

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BANCROFT PROFESSIONAL)
BUILDING ASSOCIATES, L.P.,)
)
Plaintiff,)
)
v.)
)
FAMILY MEDICINE AT GREENHILL,)
P.A., STEPHANIE MALLEUS, AND)
CHERYL A. BOLINGER)
)
Defendants.)

C.A. No.: CPU4-10-006590

Submitted: October 12, 2012
Decided: November 7, 2012

**MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF’S MOTION
TO DISMISS OR TO STRIKE DEFENDANTS’
AMENDED COUNTERCLAIMS**

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DAVIS, J.

General and Procedural Background

On May 10, 2012, Plaintiff Bancroft Professional Building Associates, L.P. (“Bancroft”) filed its complaint (the “Complaint”). Defendants Family Medicine at Greenhill, P.A. and Stephanie Malleus (collectively, “Defendants”) filed an answer and counterclaims to the Complaint on June 20, 2012. Defendants then filed an amended answer and counterclaims (the “Answer”) on July 11, 2012. Through the Answer, Defendants denied liability for breach of the lease agreement and raised seven affirmative defenses. The affirmative defenses include: failure

to state a claim, unclean hands, unilateral mistake, mutual mistake, reservation of the right to bring additional affirmative defenses, and that guarantors did not agree and are not bound to an amendment of the lease (“Amendment”).

Defendants also asserted four counterclaims (the “Counterclaims”) in the Answer. Counterclaim I is entitled “Declaratory Judgment Voiding First Amendment to Lease.” In Counterclaim I, Defendants seek a declaration -- due to certain purported material misrepresentations, concealments and/or omissions – that: (i) Defendants are entitled to rescind the Amendment, or (ii) the Amendment is void. Counterclaim II is entitled “Declaratory Judgment – Mutual Mistake.” Defendants seek, through Counterclaim II, a declaration from the Court that the Amendment is void or unenforceable due to mutual mistake. Counterclaim III, entitled “Declaratory Judgment – Unilateral Mistake,” claims that Defendants entered into the Amendment with a mistaken belief as to the amount due under the agreement. Defendants further claim that they would not have executed the Amendment had they known the correct amounts due and not reasonably relied on the misrepresentations of Bancroft. Finally, Counterclaim IV asserts that Bancroft committed unlawful practices under the Consumer Fraud Act through misrepresentations and concealments in connection with the execution of the Amendment.

On August 9, 2012, Bancroft moved to dismiss or, in the alternative, to strike Defendants’ Counterclaims (the “Motion”). Bancroft asserts that the Counterclaims should be dismissed for at least three reasons. First, Bancroft argues that Counterclaims I-III should be dismissed because these counterclaims seek declaratory relief on issues that are the mirror image of factual and legal issues raised in the Complaint. Bancroft alternatively argues that Counterclaims I-III should be stricken as redundant under Rule 12(f) because the Counterclaims

do not raise any factual or legal issues apart from the affirmative defenses listed in the Complaint. Second, Bancroft contends that Counterclaim IV for consumer fraud is time-barred under the statute of limitations. Lastly, Bancroft seeks dismissal of Counterclaim IV for failure to state a claim because Defendants allegedly did not comply with the heightened pleading requirements of Rule 9(b) of the Court of Common Pleas Civil Rules of Procedure.¹

On September 7, 2012, Defendants filed a response to the Motion (the “Response”). Defendants argue that Counterclaims I-III are not restatements of the answer denying liability but, rather, are independent claims for relief. Additionally, Defendants contend that Counterclaim IV is not time-barred under the statute of limitations and is pled with specificity under CCP Rule 9(b).

On October 12, 2012, the Court held a hearing on the Motion and the Response. Counsel for both parties appeared before the Court. After oral argument by both parties, the Court reserved decision on the Motion. This is the Court’s decision regarding the merits of the Motion.

Decision and Analysis

In considering motions to dismiss filed pursuant to CCP Rule 12(b)(6), the Court must assume that all well-pleaded facts in the complaint (or, as here, the Counterclaims) are true.² The complaint should not be dismissed unless “the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible to proof.”³

A. Counterclaims I-III are not defective under the Declaratory Judgment Act

Bancroft contends that Defendants’ Counterclaims I-III should be dismissed in violation of the Declaratory Judgment Act because they allegedly re-state the allegation of the Complaint. In support, Bancroft asks the Court to look to and apply the holding set forth in *In re RJR*

¹ Hereafter, citation to this Court’s rules of civil procedure will be as “CCP Rule ___.”

² *Battista v. Chrysler Corp.*, 454 A.2d 286, 287 (Del. Super. 1982).

³ *Id.* (citations omitted).

*Nabisco, Inc.*⁴ *RJR Nabisco* holds that a defendant may not seek a declaratory judgment that mirrors (or is directly the reverse of) the cause of action alleged by the complaint.⁵ For the Motion to be successful under this theory, the Counterclaims would have to be identical to the claims set out in the Complaint and seek, from the Court, declarations exactly the opposite of what Bancroft seeks in the Complaint. For example, the Complaint alleges a breach of the lease agreement between the parties. Defendants would fall afoul of *RJR Nabisco* and thereby “violate” the Declaratory Judgment Act if Defendants had counterclaimed seeking a declaratory judgment that they did not breach the lease agreement. The Counterclaims do not seek that relief. Counterclaims I-III seek declarations that the lease agreement, through the Amendment, is not enforceable due to mutual mistake and/or unilateral mistake. Counterclaims I-III, therefore, are not the type of “empty procedural gesture[s]” that the Court of Chancery in *RJR Nabisco* dismissed as defective.⁶ As such, the Court denies the Motion with respect to Counterclaims I-III as these counterclaims do not violate the Declaratory Judgment Act.

Bancroft’s alternative argument to strike Counterclaims I-III as redundant under CCP Rule 12(f) is also denied. It is true that Counterclaims I-III seek declaratory judgments that basically re-state certain affirmative defenses asserted in the Answer. CCP Rule 8(c) governs the pleading of affirmative defenses, and provides, in relevant part, as follows:

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as defense, the Court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.⁷

⁴ 1990 WL 80466 (Del. Ch. June 12, 1990) (Allen, C.).

⁵ 1990 WL 80466, at *1 (“The counterclaims here are simply a restatement or specification of the answer denying liability. Such a situation does not respond to the purposes of the Declaratory Judgment Act, 10 *Del. C.* §6500 *et. seq.*”). See *Rollins v. Int’l Hydronics Corp.*, 303 A.2d 660 (Del. 1973); *Stroud v. Miliken Enterprises, Inc.*, 552 A.2d 476 (Del. 1989).

⁶ 1990 WL 80466, at *1.

⁷ Ct. Com. Pl. Civ. R. 8(c). Moreover, the Court notes CCP Rule 8(f) also states that pleadings “shall be so construed as to do substantial justice.” The Court holds that dismissal of Counterclaims I-III, at this stage in the proceedings, for purportedly being duplicative of certain of the defenses would not substantially further justice.

Utilizing the guidance set out in CCP Rule 8(c), the Court will await the development of the discovery and the presentation of the facts – either in additional dispositive motions or at trial – before making a ruling that the Counterclaims are valid, if at all, as either affirmative claims for relief or as defenses. But at this stage of the proceeding, assuming – as the Court must -- that the facts plead in Counterclaims I-III are true, Defendants have stated a claims for affirmative relief.

B. Counterclaim IV will not be dismissed as time-barred and is specifically pleaded

Bancroft argues that the Court should dismiss Counterclaim IV, Defendants’ consumer fraud claim, because that claim is time-barred under 10 *Del C.* §8106. In the Motion, Bancroft asserts that the three year statute of limitations began to run in 2002 when the original lease was executed, which has since expired. For purposes of CCP Rule 12(b)(6), the Court believes that the record does not yet support these arguments and, therefore, denies the Motion with respect to Counterclaim IV.

Defendants’ alleged violation of the Consumer Fraud Act is governed by a three year statute of limitations.⁸ Delaware law allows the tolling of the statute of limitations when there is an allegation of fraudulent concealment and the defendant has acted affirmatively to conceal the wrong.⁹ “Under the fraudulent concealment doctrine of tolling, a plaintiff must show that a defendant ‘knowingly acted to prevent plaintiff from learning facts or otherwise made misrepresentations intended to put plaintiff off the trail of inquiry.’”¹⁰ Additionally, Delaware has a time of discovery rule, which provides that under certain circumstances, a cause of action does not arise until a party has reason to know of that cause of action.¹¹ Analysis under either legal principle, at this point, would require the Court to go beyond the scope of the pleadings and

⁸ See *Stenta v. General Motors Corp.*, 2009 WL 1509299, at *6 (Del. Super. May 29, 2009).

⁹ *Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 563 (D. Del. 2010).

¹⁰ *Id.* (quoting *State ex. Rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 531 (Del. Ch. 2005)).

¹¹ *Mentis v. Delaware Am. Life Ins. Co.*, 1999 WL 744430, at *10 (Del. Super. July 28, 1999).

consider matters “susceptible to proof.” That is not the standard here. Bancroft must demonstrate under CCP Rule 12(b)(6) that Defendants would not be entitled to recover under any reasonably provable set of facts.¹² The Answer and the Counterclaims provide facts, if proved, that could toll the statute of limitations with respect to the claim brought under Counterclaim IV. Therefore, the Court must deny the Motion as to Counterclaim IV and the statute of limitations argument.

Counterclaim IV also complies with the heightened pleading requirements provided by CCP Rule 9(b), which states that claims of fraud must be pleaded with particularity. Under CCP Rule 9(b), the allegations relating to the purported fraud must be specific enough “to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.”¹³ “Rule 9(b) does not require the recitation of every material detail of the fraud such as date, location and time . . .”¹⁴ Further, the Third Circuit Court of Appeals has cautioned against construing the word “particularity” too narrowly because to do so “fails to take account of the general simplicity and flexibility contemplated by the rules.”¹⁵

Counterclaim IV puts Bancroft on notice of the fraud allegations with enough particularity to allow Bancroft to defend against the action as required under Delaware law. Counterclaim IV incorporates paragraphs 1 through 50 and the affirmative defenses. Defendants’ fraud allegations include that: (1) “such Amendment was procured through intentional or negligent misrepresentation of Plaintiff to Defendant;”¹⁶ (2) “such costs have not been incurred

¹² *Battista v. Chrysler Corp.*, 454 A.2d 286, 287 (Del. Super. 1982).

¹³ *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at *5 (Del. Super. Apr. 26, 2001).

¹⁴ *In re Student Fin. Corp.*, 2004 WL 609329, at *1 (D. Del. March 24, 2004)(citations omitted).

¹⁵ *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3d. Cir. 1983)(citations omitted)(applying Fed. R. Civ. P 9(b) which is identical in all relevant aspects to CCP Rule 9). *See also Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d. Cir.), *cert. denied*, 469 U.S. 1211 (1985).

¹⁶ Defendants’ Answer, ¶ 5.

and were misrepresented by Plaintiff and/or its predecessors;”¹⁷ (3) “when presenting the Amendment, Plaintiff made the knowing, intentional, or negligent misrepresentation that the rental increases as specified in the Amendment were required and authorized pursuant to the Lease, and the amount claimed for the leasehold improvement loans or leasehold improvements, was accurate;”¹⁸ (4) “the amounts specified by the Plaintiff in the Amendment . . . were overstated . . . by amounts exceeding \$26,000;”¹⁹ (5) “Plaintiff knew or had reason to know that its representations, concealments and/or omissions were material and false and . . . were done with intent to induce Defendant [] to execute the Amendment.”²⁰

Defendants have plead specifically and have put Bancroft on notice of the alleged fraud by providing Bancroft with the types of specific details required under CCP Rule 9(b). The Court finds that the pleaded facts provide the requisite particularity under CCP Rule 9(b), and therefore, the Motion is denied as to Counterclaim IV.

With respect to Counterclaim IV, Bancroft finally argues that even if Counterclaim IV is not time-barred, the claim relates to a post-transaction communication that falls outside of the scope of the Consumer Fraud Act. Bancroft relies on *Thomas v. Hartford Mut. Ins. Co.*²¹ in support of this argument for dismissal. In *Thomas v. Hartford Mut. Ins. Co.*, the Superior Court granted summary judgment on the consumer fraud claim because the fraud alleged was perpetrated by an agent after the sale of the insurance policy and the facts demonstrated the fraud was not “in connection with the sale or advertisement of the policy, and therefore does not fall within the constructs of the Consumer Fraud Act.”²² The Motion is a motion to dismiss under

¹⁷ *Id.* at ¶ 11.

¹⁸ *Id.* at, ¶ 37.

¹⁹ *Id.* at, ¶ 38.

²⁰ *Id.* at, ¶ 40.

²¹ 2003 WL 220511 (Del. Super. Jan. 31, 2003).

²² *Id.* at *4.

CCP Rule 12(b)(6) and, at this stage of the proceedings, the Court must assume that all well-pleaded facts are true.²³ In the Answer and Counterclaims, Defendants allege that a commercial lease agreement existed between the parties and Defendants claimed that there was a misrepresentation in connection with the formulation of the Amendment.²⁴ This is not a post-transaction communication but one purportedly occurring in connection with the transaction relating to the Amendment. So, unlike in *Thomas v. Hartford Mut. Ins. Co.*, the assumed fact relates to the actual transaction and not some subsequent act. Therefore, the Court cannot find that Defendants “would not be entitled to recover under any reasonably conceivable set of circumstances” for the consumer fraud claim.

Conclusion

After consideration of the pleadings, the arguments presented by the parties on the record on October 12, 2012, the law, and the reasons stated by the Court:

IT IS HEREBY ORDERED that the Motion is **DENIED** with respect to the Counterclaims.

IT IS SO ORDERED this 7th day of November, 2012.

Eric M. Davis

Eric M. Davis
Judge

²³ *Battista*, 454 A.2d at 287.

²⁴ *See, e.g.*, Answer, ¶¶ 37 and 39.