

Cumberland, ss.

HOLLY WILSON and RYAN WILSON,
individually and as next friends of CASSIDY WILSON

Plaintiffs

v.

Docket No. BCD-CV-15-16 ✓

DANIEL G. LILLEY, P.A.
and DANIEL G. LILLEY, ESQ.

Defendants

**ORDER ON DEFENDANTS' MOTION TO STRIKE
AFFIRMATIVE DEFENSES**

Pursuant to M.R. Civ. P. 9(b) and 12(f), Defendants Daniel G. Lilley, P.A. and Daniel G. Lilley, Esq. have filed a Motion To Strike Affirmative Defenses 4 and 6 to Defendants' Counterclaim. Plaintiffs Holly and Ryan Wilson oppose the Motion. The court elects to decide the Motion without oral argument.

In their reply to Defendants' counterclaim, Plaintiffs have pleaded fraud and fraud in the inducement as the fourth and sixth numbered affirmative defenses. Defendants contend that Rule 9(b) of the Maine Rules of Civil Procedure requires affirmative defenses, as well as claims, alleging fraud to be pleaded with particularity.

Plaintiffs' Objection to Defendants' Motion to Strike notes that the Maine courts require notice pleading only. Although "Maine is a notice pleading state, . . . only requir[ing] a short and plain statement of the claim to provide fair notice of the cause of action," *Johnston v. Me. Energy Recovery Co.*, 2010 ME 52, ¶ 16, 19 A.3d 823, fraud must be pleaded in more detail than other matters. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall be stated with particularity*. Malice, intent, knowledge, and other condition of

mind of a person may be averred generally.” M.R. Civ. P. 9(b) (emphasis added); *cf.* M.R. Civ. P. 8. The requirement to plead fraud with particularity is to ensure “the defendant is fairly apprised of the elements of the claim.” 2 Harvey, *Maine Civil Practice* § 9:2 at 384 (3d ed. 2011). Notably, the need for particularity in pleading fraud is not a new requirement in Maine. Any party

seeking relief on the ground of fraud, accident or mistake, must directly charge the grounds relied upon. The statement should be so full and explicit as to show the court a clear picture of the particulars of the fraud, — the manner in which the party was misled, or imposed upon, — the character and causes of the accident, or mistake, and how it occurred. Without such a statement . . . the court can not grant relief or even hear evidence in the matter.

Semo v. Goudreau, 147 Me. 17, 20-21, 83 A.2d 209, 211 (1951).

Federal courts construing the counterpart federal Rule 9(b) are split on whether the rule applies to affirmative defenses. *See Cottle v. Falcon Holdings Management, LLC*, No. 2:11-CV-95-PRC, 2012 WL 266968, *1 (N.D. Ind. Jan. 30, 2012) (noting split among courts on the issue).

The Supreme Judicial Court of Maine has not indicated whether the particularity in pleading requirement of Rule 9(b) applies to affirmative defenses as well as to claims. However, the United States Court of Appeals for the First Circuit has said, “Fraud is an affirmative defense that must be pleaded with particularity.” *Bose Corp. v. Ejaz*, 732 F.3d 17, 22 (1st Cir. 2013), *citing* Fed. R. Civ. P. 9(b). Because the Law Court frequently follows the First Circuit’s lead in interpreting federal rules that have Maine counterparts, this court concludes that the Law Court likely would decide that the Rule 9(b) requirement of particularity applies to affirmative defenses as well as to claims and causes of action. In sum, although Maine follows the rule of notice pleadings, claims and affirmative defenses based on fraud are an exception to the general rule. *See Kaufmann v. Prudential Ins. Co. of America*, No. 09-10239-RGS, 2009 WL

2449872, *1 (D. Mass. Aug. 6, 2009) (“[w]ith the exception of fraud, the designation of a listed defense is sufficient notice to a plaintiff of its basic thrust.”)

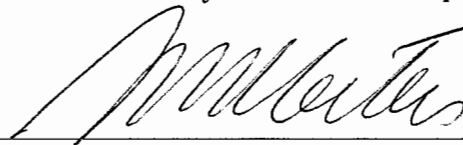
Plaintiffs also argue that the basis for their affirmative defenses of fraud and fraud in the inducement should be obvious, given that their complaint against Defendants includes a claim of fraud and fraudulent concealment at Count III. The inference may indeed be obvious, but the Defendants are still entitled to require the Plaintiffs to make the inference explicit, which they can do simply by incorporating the paragraphs of Count III by reference in pleading their affirmative defenses of fraud and fraud in the inducement.

Based on these reasons, the court will grant the Defendant's Motion to Strike. Plaintiffs have requested leave to amend, in order to meet the objection, and leave will be granted.

IT IS ORDERED: Defendants' Motion To Strike Affirmative Defenses 4 and 6 to Defendants' Counterclaim is granted. Plaintiffs' fourth and sixth numbered affirmative defenses to the counterclaim, of fraud and fraud in the inducement, are stricken. Plaintiffs may file an amended reply to counterclaim, with affirmative defenses 4 and 6 pleaded with particularity within 20 days.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this order by reference in the docket.

Dated April 9, 2015



A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 4-10-15
Copies sent via Mail Electronically

**Holly Wilson and Ryan Wilson, individually
and as next friends of Cassidy Wilson v.
Daniel G. Lilley, P.A. and Daniel G. Lilley, Esq.**

BCD-CV-2015-16

**Holly Wilson and Ryan Wilson, individually
and as next friends of Cassidy Wilson
Plaintiff**

Counsel: Julian Sweet, Esq.
Travis Brennan, Esq.
129 Lisbon Street
PO Box 961
Lewiston, ME 04243-0961

**Daniel G. Lilley, P.A. and Daniel G. Lilley, Esq.
Defendant**

Counsel: Jay Gregory, Esq.
One International Place 11th Floor
Boston, MA 02110
and
Arthur Grief, Esq.
82 Columbia Street
PO Box 2339
Bangor, ME 04402-2339