

TENTATIVE RULING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LYNCH MARKS, LLC,)	
)	
Plaintiff(s),)	No. C05-5178 BZ
)	
v.)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANT'S
VERMONSTER, LLC,)	MOTION TO DISMISS
)	
Defendant(s).)	
_____)	

Before the court is defendant Vermonster, LLC's motion to dismiss certain of plaintiff Lynch Marks, LLC's claims pursuant to Fed. R. Civ. P. 12(b)(6) and to dismiss plaintiff's fraud claim for lacking the specificity required under Fed. R. Civ. P. 9(b).¹

A motion to dismiss for failure to state a claim will only be granted when considering all well pleaded facts in the

¹ The court has not considered the materials attached to the declaration of James Lucey. In ruling on a motion to dismiss, the court is limited to the allegations of the complaint and exhibits attached thereto and may not consider matters outside the pleading. Fed. R. Civ. P. 12(b).

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complaint in the light most favorable to plaintiff, the court concludes that plaintiff is entitled to no relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The motion to dismiss the contract claim is **DENIED**.

Plaintiff has sufficiently pled the existence of a written agreement between the parties, and the court cannot conclude as a matter of law that plaintiff would not be entitled to any relief on the facts alleged. Accepting plaintiff's allegations that while the parties never executed a further written agreement, they treated the term sheet as "the written contractual agreement" which terms "have been agreed upon, confirmed and ratified thereafter by virtue of the parties [sic] subsequent oral and written agreements, communications and actions" for purposes of this motion, plaintiff has sufficiently alleged a claim. Compl. ¶ 10. The alleged writings between the parties appear sufficient at the pleading stage to satisfy the statute of frauds. Levin v. Knight, 780 F.2d 786, 787 (9th Cir. 1986)(reversing district court's grant of summary judgment because "written memorandum [detailing understanding of parties for proposed sale of professional basketball franchise] would be sufficient to comply with the statute of frauds if all disputed matters were resolved in plaintiffs' favor"). Defendant's contention that the complaint does not set forth all the terms of the contract is not grounds for dismissing the complaint. See id. ("written memorandum indicates sufficiently the few terms deemed essential as a matter of law by California courts to satisfy

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the statute of frauds requirements"). Those terms are subject to discovery. While it is true that plaintiff has not alleged that it has performed as required by the contract, its allegations in paragraphs 14, 40 and 41, among others, sufficiently allege performance to withstand a motion to dismiss. Compl. ¶¶ 14, 40 and 41.

Defendant's motion to dismiss plaintiff's second cause of action for specific performance is **DENIED**. The court does not construe the allegations of the complaint as requiring the performance of personal services, but as requiring defendant to deliver software, which plaintiff claims it ordered and paid for. In fact, in moving to dismiss the contract claim, it was defendant who characterized the term sheet as describing the proposed terms for "the sale of goods for more than \$500" (Mot. 6:13-16), and not as a contract for personal services.

Defendant's motion to dismiss the claim for conversion is **GRANTED in part and DENIED in part**. First, plaintiff's claim that defendant converted its \$75,000 is not cognizable. "The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." Farmers Ins. Exchange v. Zerín, 53 Cal.App.4th 445, 451 (Ct. App. 1997). Plaintiff "need only allege that it is 'entitled to immediate possession at the time of conversion.'" Id. at 452 (citations and emphasis omitted). "However, a mere contractual right of

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payment, without more, will not suffice." Id. Plaintiff's basis for its money conversion claim is that defendant "has possession of monies in excess of \$75,000 which were delivered . . . for goods and services either never delivered or not delivered in full, timely and in an appropriate and viable manner." Compl. ¶ 48. This is a claim under contract, which is insufficient for conversion. Therefore, defendant's motion to dismiss on plaintiff's conversion claim of the \$75,000 is **GRANTED** with leave to amend.

On plaintiff's second conversion claim regarding the intellectual property, plaintiff has alleged defendant "has failed to turn over the original code" which was "specifically assigned" to plaintiff pursuant to an assignment agreement. Compl. ¶ 48. Accepting plaintiff's allegations as true, plaintiff has a right to possess the code pursuant to the assignment agreement, and defendant has wrongfully retained it. While traditionally courts may have struggled to find conversion in cases involving intangible property, this is not the current state of the law in California. See Kremen v. Cohen, 337 F.3d 1024, 1036 (9th Cir. 2003)(holding that intangible property such as an internet domain name can be the subject of a viable claim for conversion). Plaintiff's claim that defendant converted its software code is cognizable, and defendant's motion to dismiss plaintiff's intellectual property conversion claim is **DENIED**.

The motion to dismiss the fifth and sixth claims for lacking specificity is **DENIED**. Plaintiff's allegations of

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defendant's misrepresentations concealing that it was "unable or unwilling to create a final working package of software" and "unable or unwilling to provide the [client] support" are sufficient to withstand defendant's motion to dismiss under Fed. R. Civ. P. 9(b). Compl. ¶¶ 52, 53. See, e.g., Gottreich v. San Francisco Investment Corp., 552 F.2d 866 (9th Cir. 1977)(holding that a complaint alleging that defendants misrepresented their expertise and special knowledge was sufficient under Rule 9(b) because it identified the circumstances constituting fraud so that defendants could prepare an adequate answer from the allegations). See, e.g., Gordon v. Impulse Marketing Group, Inc., 2006 WL 624838, at * 2 (E.D. Wash. Mar. 9, 2006)(under a similar Washington law, "[a]llthough Impulse Marketing has not pointed to any specific employers or relationships that were affected, its allegations [of tortious interference] are sufficient under general pleading standards to survive a motion to dismiss"). Any deficiencies of the sort claimed by defendants can best be dealt with on summary judgment.

Therefore, **IT IS ORDERED** that defendant's motion to dismiss is **DENIED** as stated above, except as to plaintiff's conversion claim for the \$75,000, which plaintiff is **GRANTED** leave to amend by **August 7, 2006**.

Dated:

Bernard Zimmerman
United States Magistrate Judge