IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NORTHPOINTE HOLDINGS, INC.	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
	)	09C-11-141-JOH
v.	)	
	)	
NATIONWIDE EMERGING MANAGERS, LLC, NATIONWIDE CORPORATION, and **NATIONWIDE MUTUAL INSURANCE COMPANY**	)	
	)	
Defendants	)	

Submitted: May 24, 2010
Decided: September 14, 2010

MEMORANDUM OPINION

Upon Motion of the Defendants to Dismiss the Second Amended Complaint or for a More Definitive Statement - ***GRANTED, in part, and DENIED, in part***

Appearances:

Bartholomew J. Dalton, Esquire, of Dalton & Associates, P.A., Wilmington, Delaware, and Rodger D. Young, Esquire, Steven Susser, Esquire, and Jason D. Killips, Esquire, of Young & Susser, P.C., of Southfield, Michigan, Attorneys for the Plaintiff

Cynthia G. Beam, Esquire, of the Law Office of Cynthia G. Beam, Newark, Delaware, and Colm F. Connolly, Esquire, of Morgan Lewis & Bockius, LLP, Philadelphia, Pennsylvania, Attorney for the Defendants

HERLIHY, Judge

This is a claim filed by the disappointed buyer of an investment advisory firm that alleges that from the time the Purchase Agreement contract was executed until closing, the seller severely and intentionally diminished the value of the company to be sold. Plaintiff, Northpointe Holdings, LLC ("Northpointe"), filed this action claiming fraud and breach of contract and defendants have moved to dismiss or for a more definite statement. For the reasons stated below, the motion is denied, in part and granted, in part.

Factual Allegations[1]

Defendant, Nationwide Emerging Managers ("Emerging Managers") is a venture capital firm that previously owned 65% of nonparty NorthPointe Capital ("NPC"). Emerging Managers is a wholly owned subsidiary and agent of defendant Nationwide Mutual Insurance Company ("Nationwide Insurance").

Thirty-five percent of NPC is owned by its employee managers. It is a Delaware LLC and operates as a registered investment advisor. It provides counseling and advisory services for clients and institutions including corporate, municipal and governmental retirement and general funds, endowments, foundations and individuals. It collects fees for its services generally as a percentage of the assets it manages. NPC invests generally in publicly traded stocks listed on the United States stock exchanges.

In 2006, Emerging Managers and the manager employees of NPC began to discuss the possibility of Emerging Managers selling its ownership interest in NPC to its employee

[1] All the factual background recited comes from the complaint.

managers. NorthPointe was created as a vehicle to purchase all of the NPC stock. NPC's employee managers transferred their interest from NPC to NorthPointe. A key consideration to both parties was the purchase price NorthPointe would pay to Emerging Managers for its shares of NPC. In order to induce it to buy Emerging Managers' equity stake in NPC at a more favorable price, Emerging Managers represented that it would leave certain funds advised by NPC ("the Sub-Advised Funds") in order to increase the revenue stream available for NPC's owners.[2] NorthPointe alleges that it would not have executed the Purchase Agreement absent these representations.

On July 19, 2007, NPC and Emerging Managers entered into a Purchase Agreement for $25,000,000 in cash and notes. The Purchase Agreement contained covenants that Emerging Managers would not terminate, place or dilute the Sub-Advised Funds that NPC was managing. The Purchase Agreement states Emerging Managers will:

> Subject to [NPC's] compliance with the Nationwide standards, not replace [NPC's] or engage a concurrent sub-adviser with respect to the NVIT Mid Cap Growth Fund [one of the sub-advised funds] such that, immediately after giving effect to any such replacement or engagement NPC shall have less than $300 million in assets under management in such fund.[3]

Also:

> NEM hereby agrees that for a three-year period following the Closing Date (the "Restricted Period"), it shall (a) not terminate, or propose to the [Fund

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[2] These were 7 funds that NPC advised and they combined generated $415,000 per month in fees.

[3] Second Am. Compl. at ¶ 25 (hereafter in footnotes referred to as "SAC").

> Board for Sub-Advised Funds] that such Sub-Advised Fund terminate, NPC's sub-advisory agreement with such Sub-Advised fund, or take any other action to cause such termination . . .[4]

In addition, the Purchase Agreement states that Emerging Managers is obligated to initiate a marketing campaign for the Sub-Advised Funds within four months of closing and to launch to additional marketing campaigns within two years. Defendant Nationwide Corporation ("NW Corp") is the guarantor of the Purchase Agreement between NorthPointe and Emerging Managers.

Beginning in November 2007, Emerging Managers began to make, or caused to be made, large withdrawals of assets from the Sub-Advised Funds. These withdrawals caused the funds to have assets below their prescribed levels and diminished their performance. Simutltaneously, Emerging Managers also failed to market the Sub-Advised Funds, which had a further negative effect on their performance. That diminished performance caused the reputation of the funds to suffer and created a cyclical decline.

Because of the poor performance of the Sub-Advised Funds, which NorthPointe attributes to Emerging Managers, Emerging Managers terminated the sub-advisory agreements and refused to market the funds. Further, the public notice accompanying the termination was made retroactive and caused contributions made to the clients of NPC to be rejected, causing further harm.

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[4] *Id*. at ¶ 26.

In either late 2007 or early 2008, Nationwide Mutual created the "NVIT Multi-Manager Mid Cap Growth Fund" and began operations in March 2008. NorthPointe alleges that the new fund contained precisely the same investment profiles as the NVIT Mid Cap Growth Fund, one of NPC's sub-advised funds. However, the new fund was not sub-advised by NPC but instead by its competitors. In July 2008, Emerging Managers transferred nearly $250 million in assets from the sub-advised NVIT fund into the newly created NVIT multi-managed fund. This left the sub-advised fund with only $175 million in assets left to be managed by NPC.

In its Second Amended Complaint, NorthPointe has sued the above named defendants and advances four causes of action:

> Count I - NorthPointe makes these claims for breach of the covenant of good faith and fair dealing:
>
> Emerging Managers breached the Purchase Agreement and the implied covenant of good faith and fair dealing thereto in the following respects, among others:[5]
>
> A. Emerging Managers breached its express obligation under the Purchase Agreement, not to replace NorthPointe Capital or engage a concurrent sub-advisor with respect to the Nationwide NVIT Mid Cap Growth Fund, by replacing NorthPointe Capital on or about July, 2008 with American Century and Neuberger Berman.
>
> B. Emerging Managers breached its express obligation under the Purchase Agreement in effect for three years after the September 28,

[5] Defendant Emerging Managers is the only defendant named in Complaint ¶ 61. Yet in the conclusory prayer for relief in Count I, NorthPointe seeks relief from all the defendants for the claims in this paragraph.

2007 Closing Date, not to terminate the funds identified as NorthPointe Capital's Sub-Advisory Funds, or take any action to cause such termination, by terminating NorthPointe Capital's sub-advisory agreement(s) with respect to each Sub-Advised Fund in late 2008 or early 2009.

C. Emerging Managers breached its express obligation under the Purchase Agreement to initiate a marketing campaign for the Sub-Advised Funds on a specific schedule, by failing to do so.

D. Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by causing assets to be transferred out of the Funds, launching a fund competing with the NVIT Fund and directing all asset flows to the new identical fund, and taking other actions with regard to the Sub-Advised Funds beginning in November 2007, that increased the likelihood that the Sub-Advised Funds would decine in value.

E. Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by causing assets to be transferred out of the Funds, launching a fund competing with the NVIT Fund and directing all asset flows to the new identical fund, and taking other actions with regard to the Sub-Advised Funds beginning in November, 2007, that diluted the value of the Sub-Advised Funds that both parties knew that NorthPointe Capital was expecting to manage.

F. Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by making decisions about Sub-Advised Funds for reasons other than objectively defensible reasons.

G. Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by making decision about Sub-Advised Funds for reasons that Emerging Managers intentionally or negligently created itself.

H. Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by making decisions

about Sub-Advised Funds for reasons that were self-serving to Emerging Managers, and detrimental to NorthPointe Holdings and NorthPointe Capital.

Count II - Equitable Fraud.

Count III - Common Law Fraud and Misrepresentation.

Count IV - Silent Fraud

NorthPointe requests this Court rescind the Purchase Agreement and seeks damages and fees. The defendants have filed this motion to dismiss multiple parts of the Second Amended Complaint, which is detailed below.

Parties' Contentions

As described in greater detail below, defendants argue that all the claims should be dismissed in whole or in part.

With respect to the breach of contract claims, defendants argue that the actions alleged do not state a cause of action as described in ¶ 61A because the express language of the contract does not prohibit the behavior alleged. They argue that ¶¶ 61 D-H are too vague to state a cause of action.

With respect to the fraud claims, defendants allege that all fraud claims stem from the contract and are not a valid basis for tort claims. Specifically, they allege that common law fraud cannot be predicated on a misrepresentation alleged in the actual making of a contract, that the equitable fraud claim fails to state a legal cause of action because an equitable remedy is not the only method to alleviate the harm caused and the silent fraud

claim cannot stand because there was no duty to speak outside of the contract.

Plaintiffs, of course, take the exact opposite position at every point in the motion as will be set forth below.

Applicable Standard

On a motion to dismiss, all well-pled allegations are accepted as true.[6] A complaint will not be dismissed on a motion to dismiss if the plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint.[7]

Discussion

Express Breach of Contract Claim in ¶ 61A

Defendants first seek to dismiss the breach of contract claims. First they attack ¶ 61A of the Complaint, which states:

> [NEM] breached its express obligation under the Purchase Agreement, not to replace [NPC] or engage a concurrent sub-advisor with respect to the Nationwide NVIT Mid Capt Growth Fund [Ex B, at § 1(b)], by replacing NorthPointe Capital on or about July, 2008 with American Century and Neuberger Berman.[8]

This allegation ties directly to the Purchase Agreement, which states:

> [NEM will not] subject to [NPC's] compliance with the Nationwide standards, not replace [NPC's] or engage a concurrent sub-adviser with respect to the NVIT Mid Cap Growth Fund [one of the sub-advised funds]

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

[7] *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 227 (Del. 1982).

[8] SAC at ¶ 61A.

> such that, immediately after giving effect to any such replacement or engagement NPC shall have less than $300 million in assets under management in such fund.[9]

Defendants argue that the Second Amended Complaint does not allege any violation of the above cited language. They argue:

> But even assuming the truth of these allegation, the described conduct is not prohibited by Section 1(b). Section 1(b) addresses only the replacement of NorthPointe Capital and the engagement of sub-advisors in addition to NorthPointe Capital *with respect to* the Nationwide NVIT Mid Cap Growth Fund. It says nothing about transferring assets from that fund to another fund; nor does it say anything about the establishment of, or retention of investment advisors for other funds.[10]

Defendants are alleged to have created a new fund identical to the Mid Cap Fund, which is one of the sub-advised funds. They then transferred a large amount of assets from the Mid Cap fund to the new fund and agreed with NPC's competitors to sub-advise the new fund.

NorthPointe alleges that this conduct violated express terms of the agreement because the Purchase Agreement required that Emerging Managers not replace NPC with another advisor or engage a concurrent sub-advisor. That is not the conduct alleged here. The contract, at least in the provision cited, does not prohibit this behavior and therefore this claim must fail. The allegations are certainly not above reproach and establish a claim that they violate the spirit and letter of the agreement. However, that is a potential claim

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[9] *Id.* at ¶ 25; Ex. 1 at Ex. D. § 1(b).

[10] Defs.' Mot. to Dismiss at 4.

of a breach of the implied covenant of good faith and fair dealing, not express contractual provisions. To the extent the claim alleges a breach of § 1(b) of the Purchasing Agreement, it is dismissed.[11]

Implied Contract Breach Alleged in ¶¶ 61D, E.

Paragraphs 61D and E contain nearly identical allegations that the defendants breached the implied covenant of good faith and fair dealing in the following manner:

> Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by causing assets to be transferred out of the Funds, launching a fund competing with the NVIT Fund and directing all asset flows to the new identical fund, and taking other action with regard to the Sub-Advised Funds beginning in November, 2007, that increased the likelihood that the Sub-Advised Funds would decline in value.[12]

> Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by causing assets to be transferred out of the Funds, lunching a fund competing with the NVIT Fund and directing all asset flows to the new identical fund, and taking other actions with regard to the Sub-Advised Funds beginning in November, 2007, that diluted the value of the Sub-Advised Funds that both parties knew that NorthPointe Capital was expecting to manage.[13]

Defendants argue, however, that implied covenants cannot override express contractual terms. They allege that the actions described in ¶¶ 61D, E are covered by the written

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[11] Defendants do not challenge the other two claims of a express breaches of contract ¶ 61B and C, so they will not be addressed and will be considered properly pleaded.

[12] SAC at ¶ 61D.

[13] *Id.* at ¶ 61E.

contract. They point to provisions in the contract that they claim cover their alleged actions.[14] However, not even the defendants' representation of the sections contemplates defendants' alleged action. It does not appear from the provisions cited that there is any language in the Purchase Agreement that contemplates Nationwide Insurance creating an additional fund and then transferring money away from it. Therefore, when considering all facts in the light most favorable to NorthPointe, it does not appear that the express language of the contract speaks to these actions but the covenant breach claims should not be dismissed for that reason.

"The covenant exists to fulfill the reasonable expectations of the parties, and thus the implied obligation must be consistent with the terms of the agreement as a whole."[15] NorthPointe has properly pled a breach of the covenant in ¶¶ 61D, E. It is consistent with the terms of the Purchase Agreement that the sub-advised funds be preserved so their would be a consistent revenue stream to NorthPointe after it acquired NPC. Emerging Managers's actions are in contradiction of that purpose and the facts present a claim for a breach of the implied covenant.

Defendants argue that the final sentences of ¶¶ 61D, E require dismissal or a more definite statement. The end of ¶ 61D states, "[T]aking other action with regard to the Sub-

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[14] *See* Defs.' Mot. to Dismiss at 5 (citing Purchase Agreement at §§ 1(a), 1(b), 1(c) and 3).

[15] *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009).

Advised Funds beginning in November, 2007, that increased the likelihood that the Sub-Advised Funds would decline in value." Paragraph 61E's end states, "[T]aking other actions with regard to the Sub-Advised Funds beginning in November, 2007 that diluted the value of the Sub-Advised Funds that both parties knew that NorthPointe Capital was expecting to manage." Defendants argue that the two phrases are so vague that no party would agree to that language if the contract were to speak on it.

The problem with the end of these paragraphs is that they are vague and do not put the defendants on notice of what type of action they are alleged to have committed. NorthPointe argues that there is sufficient clarity in reading the entire complaint and that it is clear what actions they must defend; this argument fails. While the complaint alleges a fair amount of detail, the "other action" language is too vague to be acceptable and comply with Rule 8 pleading standards. Therefore, the portion of each paragraph is stricken or a more definite statement must be provided. The balance of ¶¶ 61D, E are acceptable but the ends are not.

Alleged Breach of the Implied Covenant in Paragraphs 61 F, G and H.

Defendants argue that ¶¶ 61 F, G and H do not state a claim for breach of the implied covenant of good faith and fair dealing. They argue, "These statements border on incomprehensible, and the terms they employ are so broad and open to interpretation that no party would agree to be bound by them."[16]

[16] Defs.' Mot. to Dismiss at 7.

The challenged paragraphs state:

> Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by making decisions about Sub-Advised Funds for reasons other than objectively defensible reasons.
>
> Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the Purchase Agreement by making decisions about Sub-Advised Funds for reasons that Emerging Managers intentionally or negligently created itself.
>
> Emerging Managers breached the implied covenant of good faith and fair dealing attendant to the purchase Agreement by making decisions about Sub-Advised Funds for reasons that were self-serving to Emerging Managers, and detrimental to NorthPointe Holdings and NortPointe Capital.[17]

The complaint does not state a claim. Even taking all inferences in the light most favorable to NorthPointe, one cannot conclude that the contract would have stated that Emerging Managers was not permitted to "make decisions" for reasons other than objectively defensible reasons; about the Sub-Advised Fund for reasons that Emerging Managers intentionally or negligently created itself; or, that were self-serving to Emerging Managers, and detrimental to NorthPointe and NPC. While the contract does speak to preserving the sub-advised funds as a profitable revenue stream, it does not create a fiduciary relationship like that implied covenant violations would require. Also, the complaint is far too vague to be actionable. It does not put the defendants on notice about what decisions were made and it cannot stand.

Paragraphs 61 F, G and H are dismissed.

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[17] SAC at ¶¶ 61 F-H.

After the dismissal of the claims as indicated above, the Court does not need to dismiss all of Count I or demand a more definite statement. The complaint fairly puts the defendants on notice of the claims brought and provides them with the opportunity to answer the complaint and defend the allegations.

Common Law Fraud and Misrepresentation Claim

Defendants argue that the complaint does not state a claim for fraud because a fraud claim cannot arise from a contractual dispute. Defendants state that this remedy is in contract, not in tort, and to allow otherwise would create a situation where every breach of contract claim is now a fraud claim also. NorthPointe counters by arguing that just because the claim arises in the contract setting does not mean that it is barred from tort. It contends that the complaint alleges that the representations in the contract were false when made and therefore could constitute a fraud. The complaint alleges that the representations that defendants would perform under the contract were false when they signed the contract and that defendants never had the intention to perform. They allege that this was done to induce NorthPointe into entering the contract at a preferable price, and that NorthPointe relied upon that representation and was harmed.

A common law fraud claim needs to allege five elements: "1) the existence of a false representation, usually one of fact, made by the defendant; 2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) the defendant had the intent to induce the plaintiff to

act or refrain from acting; 4) the plaintiff acted or did not act in justifiable reliance on the representation; and 5) the plaintiff suffered damages as a result of such reliance."[18] The complaint properly alleges all elements.

The Court of Chancery dealt with a similar issue regarding a claim for fraud based on alleged misrepresentations going into the contract in *H-M Wexford LLC v. Encorp LLC*. There the court held that it was proper to allege fraud under circumstances similar to those NorthPointe alleges by enabling it to allege a fraud based on the conduct in question. Emerging Managers entered into the contract allegedly knowing full well that it was not going to perform under it. It allegedly successfully made representations to the contrary to elicit a higher purchase price. NorthPointe reasonably relied upon such representations, and suffered injury when it received a company with the rights to sub-advise devalued funds. The fraud claim stands. That part of defendants' motion is denied.

Silent Fraud Claim

Defendants argue that the silent fraud claim set forth in Count IV cannot stand for two reasons. First, because the only duty to speak is based upon a duty arising out of a contract, plaintiff's only remedy is for a breach in contract. Second, because the fraud claim as pled does not contain the particularity required under Superior Court Civil Rule 9(b).

NorthPointe contends that a duty to speak arising from a contract is sufficient to

[18] *H-M Wexford LLC v. Encorp LLC*, 832 A.2d 129, 144 (Del. Ch. 2003).

create a cause of action for silent fraud because the Purchase Agreement imposed a duty on defendants to provide notice of any failure on their part to comply with or satisfy any material element of the agreement. NorthPointe claims that Emerging Managers had no intention of doing so when it entered into the Purchase Agreement.

The silent fraud claim is dismissed. Such a claim in a contractual matter is distinguishable from a common law fraud claim. An independent duty to speak, imposed by law and separate from the contract requirements, must exist before an action for silent fraud can be brought in addition to a breach of contract claim.[19] That independent duty usually comes in the form of a special relationship, such as a fiduciary duty.[20] NorthPointe has offered no evidence in the complaint that suggests any form of special relationship between the parties. The only relationship between the parties was created through the contract, an arms length transaction, and therefore no special relationship exists. The silent fraud claim must fail, and the proper cause of action for defendants' failure to speak must be brought in contract, not in fraud.

Additionally, this Court requires any complaint of fraud to be averred with a higher standard of particularity than other types of complaints.[21] To meet the particularity

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[19] *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC,* 2009 WL 1124451, at *11, (Del. Ch. 2009), citing *Pinkert v. Oliveri,* 2001 WL 641737, at *5, (D. Del. 2001).

[20] *Id.*

[21] *IOTEX Communs., Inc. V. Defries,* 1998 WL 914265, at *3 (Del. Ch., 1998); *Atlantis Plastics Corp. v. Sammons,* 558 A.2d 1062, 1068 (1989).

requirements, a complaint must state the time, place, and contents of the alleged fraud, as well as the individual accused of committing the fraud.[22] NorthPointe fails to provide any of the requisite particulars required under Delaware law. Nor does the Court find that allowing for a more definite statement is called for.

Equitable Fraud Claim

Defendants allege that the NorthPointe cannot state a claim for equitable fraud and raises two arguments. First, that this Court does not have jurisdiction to hear a claim for equitable fraud because, as the name implies, it is a cause of action in equity. Second, defendants allege that NorthPointe fails to state a cause of action for equitable fraud because it does not allege either a special relationship or a remedy that only equity can fashion.

NorthPointe argues that it has alleged a cause of action that only equity can fashion because it seeks rescission as its remedy. It acknowledges the jurisdictional deficiency and is willing to accept transfer to the Court of Chancery.

The claim fails as a matter of law and therefore transfer is inappropriate. A claim of equitable fraud must allege either a special relationship or justification for a remedy that only equity can afford. It is clear that there is no special relationship exists between the parties, and NorthPointe has never pleaded as such. In fact, the contract states that no

[22]*Luce v. Edelstein,* 802 F.2d 49, 54 (2d. Cir., 1986).

special relationship exists.[23] Even in the absence of such contractual provision, it was clear that this was an arm's length transaction.

NorthPointe argues that only equity can grant the rescission that it seeks. However, that is not always true in a claim for rescission. The Court of Chancery has explained the difference between legal and equitable rescission:

> It is perhaps not commonly appreciated that rescission is a remedy awarded by law courts. A court of law may, upon adjudication of a contract dispute, determine, where the elements of the claim are proven, that a contract has been rescinded, and enter an order restoring plaintiff to his original condition by awarding money or other property of which he had been deprived. Equitable rescission, on the other hand, which is otherwise known as cancellation, is a form of remedy in which, in addition to a judicial declaration that a contract is invalid and a judicial award of money or property to restore plaintiff to his original condition is made, further equitable relief is required. Thus, the remedy of equitable rescission typically requires that the court cause an instrument, document, obligation or other matter affecting plaintiff's rights and/or liabilities to be set aside and annulled, thus restoring plaintiff to his original position and reestablishing title or recovering possession of property. **This additional aspect, the "equitable" ingredient in rescission, is necessitated, for example, in circumstances in which if an instrument, document, obligation, or other matter were not cancelled, plaintiff would be exposed to liability to third parties not appearing in the action. If plaintiff is fraudulently induced to execute a note in favor of defendant, the only remedy that is adequate for plaintiff is cancellation of the note to ensure that defendant does not transfer the note to a bona fide purchaser, who could then recover from plaintiff under the note.**[24]

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[23] Purchase Agreement § 9.2, "[T]here is no special relationship of trust or reliance between Buyer on the one hand and Seller on the other hand."

[24] *E.I. du Pont de Nemours & Co. v. HEM Research, Inc.,* 1989 WL 122053, at *3 (Del. Ch.)(emphasis added).

The court later held that a claim for equitable rescission must be specifically pleaded. In *Alejandro and Reinholz v. Hornung*, the Court of Chancery dismissed the plaintiffs' complaint, after finding that they only pleaded an action for legal damages and the court had no jurisdiction. The court analyzed the complaint and found, "The plaintiffs do not seek the cancellation of a relevant instrument or document, nor do they allege that, if cancellation is not granted, they will exposed to liability to third parties not appearing in the action."[25]

NorthPointe does not allege such injury either. Therefore, it alleges a claim for legal rescission, which is an action at law and subject to the jurisdiction of this Court. At no point does the complaint allege that it is without an adequate remedy at law. If that remedy is adequate, then they have not pleaded justification for a remedy that only equity can afford and the equitable fraud claim must be dismissed.[26]

NW Corp's Guarantor Status

Defendants argue that all claims other than the breach of contract claim should be dismissed with respect to NW Corp, which is the guarantor. They allege that the Purchase

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[25] *Alejandro & Reinholz v. Horning, et. al.*, 1992 WL 200608, at *3 (Del. Ch.)

[26] Most of NorthPointe's causes of action are at law. Should NorthPointe wish to plead a case of equitable fraud consistent with Delaware law, the Delaware Constitution provides a process to have this judge appointed to hear this claim as a temporary member of the Court of Chancery. Article IV, § 14, Delaware Constitution. Such an approach is more efficient than seeking to transfer this entire case to that Court.

Agreement defines NW Corp as a guarantor solely for the purposes of Section 9.13, which promises the performance of Emerging Managers of its obligations to the Agreement. They contend that this does not include the claims for fraud.

NorthPointe responds by arguing that the implied covenant of good faith and fair dealing claims should apply to the guarantor. This is something defendants do not argue.

The fraud claims cannot apply to NW Corp, especially when considered in light of the relief requested. The plaintiff is seeking rescission. Legal rescission requires the court to declare the contract null and void and award damages that put the parties back in the position they were in before the contract. If the contract is null then there is no valid guaranty provision upon which NorthPointe to rely.

Further, NorthPointe has spent the majority of its memorandum explaining how defendants' actions fall outside the bounds of the contract in order to save its fraud claims. If the actions are outside of the contract, then they are not part of guaranty and NW Corp is not liable for them. NW Corp is only liable for breach of contract claims and not with any fraud claims.

Conclusion

For the reasons stated herein, defendants' motion to dismiss is **DENIED, in part, and GRANTED, in part**, as follows:

Count I, breach of express contract as described in ¶ 61A is dismissed;

Count I, breach of implied covenant as described in ¶¶ 61D and E is not dismissed but is dismissed as it relates to the final portions or NorthPointe shall have ten (10) business days to provide a more definite statement;

Count I, breach of implied covenant as described in ¶¶ 61 F, G, and H is dismissed;

Count II, equitable fraud is dismissed subject to NorthPointe pleading a claim for such;

Count III, common law fraud and misrepresentation is not dismissed; and

Count IV, silent fraud is dismissed.

IT IS SO ORDERED.

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J.