Act”), N.C.G.S. § 15A-287 *et seq.*

12. After full briefing, a hearing was held on the Motion on 24 October 2023. (*See* ECF No. 50.) The Motion is now ripe for disposition.

II. LEGAL STANDARD

13. After a responsive pleading has been served, a party may amend its pleading only by leave of court or by written consent of the adverse party.

N.C.G.S. § 1A-1, R. 15(a). “[L]eave shall be freely given when justice so requires.” *Id.* Even so, “the right to amend pursuant to Rule 15 is not unfettered.” *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Dec. 22, 2021) (citing *Vaughan v. Mashburn*, 371 N.C. 428, 433 (2018)). Reasons to deny a motion to amend include “undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment.” *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (quoting *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994)).

14. Ultimately, whether to allow an amendment rests in the trial judge’s discretion. *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991).

III. ANALYSIS

15. In response to Swaringen’s Motion, Plaintiffs argue futility. As this Court has observed, the standard for assessing futility under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6). *See, e.g., Columbus Life Ins. Co. v. Wells Fargo Bank, N.A.*, 2022 NCBC LEXIS 40, at **14-15 (N.C. Super. Ct. May 3, 2022).

16. Dismissal pursuant to Rule 12(b)(6) is proper “(1) when the complaint on its face reveals no law supports the claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; or (3) when some fact disclosed in the complaint necessarily defeats the claim.” *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *14 (N.C. Super. Ct. May 9, 2018) (quoting *Oates v. JAG, Inc.*, 314 N.C. 276, 278 (1985)) (cleaned up). When deciding a

motion to dismiss, the Court construes the complaint liberally and accepts all allegations as true. *See, e.g., Sykes v. Health Network Sols., Inc.*, 373 N.C. 326, 332 (2019); *Laster v. Francis*, 199 N.C. App. 572, 577 (2009).

17. North Carolina's Electronic Surveillance Act (the "Act") makes it a crime to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication without the consent of at least one party to the conversation. N.C.G.S. § 15A-287(a)(1). In addition, section 15A-296 of the Act authorizes any person whose communications are actually intercepted, disclosed, or used in violation of the Act to file a civil action for compensatory and punitive damages, as well as attorney's fees. N.C.G.S. § 15A-296(a).

18. "Intercept" means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device." N.C.G.S. § 15A-286(13). An "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation[.]" N.C.G.S. § 15A-286(17).

19. Our Court of Appeals has observed that the North Carolina Electronic Surveillance Act is modeled after the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510 *et seq.* *Kroh v. Kroh*, 152 N.C. App. 347, 351 (2002). Accordingly, federal case law is instructive.

20. Plaintiffs argue that the proposed counterclaim is futile because: (1) Swaringen did not have an objectively reasonable expectation of privacy when she engaged in the subject conversations; (2) Plaintiffs' recording of the subject conversations was not "willful" and thus not in violation of the statute; and (3) Plaintiffs were justified in recording Swaringen's communications to protect their rights and property. (Pls.' Resp. in Opp. to Def.'s Mot. to Amend Ans. ["Pls.' Br. Opp."] pp. 1-2, ECF No. 47.)

21. Swaringen responds that Plaintiffs have applied the wrong standard to analyze futility. (Reply Br. Supp. Mot. Amend ["Def.'s Reply Br."] 1-3, ECF No. 49.) Even so, Swaringen argues that case law supports her claim. (Def.'s Reply Br. 3-7.)

A. The Standard for Evaluating Futility

22. In support of their opposition, Plaintiffs filed the Third Declaration of Kira Parsons (the "Parson's Affidavit") (ECF No. 48). Parson's affidavit contains additional representations of fact that bear on whether Swaringen knew or should have known that conversations in her office were not private. These assertions are contrary to Swaringen's allegations that (a) she did not know she was being recorded, (b) she believed conversations in her closed office were private, (c) she had a subjective expectation that her private conversations were not subject to interception, and (d) her expectation was objectively justified. (*See generally* Proposed Counterclaim.)

23. Although it is possible for a motion to amend to add a claim to fail on futility grounds because the proposed claim is subject to summary judgment, *see e.g.*, *North Carolina Council of Churches v. State*, 120 N.C. App. 84, 93 (1995), such a

result is premature in this case. Plaintiffs have not demonstrated that there are no genuine issues of material fact. To the contrary, if Swaringen is able to support her allegations with evidence, summary judgment may prove to be difficult for Plaintiffs with respect to the proposed counterclaim.

24. Returning, then, to the more commonly used rule 12(b)(6) analysis, for the reasons stated below, the Court determines that Swaringen has successfully pleaded the elements of a civil claim for violation of the Act.

B. Reasonable Expectation of Privacy

25. As noted above, an “oral communication” under § 15A-287 is “any oral communication uttered by a person *exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation[.]*” N.C.G.S. § 15A-286(17) (emphasis added). In other words, Swaringen must allege that she had a subjective expectation that the recorded communications were private and that her expectation was reasonable. *See United States v. Kesari*, 556 F. Supp. 3d 571, 588 (2021) (“The statute’s definition of protected oral communications . . . is intended to parallel the ‘reasonable expectation of privacy’ test created by the Supreme Court in *Katz v. United States[.]*”) (quoting *United States v. Paxton*, 848 F.3d 803, 808 (7th Cir. 2017)).

26. Swaringen’s Proposed Counterclaim alleges that the communications at issue occurred in her office with the door closed and that she thought she was speaking privately when she was recorded. She further alleges that she used her personal cell phone, not the employer-provided cell phone, to make the call to Baggett.

She alleges that she believes the recordings were made by a device she found in her office, not by the security cameras in the hallway. Moreover, nothing in her allegations or even in Parsons' affidavit suggests that Swaringen had prior knowledge that the company's security cameras could pick up either audio or video from her closed-door office.

27. The Court concludes that Swaringen's factual allegations support her conclusory allegation that she exhibited a subjective expectation of privacy under circumstances justifying her expectation. Whether she will be able to prove her allegations is a question for another day.

C. "Willful" Interception and Justification

28. Plaintiffs argue that because their interception of Swaringen's oral communications was "justified" and therefore not "willful," Swaringen's Proposed Counterclaim for violation of the Act is futile. The Court disagrees.

29. Plaintiffs argue that their decision to record was justified because they believed Swaringen was "engaged in an unlawful conspiracy involving theft of the employer's extremely sensitive business information and the transfer of the same to a competitor[.]" (Pls.' Br. Opp. p. 6.) They cite *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1 (2007), to support this contention. But the facts of *Kinesis* are not analogous to those here. In *Kinesis*, the employer accessed the ex-employees' voicemail and e-mail accounts that were stored on equipment provided by the employer. In this case,

the communications were allegedly intercepted in violation of the Act. *Kinesis*, 187 N.C. App. at 17-18.⁴

30. Furthermore, case law in which an otherwise illegal interception was found to be justified has turned on whether public safety was implicated. *See e.g.*, *Wright v. Town of Zebulon*, 202 N.C. App. 540, 545-46 (2010) (affirming that Defendants did not act with a bad purpose or without justifiable excuse when they placed a surveillance device in plaintiff's patrol car to conduct an "integrity check" after receiving complaints that plaintiff was tipping-off possible drug dealers); *Adams v. Sumner*, 39 F.3d 933, 936 (9th Cir. 1994) ("The clerk's continued eavesdropping was not done with a bad purpose or without justifiable excuse. When he heard the callers mention a gun, he was alerted to the possibility of illegal activity occurring in the hotel and was justified in listening to the conversation to determine whether his concern was merited."); *State v. McGriff*, 151 N.C. App. 631, 639 (2002) ("We conclude that [the] continued listening was not done with a bad purpose or without a justifiable excuse; rather, it was done out of the concern for the welfare of a minor."). In contrast, Swaringen alleges that Calibers' actions were self-motivated: "[b]ecause Caliber wanted to know what Swaringen was communicating to others while in her office, with the door closed[.]" (Proposed Counterclaim ¶ 20.)

31. Accordingly, on this record, the Court cannot conclude that the Proposed Counterclaim is futile because the alleged interceptions were justified. Swaringen

⁴ In addition, the summary judgment motion before the court in *Kinesis* followed extensive discovery by the parties.

has sufficiently pled a claim for relief under the North Carolina Electronic Surveillance Act.

III. CONCLUSION

32. WHEREFORE, the Court in its discretion, GRANTS the Motion. Swaringen may file her Counterclaim against Caliber Packaging and Equipment, LLC and Caliber Packaging Group, LLC, in the form presented with her Motion, (ECF 41.1), within five (5) days.

IT IS SO ORDERED, this the 25th day of October, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases