

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BLUEACORN PPP, LLC,)
)
 Plaintiff,)
)
 v.)
)
 PAY NERD LLC, PAYNERDIER)
 LLC, MATTHEW MANDELL and)
 TAYLOR HENDRICKSEN,)
)
 Defendants.)

C.A. No. 2023-0414-MMJ

Submitted: November 6, 2023
Decided: January 29, 2024
Unsealed: February 8, 2024

On Defendant Paynerd LLC, Paynerdier LLC,
Matthew Mandell, and Taylor Hendricksen’s
Motion to Dismiss Plaintiff Blueacorn PPP, LLC’s Complaint

DENIED

OPINION

A. Thompson Bayliss, Esq., Michael A. Barlow, Esq., Adam K. Shulman, Esq., Joseph A. Sparco, Esq., Abrams & Bayliss LLP, Wilmington, DE, Michael A. Levy, Esq. (*pro hac vice*) (Argued), Charlotte K. Newell, Esq., Katelin Everson, Esq. (*pro hac vice*), Sidley Austin LLP, New York, NY, Christopher M. Egleson, Esq. (*pro hac vice*), Sidley Austin, Los Angeles, CA, *Attorneys for Plaintiff Blueacorn PPP, LLC.*

Francis DiGiovanni, Esq., Todd C. Schiltz, Esq., Renée M. Dudek, Esq., Faegre Drinker Biddle & Reath LLP, Wilmington, DE, Breton Bocchieri, Esq. (*pro hac vice*) (Argued), Michael B. Lachuk, Bocchieri & Lachuk, Los Angeles, CA, *Attorneys for Defendants PayNerd LLC, PayNerdier LLC, Matthew Mandell, and Taylor Hendricksen*

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

The original complaint in this contract dispute was filed on December 23, 2021. Defendants filed a Partial Motion to Dismiss and Plaintiffs amended their complaint. The Court heard argument on Defendants' Motion to Dismiss Counts II, III, V-VII, and X of the Amended Complaint.

By Opinion dated November 3, 2022, the Court ruled that Counts I, II, IV, IX and X remained. Counts V-VIII were dismissed without prejudice. Count III - negligent misrepresentation - was dismissed because the Court of Chancery has exclusive jurisdiction over equitable claims. Plaintiffs were granted leave to file an election to transfer Count III to the Court of Chancery pursuant to 10 *Del. C.* § 1902.¹ This Judge has been cross-designated as Vice Chancellor for the purpose of addressing Count III (negligent misrepresentation) and all equitable defenses.

On December 21, 2022, Defendants filed an Answer and Third-Party Complaint, asserting various counterclaims. Plaintiffs filed motions to dismiss the counterclaims and third-party claims. By Opinion dated August 16, 2023, the Court ruled:

The Court finds that PayNerd sufficiently pled its fraudulent inducement counterclaims by alleging that Blueacorn made misrepresentations of then-existing operational capacities that were

¹See *Fin Cap Inc. v. PayNerd LLC*, 2023 WL 5543736, at *2 (Del. Super.).

based on facts known to the speakers at the time the misrepresentations were made. Under these case-specific factual allegations, whether or not fraudulent inducement ultimately is determined to be beyond mere puffery or fraud in hindsight will be determined in the context of evidence, including facts relating to credibility and context.

The Court finds PayNerd has alleged that Reis himself made misrepresentations. The Court finds that the allegations are sufficiently particularized to put Reis on notice. PayNerd may develop the factual record through discovery to make the appropriate distinctions between allegations attributable to closely related parties: Reis, Spirakus, and Fin Cap.

Therefore, the Court hereby **DENIES** Blueacorn's and Reis' Motions to Dismiss with respect to Counterclaim V. The Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaim VI.

The Court finds that PayNerd's breach of contract claims go beyond the alleged failure to process every single PPP loan application. The breach of contract claims include other alleged breaches. The Court finds that genuine issues of material fact exist that prevent dismissal of Counterclaims I and II. Therefore, the Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaims I and II.

The Court finds that Blueacorn had an implied duty to maintain accurate Salesforce records. With respect to Blueacorn's alleged duties to provide application processing, to process all applications from PayNerd, and not to mismanage internal operations, the Court finds the implied duty of good faith and fair dealing does not apply. Therefore, Blueacorn's Motion to Dismiss is hereby **GRANTED IN PART AND DENIED IN PART** with respect to Counterclaims III and IV. Counterclaims III and IV only may continue as to the alleged Salesforce data integrity.

The Court finds that PayNerd's Counterclaims VII–XII are unnecessarily duplicative of its contractual claims. Therefore, PayNerd's Counterclaims VII–XII are hereby **DISMISSED**.

Plaintiffs' and Third-Party Defendants Noah Spirakus' and Barry Calhoun's Motion to Dismiss PayNerd's Counterclaims and Third-Party Claims is hereby **GRANTED IN PART AND DENIED IN PART**. Third-Party Defendant Nathan Reis' Motion to Dismiss and Joinder is hereby **DENIED**.²

Defendants have moved to dismiss the negligent misrepresentation claim.

MOTION TO DISMISS STANDARD

When considering a Rule 12(b)(6) motion, the Court views the complaint in the light most favorable to the non-moving party, accepts the well-pled allegations, and draws reasonable inferences from those allegations.³

ANALYSIS

It is undisputed that Plaintiffs are not seeking an equitable remedy. Therefore, the issue raised in this motion is whether Plaintiffs have alleged a relationship sufficient to obtain jurisdiction in the Court of Chancery.

Negligent Misrepresentation - Required Duty

Defendants argue that there is no equity jurisdiction. Negligent misrepresentation requires either a fiduciary or other special relationship. Defendants assert Plaintiffs have failed to plead any relevant relationship. The parties are sophisticated business entities and independent contractors whose

²*Id.* at *9-10.

³*Gantler v. Stephens*, 965 A.2d 695, 703-04 (Del. 2009).

relationships are governed by, and limited to, written commercial contracts that were negotiated and performed at arms' length.

Plaintiffs counter that Pay Nerd had a pecuniary duty to provide accurate information. Plaintiffs allege that Defendants breached that duty by supplying false information, failing to exercise reasonable care in obtaining or communicating information, and that Plaintiffs suffered a pecuniary loss caused by justifiable reliance upon the false information.

Negligent misrepresentation is “essentially a species of fraud with a lesser state of mind requirement.” However, there is an added element of pecuniary duty.⁴

To assert a claim for negligent misrepresentation, a plaintiff must plead four elements: “(1) the defendant had a pecuniary duty to provide accurate information, (2) the defendant supplied false information, (3) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information.”⁵

The Court of Chancery has clarified the requirements for equity jurisdiction, based on negligent misrepresentation, in more recent case law. For example, in *Addy*

⁴*Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 822 (Del. Ch. 2014).

⁵*Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch.).

v. Piedmonte,⁶ the plaintiff failed to allege the existence of a fiduciary relationship regarding the transactions at issue. The Court concluded that the only reasonable inference was that there was no special trust imposed or any special duty to protect the plaintiff's interests.

“The Court of Chancery generally does not apply fiduciary duty doctrine to ordinary commercial transactions... ‘[I]t is vitally important that the exacting standards of fiduciary duties not be extended to quotidian commercial relationships. This is true both to protect participants in such normal market activities from unexpected sources of liability against which they were unable to protect themselves and, perhaps more important, to prevent an erosion of the exacting standards applied by courts of equity to persons found to stand in a fiduciary relationship to others.’ Bargained-for commercial relationships between sophisticated parties do not give rise to fiduciary duties. In addition, [the Court of Chancery] is chary of expanding the scope of fiduciary duty to a broad set of commercial relationships which traditionally has been regulated by normal market conditions, rather than the

⁶2009 WL 707641 (Del. Ch.).

scrupulous concerns of equity for persons in special relationships of trust and confidence.”⁷

A negligent misrepresentation claim must allege either: “(i) a special relationship between the parties over which equity takes jurisdiction (like a fiduciary relationship) or (ii) justification for a remedy that only equity can afford.”⁸ A generic pecuniary interest is not sufficient. There must be a fiduciary relationship beyond a normal arm’s-length business relationship. The plaintiff must demonstrate its dependence on the defendant - to provide information - “to such an extent as to invoke the power of equity to regulate fiduciary relationships....”⁹

The Court notes that rarely, if ever, does each party involved in a business contract dispute ***not*** have a pecuniary interest in the transaction. If the Court were to interpret “pecuniary duty” as broadly as asserted by Plaintiffs, virtually every fraud-in-the-inducement or breach of warranty claim would be heard in the Court of Chancery.

⁷*Id.* at *17 (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 627-28 (Del. Ch. 2005), *rev’d in part on other grounds*, 901 A.2d 106 (Del. 2006) and citing *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found.*, II LLC, 2005 WL 1364616, at *6 (Del. Ch.)).

⁸*Lyons Ins. Agency Inc. v. Wilson*, 2018 WL 481641, at *4 (Del. Ch.) (quoting *Envo, Inc. v. Waters*, 2009 WL 5173807, at *6 (Del. Ch.)); *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *9 (Del. Ch.).

⁹*Biegler v. Underwriting Service Mgmt. Co., LLC*, 2022 WL 17820533, at *4 (Del. Ch.).

Pleading with Particularity

Defendants argue that Plaintiffs' negligent misrepresentation claims also fails to satisfy the Court of Chancery Rule 9(b) requirement of pleading with particularity. Specifically, Defendants assert that Plaintiffs have not articulated why statements by some Defendants are attributable to all Defendants. Additionally, there are no alleged misrepresentations purportedly made by any Defendant to the "actual plaintiff" in this action - Blueacorn PPP, LLC.

Plaintiffs' contend that Defendants already have argued that Blueacorn could not claim any reliance because Blueacorn had not yet been formed when Defendants initially made their alleged misrepresentations. Defendants argue that negligent misrepresentation cannot apply because Defendants' alleged false statements were directed to Fin Cap, not Blueacorn. Plaintiffs assert that this argument fails. Plaintiffs allege that Defendants' misrepresentations continued to persist during the period of time after Blueacorn was formed through the time the contract was executed. The Defendant seller allegedly made false statements to a buyer, for the purpose of inducing the Plaintiff buyer to form a new company in order to engage in business with the seller. Under these circumstances, a claim against Defendants can be stated, even though alleged misrepresentations were not made directly from one named party to another.

In the Opinion dated August 16, 2023, this Court found:

The Court finds that PayNerd sufficiently pled the elements of its fraudulent inducement counterclaims—misrepresentation, knowledge of the falsity, intent, reliance, and damages. PayNerd sufficiently alleged that Blueacorn made misrepresentations of then-existing operational capacities that were based on facts known to the speakers at the time the misrepresentations were made. Under these case-specific factual allegations, whether or not fraudulent inducement ultimately is determined to be beyond mere puffery or fraud in hindsight will be determined in the context of evidence produced in discovery. This is especially true because the alleged misrepresentations are oral, making credibility and context of greater importance.

After considering the parties arguments on the issue of group pleading, the Court found:

The Court finds that imputation is not required in this case because the counterclaim does not allege that another's statements should be imputed to Reis. Rather, PayNerd alleges that Reis himself made misrepresentations. Therefore, the instant case is more akin to *River Valley* and *WeWork*. The Court finds that the allegations are sufficiently particularized to put Reis on notice. It is reasonably conceivable that Reis is liable for the alleged misrepresentations. PayNerd should have the opportunity to develop the factual record through discovery to make the appropriate distinctions between allegations attributable to closely related parties: Reis, Spirakus, and Fin Cap.

The reasoning applied denying dismissal of the counterclaims also applies to Plaintiffs' affirmative claims. Fin Cap Inc. and Blueacorn PPP, LLC are closely-related. Plaintiffs have sufficiently alleged misrepresentation by claiming that

Defendants' purportedly false statements were made for the purpose of inducing a buyer to form a new company to engage in business with the seller.¹⁰

Practical Considerations

In response to questioning during oral argument, counsel for Pay Nerd stated that dismissal of the negligent misrepresentation claim would streamline the case at this stage in the litigation. Counsel asserted that, for example, fewer witnesses would be necessary at trial and certain factual and legal issues would not need to be addressed. Blueacorn's counsel disagreed, stating that trial would involve the same witnesses and evidence.

When a judicial officer is cross-appointed to sit in both law and equity, the jury is presented with special interrogatories to determine the issues of fact upon which the legal claims depend. The Judge or Chancellor separately determines whether the facts support liability for the claims sounding in equity.

In this case, the Court is not persuaded that judicial economy will be served by dismissing the negligent misrepresentation claim at this time. Counsel did not provide any specifics about what witnesses or discovery would become superfluous. Although Pay Nerd argued that there would be additional factual issues regarding

¹⁰See *Trascent Mgmt. Consulting, LLC v. Bouri*, 2018 WL 4293359, at *12 (Del. Ch.); *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 508-509 (Del. Super. 1931).

the relationship between the parties, it appears that the parties' course of conduct will have to be presented to the finders of fact regardless of the nature of the cause of action.

All parties agree that negligent misrepresentation in this case is essentially a "lesser included offense" of the legal claim based on intentional or reckless fraud in the inducement. Should the jury find that Defendants are liable for fraud, the negligent misrepresentation claim will become moot. If the jury finds otherwise, the Court can address the negligent misrepresentation claim at that time.

CONCLUSION

Plaintiffs have sufficiently alleged misrepresentation by claiming that Defendants' purportedly false statements were made for the purpose of inducing a buyer to form a new company to engage in business with the seller.

The Court finds that the negligent misrepresentation claims has been pled with sufficient particularity as required by Rule 9(b). While the complaint was amended without leave of the Court, that procedural impropriety does not warrant dismissal under the present circumstances.

However, the Court is not convinced that Plaintiffs have pled a pecuniary interest to invoke equity jurisdiction, based upon negligent misrepresentation. The Court notes that rarely, if ever, does each party involved in a business contract dispute ***not*** have a pecuniary interest in the transaction. If the Court were to interpret

“pecuniary duty” as broadly as asserted by Plaintiffs, virtually every fraud-in-the-inducement or breach of warranty claim would be heard in the Court of Chancery.

Nevertheless, in the interest of judicial economy, having assessed all practical considerations, the Court declines to dismiss the negligent misrepresentation claim at this time. If appropriate, the Court will revisit the motion at the conclusion of the trial.

THEREFORE, Defendant Paynerd LLC, Paynerdier LLC, Matthew Mandell, and Taylor Hendricksen’s Motion to Dismiss Plaintiff Blueacorn PPP, LLC’s Complaint is hereby **DENIED AT THIS TIME**.

IT IS SO ORDERED.

Mary M. Johnston
The Honorable Mary M. Johnston