

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINTAS CORPORATION	:	
	:	NO. 1:13-CV-00241
Plaintiff,	:	
	:	OPINION AND ORDER
v.	:	
	:	
FIRST ADVANTAGE ENTERPRISE	:	
SCREENING CORPORATION	:	
	:	
Defendant.	:	

This matter is before the Court on Defendant's Motion to Dismiss Count Three of Plaintiff's Complaint (doc. 4), Plaintiff's Memorandum in Opposition (doc. 9), and Defendant's Reply (doc. 12). For the reasons indicated herein, the Court DENIES Defendant's Motion.

I. Background

This case involves a contractual dispute and allegedly independent fraudulent misrepresentations (docs. 1, 9). In early 2010, Defendant First Advantage Enterprise Screening Corporation ("First Advantage") agreed to provide driver qualification and drug testing services to ensure the compliance of Plaintiff Cintas Corporation ("Cintas") with regulations established by the United States Department of Transportation ("DOT") (docs 9, 12). The terms of this agreement are memorialized in three documents, the Master Service Agreement ("MSA"), the Driver Qualification Service Addendum, and Drug Free Workplace Service Addendum (doc. 1). Plaintiff claims that the agreements required First Advantage to assist Plaintiff

in complying with DOT regulations by developing and implementing an auditing and drug testing program (doc. 9). Plaintiff alleges that Defendant not only failed to provide the contracted-for compliance services, but in addition, sent Cintas monthly reports of compliance statistics that misrepresented the actual rates of compliance resulting in Cintas' continued payments to First Advantage (Id.). Plaintiff brings claims for 1) breach of contract, 2) unjust enrichment, and 3) fraudulent misrepresentation (doc. 1). Defendant brings this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) arguing that Plaintiff has failed to state a claim upon which relief can be granted as to Count Three (doc. 4). Defendant argues that Plaintiff's claim for fraudulent misrepresentation is barred by the economic loss doctrine (docs. 4, 12).

II. Motion to Dismiss Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed. R. Civ. P. 8(a), which requires that a pleading "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976); Erickson v. Pardus, 551 U.S. 89 (2007). In its scrutiny of the complaint, the Court must construe all well-pleaded facts liberally in favor of the party opposing the motion. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its

face.” Courie v. Alcoa Wheel & Forged Products, 577 F.3d 625, 629-30 (6th Cir. 2009), quoting Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

A motion to dismiss is therefore a vehicle to screen out those cases that are impossible as well as those that are implausible. Courie, 577 F.3d at 629-30, citing Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L. REV. 873, 887-90 (2009). A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Iqbal, 129 S.Ct. at 1949. Plausibility falls somewhere between probability and possibility. Id., citing Twombly, 550 U.S. at 557. As the Supreme Court explained,

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Id. at 1950.

The admonishment to construe the plaintiff's claim liberally when evaluating a motion to dismiss does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal

conclusions. Wright, Miller & Cooper, Federal Practice and Procedure: § 1357 at 596 (1969). "In practice, a complaint...must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), quoting In Re: Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981); Wright, Miller & Cooper, Federal Practice and Procedure, § 1216 at 121-23 (1969). The United States Court of Appeals for the Sixth Circuit clarified the threshold set for a Rule 12(b)(6) dismissal:

[W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988).

III. Discussion

Defendant argues that Plaintiff's fraudulent misrepresentation claim should be dismissed based on the economic loss doctrine, which prohibits the bringing of tort claims where overlapping claims in contract adequately address the alleged losses suffered when they are only economic in nature (doc. 4 citing Del. Art Museum v. Ann Beha Architects, Inc., No. 06-481, 2007 WL 2601472, at *2 (D. Del. Sept. 11, 2007); Brasby v. Morris, No. 10-022, 2007 WL 949485, at *6 (Del. March 29,

2007)). Defendant claims that because Plaintiff did not allege a breach of a duty independently of the duties imposed by the contract, the only alleged misrepresentations pertain to performance, and the relief sought in the fraudulent misrepresentation and breach of contract claims are identical, Count Three should be dismissed (Id. citing B&P Co. v. TLK Fusion Entertainment, LLC, No. 3:11-CV-276, 2013 WL 693167, at *10 (S.D. Ohio Feb. 26, 2013); Templeton v. EmCare, Inc., 868 F. Supp. 2d 333, 340 (D. Del. 2012)).

Plaintiff argues in response that the allegedly fraudulent compliance reports were not accounted for in any of the three agreements (doc. 9). Plaintiff claims that in reliance on the statistics presented in the reports, it continued making payments to First Advantage and developed a false sense of understanding and security about its DOT compliance (Id.). In Plaintiff's view, the misrepresentations were separate and apart from the performance of the contract such that the economic loss doctrine is inapplicable (Id.). Plaintiff claims that intentional tort claims like fraudulent misrepresentation are recognized exceptions to the economic loss doctrine because they arise independently of the contract (Id.).

In its Reply, Defendant reiterates that the allegedly fraudulent compliance reports were generated pursuant to the contract (doc. 12). Defendant again asserts that the fraudulent misrepresentation claim should be dismissed because the alleged fraud arose out of the contract and the Plaintiff has not identified any separate injuries (Id.).

Having reviewed this matter, the Court finds that Plaintiff's claim for fraudulent misrepresentation survives Defendant's attack.

Though Defendant argues for the application of the economic loss doctrine, the doctrine has been held inapplicable to intentional torts under Delaware and Ohio law. The Penn Mutual Life Insurance Co. v. Norma Espinoza 2007-1 Ins. Trust., No. 09-300, 2011 WL 710970, at *3 (D. Del. Feb. 22, 2011) (citing Commonwealth Constr. Co. v. Endecon,

Inc., No. 08C-01-266, 2009 WL 609426, at *5 (Del. Sup. Mar. 9, 2009) (“Claims of fraud, as well as other intentional torts, are exceptions to the economic loss rule.”); Reengineering Consultants Ltd. v. EMC Corp., No. 08-47, 2009 WL 113058, at *6 (S.D. Ohio Jan. 14, 2009) (citing Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 630-31 (Ohio 1989). (“The economic loss rule prevents recovery in negligence of purely economic loss, not recovery under an intentional tort theory for economic loss.”)).

For the economic loss doctrine to be held inapplicable to this alleged fraudulent misrepresentation, the claim at issue must arise independently of the underlying contract. Eysoldt v. ProScan Imaging, 957 N.E.2d 780, 785 (Ohio Ct. App. 2011); McKenna v. Terminex Intern. Co., No. 04C-02-022, 2006 WL 1229674, at *2 (Del. Super. Ct. Mar. 13, 2006). Put another way, Plaintiff must allege that Defendant breached a duty that is independent of the duties owed by the contract. Eysoldt, 957 N.E.2d at 785; McKenna, 2006 WL 1229674, at *2. Here, Plaintiff’s allegation that the fraudulent misrepresentation of the compliance reports was separate and apart from Defendant’s performance obligations under the agreements is sufficient to survive Defendant’s preliminary challenge.

Finally, the Court finds mistaken Defendant’s contention that Plaintiff did not allege any separate injuries in its fraudulent misrepresentation claim. While the complaint seeks damages in excess of \$1,200,000 for both the breach of contract and fraudulent misrepresentation claim, Plaintiff further requests “other damages for First Advantage’s fraud, including all compensatory damages, interest, exemplary and punitive damages in an amount to be determined at trial” (doc. 1). The fact that Plaintiff has pleaded punitive damages, in the Court’s view, precludes Defendants’ invocation of the economic loss doctrine in this case. See Combs v. Crown Life Ins., No. 1:07-CV-00151, 2008 WL 641557, at *7 (S.D. Ohio Mar. 4, 2008).

The Court concludes that Cintas has plead sufficient facts to establish a tort arising independently of the

contract such that the claim is not definitively barred by the economic loss doctrine.

IV. CONCLUSION

For the reasons indicated herein, the Court concludes that Plaintiff's fraudulent representation claim survives Defendant's Motion to Dismiss. Accordingly, the Court DENIES Defendants' Motion to Dismiss Count Three of Plaintiff's Complaint (doc. 4).

SO ORDERED.

Dated: July 18, 2013

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District

Judge