

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Med World Acquisition Corp. d/b/a)
Omnicare of Plainview and Shore)
Pharmaceutical Providers, LLC d/b/a/)
Omnicare of Plainview,) C.A. No. N19C-06-028 FWW
)
Plaintiff/Counterclaim Defendant,)
)
v.)
)
Friedwald Center for Rehabilitation and)
Nursing, LLC d/b/a/ Friedwald Center,)
)
Defendant/Counterclaimant.)

Submitted: August 9, 2019
Decided: November 25, 2019

Upon Plaintiff/Counterclaim Defendant's Motion to Dismiss
GRANTED

ORDER

James W. Semple, Esquire, R. Grant Dick IV, Esquire, Cooch and Taylor, P.A., The Brandywine Building, 1000 West Street, 10th Floor, Wilmington, DE, 19801; Attorneys for Plaintiff/Counterclaim Defendant.

James Tobia, Esquire, The Law Office of James Tobia, LLC, 1716 Wawaset Street, Wilmington, DE 19806; Attorney for Defendant/Counterclaimant.

WHARTON, J.

This 25th day of November, 2019, upon consideration of Plaintiff-Counterclaim Defendant's Motion to Dismiss and Defendant-Counterclaimant's Response, it appears to the Court that:

1. On June 4, 2019, Plaintiff-Counterclaim Defendant, Med World Acquisition Corp. d/b/a Omnicare of Plainview and Shore Pharmaceutical Providers, LLC d/b/a/ Omnicare of Plainview ("Omnicare"), bought this action against Defendant-Counterclaimant Friedwald Center for Rehabilitation and Nursing, LLC d/b/a/ Friedwald Center ("Friedwald"), alleging breach of a pharmaceutical services contract between the parties.¹

2. On July 3, 2019, Friedwald answered and counterclaimed, alleging one count of common law fraud. Friedwald requests \$746,921.20 in damages, asserting that Omnicare engaged in billing practices which were intentionally "designed to deceptively overbill" them over the course of four years.² Friedwald alleges that Omnicare knowingly, with the intent to deceive, failed to submit bills to proper payor sources, improperly used split billing practices, failed to provide credits, and included additional per-diem charges to their bill.³ Friedwald attributes approximately fifty-three thousand dollars of the requested damages to actions

¹ Complaint, D.I. 1.

² Friedwald does not specify those four years. *See* Counterclaim at ¶ 6, D.I. 4.

³ *Id.* at ¶ 3.

occurring within the months of January and June 2017.⁴ Specifically, in its counterclaim, Friedwald alleges that approximately sixteen thousand dollars in damages occurred as a result of Omnicare’s “fraudulent pricing of products and services” and another, approximately thirty-seven thousand dollars occurred as a result of Omnicare’s “improper billing practices.”⁵

3. On July 22, 2019, Omnicare moved to dismiss the counterclaim under Superior Court Civil Rule 12(b)(6) for: (1) failure to meet the particularity pleading standard under Superior Court Civil Rule 9(b), and (2) failure to allege separate damages.⁶ Additionally, Omnicare contends that the counterclaim is actually a breach of contract claim because the action is based entirely on the terms of the contract between the parties.⁷

4. On August 8, Friedwald answered Omnicare’s Motion to Dismiss.⁸ Friedwald contends that its claim has been plead with sufficient particularity and that the claim alleges conduct separate and distinct from the conduct constituting breach of contract.⁹ In the alternative, Friedwald requests leave to amend the pleading.¹⁰

⁴ *Id.* at ¶ 4-5.

⁵ *Id.*

⁶ Mot. Dismiss, D.I. 6.

⁷ *Id.*

⁸ Resp. Mot. Dismiss, D.I. 8.

⁹ *Id.*

¹⁰ *Id.*

5. Under Superior Court Civil Rule 12(b)(6), dismissal is warranted only if it appears with reasonable certainty that the nonmoving party would not be entitled to recover under any reasonably conceivable set of circumstances.¹¹ In ruling on a 12(b)(6) motion, the Court draws all reasonable factual inferences in the light most favorable of the opposing party¹² and assumes that all well-pleaded facts in a complaint are true.¹³ Allegations are well-pleaded if they place the defendant on notice of the claim.¹⁴ Although the pleading threshold in Delaware is low, “[a]llegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss.”¹⁵

6. Superior Court Civil Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”¹⁶ The particularity pleading standard requires a party to plead “the

¹¹ *Greenfield for Ford v. Budget of Delaware, Inc.*, 2017 WL 729769, at *2 (Del. Super. Ct. Feb. 22, 2017).

¹² *Id.*

¹³ *Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *6 (Del. Super.).

¹⁴ *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del.1995).

¹⁵ *Brevet Capital*, 2011 WL 3452821 at *6.

¹⁶ Super. Ct. Civ. R. 9(b).

time, place and contents of the false representations.”¹⁷ However, “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.”¹⁸

7. The requirement that fraud be pleaded with particularity “serves to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude.”¹⁹ In order to survive a motion to dismiss a fraud claim, the party asserting fraud must allege that: (1) the accused party falsely represented a material fact or omitted facts that they had a duty to disclose; (2) the accused party knew that the representation was false or made with a reckless indifference to the truth; (3) the accused party intended to induce the party asserting the fraud action to act or refrain from action; (4) the party asserting the fraud acted in justifiable reliance on the representation; and (5) the party asserting the fraud was injured by its reliance on the accused party’s representation.²⁰ Here, Omnicare argues that in order to allege that it intentionally engaged in fraud, Friedwald must allege sufficient facts reasonably to infer that something was knowable and that Omnicare was in a position to know it.²¹

¹⁷ *ITW Glob. Investments Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *5 (Del. Super. Ct. June 24, 2015).

¹⁸ Super. Ct. Civ. R. 9(b).

¹⁹ *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del.1993).

²⁰ *ITW Glob. Investments Inc.*, 2015 WL 3970908, at *5.

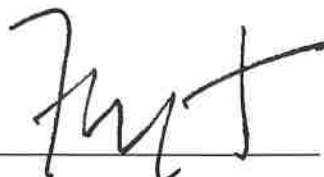
²¹ Mot. Dismiss at ¶ 9 (quoting *Albert v. Alex Brown Mgmt. Services, Inc.*, 2005 WL 2130607, at *11 (Del. Ch. 2005), D.I. 6.

8. The Court finds that Friedwald's complaint fails to meet the particularity standards under Rule 9(b). Although, the Counterclaim contains allegations that Omnicare "knowingly" with an "intent to deceive" failed to submit bills to proper payor sources, improperly used split billing practices, failed to provide credits, and included additional per-diem charges to their bill,²² the allegations are conclusory and fail to include any factual basis to apprise Omnicare sufficiently of the basis of the counterclaim. While Friedwald may plead knowledge generally, Delaware's particularity standard requires Friedwald to allege facts that could reasonably infer that knowledge.

9. Because the Court finds that the pleading fails for lack of particularity, the Court does not reach the issue of separate damages. The Court, however, will allow Friedwald leave to amend the pleading.

THEREFORE, Omnicare's Motion to Dismiss is **GRANTED**. Friedwald may amend its counterclaim within 30 days of the date of this Order.

IT IS SO ORDERED.



Ferris W. Wharton, J.

²² Counterclaim at ¶ 3, D.I. 4.