

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

John V. Work, Esquire
Law Office of John V. Work, P.A.
800 North King Street
Suite 303
Wilmington, Delaware 19801
Attorney for Plaintiff Universal Capital Management, Inc.

Samuel T. Hirzel, Esquire
Proctor Heyman, LLP
300 Delaware Avenue
Suite 200
Wilmington, Delaware 19801
Attorney for Defendants Micco World, Inc., Phil Lundquist, Steven Brisker, and Tom Ridenour

***Re: Universal Capital Management, Inc. v. Micco World, Inc., Phil
Lundquist, Steven Brisker, and Tom Ridenour***
C.A. No. N10C-07-039-RRC

Submitted : November 29, 2011
Decided : February 1, 2012

On Defendants' Motion to Dismiss.

DENIED.

Dear Counsel:

INTRODUCTION

Defendants' Motion to Dismiss Plaintiff's Complaint is predicated upon Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted and upon Rule 9(b) for failure to plead fraud with particularity. Defendants' Motion seeks to dismiss every claim from Plaintiff's Complaint

except for Plaintiff's claim for *quantum meruit* in Count I. This Court concludes that Defendants' Motion requires analysis of facts outside the Complaint, which compels conversion of the Motion to one for Summary Judgment. Such a conversion allows discovery to continue on Plaintiff's claims, while maintaining Defendants' right to seek dismissal of the case later with a complete factual record. Therefore, Defendants' Motion to Dismiss is **DENIED WITHOUT PREJUDICE** with leave to potentially file a Motion for Summary Judgment at the conclusion of discovery.

PROCEDURAL AND FACTUAL BACKGROUND

Defendants have moved to dismiss Plaintiff's Complaint both on jurisdictional and substantive grounds. To address both independently, the Court bifurcated the two grounds into two separate motions to dismiss. The Court previously addressed Defendants' jurisdictional Motion to Dismiss in a letter opinion dated June 2, 2011.¹ The complete facts outlined in that opinion are incorporated by reference and the only facts repeated are those necessary for analyzing the instant substantive claims.²

Plaintiff's Complaint is based upon a contractual breakdown regarding agreements to promote and facilitate Defendant Micco's initial public offering ("IPO"). Through contractual arrangements, Plaintiff offered services to provide investors for Defendant Micco's IPO in consideration for warrants to purchase stock of the publicly traded corporation to be created from Plaintiff's efforts.³ The contractual arrangements were eventually terminated by Defendant.

Many of Plaintiff's claims arise from a private offering memorandum ("POM") provided by Defendants to Plaintiff in December 2008 for use in soliciting investors. With the aid of the POM, Plaintiff solicited investors whom together invested approximately six hundred thousand dollars. Plaintiff later learned that the POM allegedly contained numerous material misrepresentations and omissions.

¹ *Universal Capital Management, Inc. v. Micco World Inc.*, 2011 WL 2347612 (Del. Super. June 2, 2011) (Court finds that jurisdiction is proper over Defendants and that service of process was effective).

² *Id.*

³ The contracts were actually between Plaintiff and Micco World Inc's predecessor in interest, Constellation Group, LLC. When analyzing Defendants' jurisdictional Motion to Dismiss the Court found sufficient privity between the parties to establish jurisdiction, and still finds the contract is enforceable against Micco World, Inc.. *See Id.*

Thereafter, upon reviewing accounting information provided by Defendants, Plaintiff discovered that Micco was allegedly misappropriating funds. Plaintiff asserts that Defendants were using the investor money for personal expenses and not as intended. In July 2009, after Plaintiff challenged the use of the funds provided, Defendants terminated the relationship with Plaintiff. In December 2009, Defendants held a shareholders' meeting and allegedly made false and disparaging claims about Plaintiff. Some of the shareholders in attendance included investors that Plaintiff found for Micco.

STANDARD OF REVIEW

Defendants filed the Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6) for “failure to state a claim upon which relief can be granted.”⁴ The standard of review on such a motion is well-settled. A motion to dismiss pursuant to Rule 12(b)(6) “tests the sufficiency of [p]laintiff’s complaint.”⁵ The plaintiff’s burden to survive dismissal is low.⁶ The Court must accept all well-pled allegations as true.⁷ A motion to dismiss should be denied if the plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof.⁸ The motion will be denied when the plaintiff is able to prove facts entitling plaintiff to relief.⁹ However, “[w]here allegations are merely conclusory. . . (i.e., without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.”¹⁰

“Delaware is a notice pleading jurisdiction and the complaint need only give general notice as to the nature of the claim asserted against the defendant in order to avoid dismissal for failure to state a claim.”¹¹ Even if the plaintiff’s allegations are “vague or lacking in detail, [a complaint] is nevertheless ‘well-pleaded’ if it puts the opposing party on notice of the claim being brought against it.”¹² A

⁴ Super. Ct. Civ. R. 12(b)(6).

⁵ *Browning v. Data Access Systems, Inc.*, 2011 WL 2163555 *2 (Del. Super. Jan. 31, 2011).

⁶ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

⁷ *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super. Mar. 31, 2009) (*citing Anglo Am. Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.*, 829 A.2d 143, 148–49 (Del. Ch. 2003)).

⁸ *Duffield Assoc., Inc. v. Meridian Architects & Engineers, LLC*, 2010 WL 2802409 *3 (Del. Super. June 16, 2010).

⁹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978) (citations omitted).

¹⁰ *Lord v. Souder*, 748 A. 2d 393, 398 (Del. 2000).

¹¹ *Nye v. Univ. of Delaware*, 2003 WL 22176412, at *3 (Del. Super. Sept. 17, 2003).

¹² *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

complaint with sufficient notice shifts the burden to the defendant to “determine the details of the cause of action by way of discovery for the purpose of raising legal defenses.”¹³ The motion will be granted “only where it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief.”¹⁴

Additionally, Superior Court Civil Rule 9(b) requires that if a Complaint asserts a claim of fraud that the circumstances constituting a fraud claim be stated with particularity.¹⁵ In order to meet the particularity requirement, a complaint “must state the time, place, and contents of the alleged fraud, as well as the individual accused of committing the fraud.”¹⁶ The following elements must be plead to state a claim for fraud:

- (1) a false representation, usually of fact, made by the defendant;
- (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
- (3) an intent to induce the plaintiff to act or to refrain from acting;
- (4) the plaintiff's action or inaction was taken in justifiable reliance upon the representation; and
- (5) damage to the plaintiff as a result of such reliance.¹⁷

CONTENTIONS

1. Breach of Contract and Unjust Enrichment

Defendants seek to dismiss Plaintiff’s breach of contract claim by asserting that Defendant is not a party to the contract because the contracts are between Plaintiff and Constellation Group, LLC,¹⁸ and because Defendants allege that the

¹³ *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del.1952).

¹⁴ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del.1998) (citing *Spence*, 396 A.2d at 968).

¹⁵ *Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222 (Del. Super. Apr. 1, 2010) (citing *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793 (Del. Ch. July 24, 2009)).

¹⁶ *Northpointe Holdings v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677 *8 (Del. Super. Sept. 14, 2010).

¹⁷ *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542 *4 (Del. Super., April 26, 2001) (quoting *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del.1983)).

¹⁸ See *Weatherproofing Specialties, Inc. v. Furlong*, 2001 WL 1555694 at *1 (Del. Super. Aug. 20, 2001) (granting defendant’s motion to dismiss because plaintiff was not a party to the contract).

consideration owed under the contract was conditioned upon a successful initial public offering which never occurred. Additionally, Plaintiff's Complaint includes a joint unjust enrichment and *quantum meruit* claim. Defendants have not sought to dismiss Plaintiff's *quantum meruit* claim and instead have conceded that it should survive a Motion to Dismiss. However, Defendants argue that if the Court determines that a contract governs the parties' relationship, an unjust enrichment claim is invalid.

Plaintiff responds by arguing that there is privity between the parties because the contracts include clauses binding successor entities. This Court agreed with Plaintiff in its previous opinion in this case on the jurisdictional motion to dismiss.¹⁹ Plaintiff also asserts the consideration was not contingent because the contracts provide that consideration is due within thirty days of signing the contract. Plaintiff asserts that the unjust enrichment claim is presented in the alternative such that if the Court were to find that the contract was invalid in accordance with Defendants' privity argument, unjust enrichment would then be available.²⁰

2. Fraud

Defendants allege that Plaintiff's fraud claim must be dismissed because it is not averred with the standard of particularity required for a valid fraud claim. Defendants argue that Plaintiff's fraud claim lacks any specificity regarding the required details for time, place, and content of the alleged fraud. Defendant argues that Plaintiff's Complaint simply refers to the POM and attributes misrepresentations to Defendant in a general way that is insufficient to withstand dismissal.²¹

¹⁹ *Universal Capital Management, Inc. v. Micco World Inc.*, 2011 WL 2347612 *3 (Del. Super. June 2, 2011).

²⁰ Superior Court Civil Rule 8(e)(2) states that, "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically. . . [t]he party may also state as many separate claims or defenses as the party has regardless of consistency."

²¹ See e.g., *Metro Comm'n Corp. BVI v. Adv. Mobilecomm Tech's, Inc.*, 854 A. 2d 121, 144 (Del Ch. 2004)(dismissing fraud claim that failed to "identify any specific statement by a specific defendant."); *Hauspie v. Stonington Partners, Inc.* 945 A. 2d 584, 588 (Del. 2008)(dismissing fraud claim where elements of fraud claim were not pled with particularity as to an individual defendant).

In response, Plaintiff stressed that at a minimum, limited discovery was required to further develop the facts underpinning the fraud claim. Furthermore, Plaintiff avers that while there is a heightened pleading standard for fraud, the standard does not require a pleading of exactitude.²² Plaintiff argues that the Complaint satisfactorily pleads fraud because the POM contained material misrepresentations regarding finances, capital, and intent to complete an initial public offering. Plaintiff contends that the Complaint otherwise provides sufficient details regarding the time, place, and declarant of the misrepresentation.

3. Tortious Interference With Business Relations

To sustain a claim of tortious interference with business relations, a plaintiff must demonstrate: “(a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages.”²³ Defendant contends that Plaintiff’s claim must fail because Plaintiff fails to identify facts supporting the elements and because Plaintiff only vaguely describes missed business opportunities.

Plaintiff alleges that Defendants intentionally damaged Plaintiff’s reputation at the shareholders’ meeting and the POM simply because Plaintiff questioned Defendant Micco’s finances. Plaintiff contends that this claim would benefit from discovery.

4. Defamation

Defendants argue that Plaintiff has failed to plead defamation with proper specificity. To sustain a defamation claim, a plaintiff must plead “(1) a defamatory communication; (2) publication; (3) [that] the communication refers to the plaintiff; (4) a third party’s understanding of the communication’s defamatory

²² See *Narrowstep*, 2010 WL 5422405 *13(Del Ch., Dec. 22, 2010) (“While the Complaint to some degree lacks detail about time, place, and speaker” the Court found the Complaint sufficiently apprised the defendant of the basis for the claim.) See also *Grunstein v. Silva*, 2009 WL, 4698541 at *14(Del. Ch. Dec 8)(The Complaint must contain “detail sufficient to apprise the defendant of the basis for the claim.”)

²³ *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001).

character; and (5) injury.”²⁴ A defendant “may plead the truth of the alleged defamatory statement as a defense.”²⁵ Defendants contend that the Complaint fails to allege the defamatory communication and a third party’s understanding of the communication’s defamatory character and as such, the defamation claim must be dismissed.

Like the fraud claim, in response Plaintiff stressed that the defamation claim also requires factual development through discovery. Additionally, Plaintiff contends that the defamatory statement occurred at the shareholders’ meeting and that the false statement itself consisted of various disparaging accusations leveled against Plaintiff. Plaintiff states that the third party’s understanding of the defamatory statement is also pled because the Complaint indicates that adverse and injurious results were felt in Plaintiff’s ability to continue a business relationship with current and future investors.

5. Civil Conspiracy

Defendants submit that Plaintiff’s civil conspiracy claim must be dismissed because “[c]ivil conspiracy is not an independent cause of action...it is essential that there be an underlying wrongful act, such as a tort or statutory violation.”²⁶ “A breach of contract is not an underlying wrong that can give rise to civil conspiracy.”²⁷ Moreover, directors cannot conspire with their corporation.²⁸

Plaintiff argues that the claim for civil conspiracy is not based upon the breach of contract claim but rather, is based upon Plaintiff’s claims for fraud, defamation, and tortious interference. Plaintiff contends that Defendants acted in concert, through the corporate form, to perpetuate a fraud and use investor money for personal gain. Since the civil conspiracy claim requires an underlying tort, Plaintiff asserts that discovery on the underlying fraud and defamation claims is necessary for this claim as well.

6. Damages

²⁴ *Eaton v. Raven Transport, Inc.*, 2010 WL 4703397, *2(Del. Super. Nov. 15, 2010).

²⁵ *Id.*

²⁶ *NKS Distrib., Inc. v. Tigani*, 2010 WL 2178520 *5 (Del Ch. May 28, 2010).

²⁷ *NAACO Indus., Inc., v. Applicia Inc.*, 2009 WL 4981577 *31 (Del Ch. Dec. 22, 2010).

²⁸ *Amaysing Techs., Corp. v. Cyberair Comms., Inc.*, 2005 WL 578972 (Del Ch. Mar. 3, 2005).

Lastly, Defendants seek to dismiss Plaintiff's request for punitive damages, which is featured in the Complaint as an independent claim. "Punitive damages are not recoverable for breach of contract unless the conduct also amounts independently to a tort" or was malicious or willful.²⁹

Plaintiff argues that punitive damages are appropriate based upon the fraud, defamation, and tortious interference, and that whether Defendants' behavior was sufficiently outrageous to warrant punitive damages is a question for the jury. Plaintiff proffers that punitive damages were provided in the Complaint as an independent claim simply because Plaintiff wished to provide Defendant with adequate notice.

DISCUSSION

The current Motion to Dismiss seeks to dismiss all of Plaintiff's claims with the exception of Plaintiff's claim for *quantum meruit* in Count I. Therefore, discovery on the *quantum meruit* claim will continue regardless of the Court's finding on this Motion. Some of the claims proffered in Plaintiff's Complaint are pled somewhat thinly. However, argument and briefing on this Motion has demonstrated that the factual record requires further development so that the Court may fairly analyze Plaintiff's claims. Plaintiff's request for discovery seems appropriate and is not limited to specific claims since the facts that the individual claims rely upon are inherently interconnected.

Specifically, the Court notes that two of the most thinly pled claims are Plaintiff's claim for fraud and defamation. Plaintiff's fraud claim is problematic in light of the higher pleading standard for fraud. Plaintiff provided only scant detail regarding what specific false representations were made and only generally described the declarant as being affiliated with Micco. A fraud claim requires a heightened pleading standard, but at its core it requires details regarding time, place, and content. It is on the content prong where the Complaint is weakest. However, despite being somewhat of a close call, there is a sufficient pleading. Further factual development through discovery will aid in determining whether the fraud claim stands.

²⁹ *E.I. duPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996).

Plaintiff's defamation claim is lacking for many of the same reasons shared by Plaintiff's fraud claim. Like with the fraud claim, more development is required regarding what exactly was said at the shareholders' meeting and by whom, and more information is required regarding precisely what misrepresentations were included in the POM. Once that factual record is complete, an analysis of whether those statements equate to defamation will be ripe.

Not only are facts needed to fairly adjudicate this Motion, facts outside the Complaint have already been brought before the Court during oral argument and in briefing. Effectively, the Court has been asked to test the sufficiency of claims which rest entirely upon the POM and statements made at the shareholders' meeting, when the POM is not a part of the Complaint and the facts are not fully developed from the shareholders' meeting.

“If, on a motion. . .to dismiss for failure of a pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”³⁰

“Any *sua sponte* conversion by the trial judge should be “exercised with great caution and attention to the parties’ procedural rights....”³¹ Before so converting, a trial judge must provide adequate notice and an opportunity to present pertinent material.³² However, a trial court may convert such a motion where factual clarification is required.³³ The additional step of allowing a party to engage in discovery to create a more complete factual record is common in the Delaware judiciary.³⁴

³⁰ *Appriva Shareholder Litigation Co., LLC v. EV3, Inc.*, 937 A.2d 1275 (2007) (citing Fed. R. Civ. P. 12 and Super. Ct. Civ. R. 12.)

³¹ *Id.* (citing 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 136, at 149 (3d ed.2004)).

³² *Id.* at 1288.

³³ *Degnars v. Kimmel, Weiss & Carter*, 1996 WL 527311 (Del. Super. June 21, 1996) (converting a motion to dismiss to a motion for summary judgment and finding it “desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances[.]” where evidence was submitted with the motion to dismiss).

³⁴ *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168-69 (Del. 2006). See also *Marvel v. Prison Industries*, 884 A.2d 1065, 1070-71 (Del. Super. 2005) (denying motion to dismiss for failure to state a claim because plaintiff was not “afforded a reasonable opportunity

The Court is not excluding any information proffered that rests outside the Complaint and already has been asked to consider material outside the Complaint. Adequate notice is hereby provided that such a conversion has occurred and ample opportunity is available for the parties to provide information pertinent to a motion for summary judgment. Notably, discovery will continue in this case regardless of the Court's ruling on this Motion since, even if the Court dismissed all the claims sought to be dismissed, the *quantum meruit* claim remains. Plaintiff's *quantum meruit claim* implicates Plaintiff's other claims, including the claim for breach of contract because the discovery will inevitably overlap.

The Court finds it is an appropriate exercise of discretion to deny the Motion to Dismiss to allow to further development of the record. A denial without prejudice operates to convert this Motion to Dismiss to a Motion for Summary Judgment, whereby the parties will have the opportunity to argue with a fully developed factual record. The current Trial Scheduling Order has an amended pleading deadline of February 8, 2012, a discovery cutoff date of April 30, 2012, and a dispositive motions deadline of May 14, 2012.³⁵ Trial is scheduled for December 10, 2012.

Therefore, Defendants' Motion to Dismiss is **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary

to engage in discovery); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003) (denying motion to dismiss for failure to state a claim but allowing "extensive discovery to take place in order to create a more complete factual record).

³⁵ The Trial Scheduling Order provides that the dispositive motions deadline may be earlier if the parties stipulate that all factual discovery is completed.