

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AcademixDirect, Inc.,)
)
 Plaintiff,)
) C.A. No.: N19C-10-246 FJJ
 v.)
)
 Digital Media Solutions, LLC, et al.,)
)
)
 Defendants.)

Submitted: May 8, 2020

Decided: June 26, 2020

ORDER

*Upon Plaintiff/Counterclaim Defendants' Motion to Dismiss.
GRANTED, in part, and DENIED, in part.*

*Upon Plaintiff/Counterclaim Defendants' Motion to Stay.
DENIED AS MOOT.*

This 26th day of June, 2020, upon consideration of Plaintiff/Counterclaim Defendant AcademixDirect, Inc.'s ("Plaintiff") Motion to Dismiss, Defendant/Counterclaim Plaintiff Digital Media Solution's and Avenue 100 Media Solutions LLC's (collectively referred to as "Defendants") Response, and Plaintiff's Reply, it appears to the Court that:

1. Plaintiff has filed a breach of contract claim against Defendants. In response to Plaintiff's breach of contract claim, Defendants have raised affirmative defenses and filed a counterclaim that alleges breach of contract and fraud. Additionally, Defendants assert a claim for the recovery of lost profits, third-party indemnification, and a claim under Delaware's Unfair Trade Practice Act. Plaintiff has moved to dismiss some of the claims asserted in Defendants' counterclaim.

2. Under Superior Court Civil Rule 12(b)(6), the Court may dismiss a claim if it determines with reasonable certainty that no set of facts can be inferred from the pleadings upon which the nonmoving party could prevail.¹ When analyzing a motion to dismiss under Rule 12(b)(6), the Court accepts the well-pled allegations of the counterclaim as true and draws all reasonable inferences that logically flow from those allegations in favor of the non-moving party.²

3. Plaintiff argues that the Defendants have not adequately pled a breach of contract claim. I draw the parties' attention to paragraph 2 of the counterclaim.³ I find

¹ *Central Mortgage Co., v. Morgan Stanley Mortgage Capital Holdings, LLC.*, 27 A.3d 531, 534 (Del. 2011).

² *Clinton v. Enterprise Rent-A-Car*, 977 A.2d 892, 895 (Del. 2009).

³ See Compl. at pp. 9-10. (Counterclaim ¶ 2(a)-(g)).

that the allegations in this paragraph adequately plead a breach of contract claim. On this basis, Plaintiff's Motion to Dismiss the breach of contract claim is DENIED.

4. Next, Plaintiff alleges that Defendants' claim for lost profits should be dismissed because the parties' contract ("Agreement") bars such a claim.

Section 23 of the Agreement provides:

NEITHER PARTY SHALL BE HELD LIABLE, WHETHER IN TORT, BREACH OF CONTRACT OR ANY OTHER LEGAL THEORY, FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES, OR FOR ANY LOST REVENUE (EXCLUDING AMOUNTS OWED BY [Digital Media] TO [Academix] HERENUNDER)(*sic*), LOST PROFITS, OR LOST DATA OR ANY COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES ARISING FROM THE PERFORMANCE OF OR FAILURE TO PERFORM UNDER THIS AGREEMENT, REGARDLESS OF WHETHER A PARTY WAS INFORMED OR HAD ADVANCE KNOWLEDGE OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS.⁴

The clear language of Section 23 of the Agreement bars any recovery of consequential damages or lost profits "arising from the performance or failure to perform under this Agreement."⁵ Defendants claim that, as a consequence of Plaintiff's allegedly wrongful actions, certain customers took adverse action against Defendant. This alleged adverse action involves customers ceasing or reducing business with the Defendant and customers declining to pay for leads submitted by Defendant that were procured from Plaintiff. These "lost profit" damages are not recoverable under Section 23 of the Agreement.⁶ As such, Defendants' claim for lost profits is DISMISSED.

⁴ Compl., Ex. A at p. 6.

⁵ *Id.*

⁶ See *Relax Ltd v. AMP Acquisition Co.* 2011 WL 2162915 (Del. Super., May 26, 2011).

5. Next, Plaintiff moves to dismiss Defendants' claim for third-party indemnification for reasons under paragraph 25 of the Agreement.⁷ It provides:

25. **Indemnification.** To the fullest extent permitted by law, each Party ("Indemnitor") shall indemnify, defend, and hold the other Party harmless, including their respective directors, officers, employees, shareholders, agents, sub-contractors, representatives and affiliated companies (collectively the "Covered Parties"), from and against any and all damages, losses, liabilities, costs and expenses of any kind or nature (including reasonable legal fees and other expenses incurred in investigating and defending against the same) arising out of any claim, suit, action or proceeding brought by a third party against a Covered Party that is based upon or results from a breach by the Indemnitor of any representation, warranty, covenant, or obligation in this Agreement. The obligations of an Indemnitor under this Section 25 are expressly conditioned upon (i) the Covered Party seeking indemnification providing prompt notice to the Indemnitor of any claim for which indemnification is sought, (ii) tendering to the Indemnitor sole control over defense and settlement of such claim and (iii) providing to Indemnitor at Indemnitor's cost and expense, all reasonable cooperation requested by Indemnitor in connection with the defense and settlement of such claims.⁸

Plaintiff claims that the third-party claim for indemnification should be dismissed because (1) there has been no allegation that a third-party claim has been made and (2) the notice requirement of any such claim has not been made.⁹ In contrast, Defendants plead that a third-party claim has been made and notice has been given.¹⁰ At this juncture, this is sufficient to overcome the Rule 12(b)(6) standard.¹¹ Whether such a claim has the appropriate factual basis is an issue for another day. As such, Plaintiff's Motion to Dismiss Defendants' Third Party Indemnification Claim is DENIED.

⁷ Pl.'s Mot. to Dismiss at pp. 12-15.

⁸ Compl., Ex. A at p. 7.

⁹ Pl.'s Mot. to Dismiss at pp. 12-15.

¹⁰ Defs.' Answ. Br. in Opp. to Pl.'s Mot. to Dismiss at pp. 14-16.

¹¹ Super. Ct. Civ. R. 12(b)(6).

6. Next, Plaintiff argues that Defendants' claim under the Delaware Deceptive Trade Practices Act ("DTPA") should be dismissed.¹² To sustain a claim under the DTPA, the party seeking such relief must, at minimum, have standing to seek an injunction.¹³ Standing for an injunction requires an ongoing wrong.¹⁴ In the instant case, the parties ceased business activities with each other no later than mid-2019. As there is no ongoing harm, injunctive relief would be inappropriate. Thus, Defendants' DTPA counterclaim is DISMISSED.

7. Defendants also allege, in their counterclaim, a claim of fraud. Under Superior Court Civil Rule 9(b),¹⁵ fraud must be pled with particularity.¹⁶ In order to satisfy Rule 9(b), a party must allege with particularity the: (i) time, place, and contents of the false representations; (ii) the identity of the person making the false statements; and (iii) the benefit to be obtained by making them.¹⁷ The fraud claim as alleged, lacks the particular facts required by Rule 9(b). There is no information as to: (i) the time, place, or contents of the false representations; (ii) the identity of the persons making the false claims; or (iii) the benefit to be obtained by making them. In short, the requirements of Rule 9(b) have not been satisfied.

However, even assuming the Rule 9(b) particularity requirement had been met, the fraud claim still fails. Under Delaware law, a claim for fraud must stand on its own,

¹² Pl.'s Mot. to Dismiss at pp. 16-18.

¹³ *Grand Ventures v. Whaley*, 622 A.2d 655, 660 (Del. Super. 1992), *aff'd*, 632 A.2d 63 (Del. 1993).

¹⁴ *Agilent Techs, Inc. v. Kirkland*, 2009 WL 119865 (Del. Ch., Jan. 20, 2009).

¹⁵ Super. Ct. Civ. R. 9(b).


¹⁶ *Trenwick America Litigation Trust v. Ernest & Young, LLC.*, 906 A.2d 168, 207 (Del.Ch. 2006), *aff'd* 931 A.2d 438 (Del.2007).

¹⁷ *Nutt v. AC&S, Inc.* 466 A.2d 18 (Del.Super.Ct. 1983) *aff'd sub.nom.*, *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984).

separate and apart from a claim for breach of contract.¹⁸ In an effort to avoid the “bootstrapping” doctrine, Plaintiff argues that the claims of fraud are based upon Plaintiff’s attempt to conceal its breach of contract to Defendant.¹⁹ A similar argument was recently raised and rejected by this Court in *Continental Finance Co., LLC v. ICS Corp.*²⁰ As in *Continental*, the duty independent of the contract that is alleged here is the duty not to lie. This is not a claim that is independent of the parties’ underlying contract. Therefore, since Defendants’ claim for fraud does not meet the requirements of Rule 9(b) and also runs afoul of the bootstrapping doctrine, it is DISMISSED.

8. A Motion to Stay is also pending.²¹ With the issuance of this decision, that Motion to Stay is now moot. As Defendants’ discovery was issued before this decision, the Court fully expects that discovery will be tailored in a manner consistent with the Court’s decision on this instant Motion to Dismiss.

IT IS SO ORDERED.



Francis J. Jones, Judge

Wilmington, Delaware

cc: File&ServeXpress

¹⁸ *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917 (Del. Super. Aug. 7, 2019).

¹⁹ Pl.’s Resp. to Defs. Answ. Br. in Opp. to Pl.’s Mot. to Dismiss at pp. 19-22.

²⁰ *Continental Finance Co., LLC v. ICS Corp.*, 2020 WL 836608 (Del. Super., Feb. 20, 2020).

²¹ D.I. 23.