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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CENTURY 21, LLC,
Plaintiff,

v.

JIMMY J. DAGUE, et al.,
Defendants.

Case No. 2:08-CV-00403-KJD-RJJ

ORDER

Currently before the Court is Plaintiff’s Motion to Dismiss Counterclaim (#19), filed June 30, 2008. Defendants filed a Response (#22), on July 14, 2008, to which Plaintiff filed a Reply (#23), on July 22, 2008.

I. Background

This action arises from a series of real estate franchise agreements entered into between Vision Properties, Inc. (“Visions”) and Plaintiff Century 21, LLC (“Century 21”) between May 16, 2001, and March 15, 2006. Defendants Jimmy J. Dague (“Dague”), Rodney L. Johnson (“Johnson”), and Michael G. Brelsford (“Brelsford”) jointly and severally guaranteed prompt payment and performance of all obligations under the franchise agreements. Plaintiff filed a Complaint in this Court on March 31, 2008, which alleges five claims for relief for breach of contract

1 against Dague, Johnson, and Brelsford for alleged breach of the underlying franchise agreements and
2 guarantees, among other things.

3 Defendants Dague, Johnson, and Brelsford, along with Ellen Heaston (hereinafter referred to
4 collectively as “Counterclaimants”) filed an Answer (#15) on May 19, 2008, and an Amended
5 Answer with Counterclaim (#17), on June 9, 2008. The Counterclaim contains two causes of action,
6 for (1) Declaratory Relief; and (2) Breach of the Covenant of Good Faith and Fair Dealing.
7 Specifically, Counterclaimants seek declaratory judgment that Counterdefendant is the owner of
8 stock that Visions’ issued Plaintiff as partial consideration for the promissory notes entered into
9 between the parties. Counterclaimants aver that Plaintiff became the owner of the stock at some time
10 contemporaneous to the breaches of the promissory notes, and Plaintiff disclaims ownership of the
11 stock.

12 Additionally, Counterclaimants aver that Plaintiff breached the implied covenant of good
13 faith and fair dealing with them by “failing to honestly and fairly negotiate, cooperate, assist and
14 credit, [Visions] and Counterclaimants during [Visions] Chapter 11 reorganization”. (Answer and
15 Counterclaim at 4.)

16 Plaintiff’s Motion to Dismiss seeks that the Court dismiss the Counterclaims pursuant to Fed.
17 R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically,
18 Plaintiff argues that as a matter of law, it does not own the pledged stock because it did not take the
19 statutory action necessary to acquire ownership; and (2) that Visions’ trustee is the only party that has
20 standing to sue for breach of the covenant of good faith and fair dealing for actions that took place
21 during Visions’ bankruptcy proceedings. Plaintiff also avers that Counterclaimants lack standing
22 because they were not party to the bankruptcy proceeding and therefore could not have been involved
23 in negotiations with Plaintiff except as agents for Visions.

1 **II. Standard of Law for Rule 12**

2 According to Fed. R. Civ. P. 12(d) the Court must treat a motion to dismiss made under Rule
3 12(b)(6) as a Rule 56 motion for summary judgment if “matters outside the pleadings are presented
4 to and not excluded by the court.” See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912,
5 925 (9th Cir.2001).

6 Here, Plaintiff has attached to its Motion to Dismiss, an exhibit of correspondence between
7 Plaintiff’s counsel and counsel for Defendants, together with a copy of the Stock Pledge Agreement
8 of May 7, 2007. (See Pl.’s Motion to Dismiss at Ex. 1, Ex 2.) Pursuant to Fed. R. Civ. P. 12(d),
9 should the Court choose to consider Plaintiff’s exhibits, it must treat the Motion as one for summary
10 judgment and allow the parties a reasonable opportunity to present all material that is pertinent to the
11 Motion. Here however, the Court exercises its discretion to exclude Plaintiff’s exhibits, thereby
12 refusing to convert Plaintiff’s Motion into one for summary judgment. See Fed. . Civ. P. 12(e)

13 **III. Standard for Motion to Dismiss**

14 In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6),
15 the court must accept as true all material allegations in the complaint as well as all reasonable
16 inferences that may be drawn from such allegations. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 (9th
17 Cir. 2000). The Court “must construe the complaint in the light most favorable to the plaintiff and
18 must accept all well-pleaded factual allegations as true.” Siaperas v. Mont. State Comp. Ins. Fund,
19 480 F.3d 1001, 1003 (9th Cir.2007) (quotation omitted). The purpose of a motion to dismiss under
20 Rule 12(b)(6) is to test the legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732
21 (9th Cir.2001). However, there is a strong presumption against dismissing an action for failure to
22 state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir.1997) (citation omitted).
23 A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. Bell
24 Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Although a plaintiff’s factual allegations need not
25 be detailed, they must allege “more than labels and conclusions, and a formulaic recitation of the

1 elements of a cause of action will not do.” Id. Dismissal is proper only if no cognizable legal theory
2 exists or the plaintiff has alleged insufficient facts to support a cognizable legal theory. Siaperas, 480
3 F.3d at 1003.

4 **IV. Analysis and Discussion**

5 Plaintiff seeks that the Court dismiss Defendants’ first counterclaim for declaratory relief,
6 arguing that Plaintiff is not the owner of the stock at issue as a matter of law, and that Defendants’
7 claim fails to set forth an actual controversy under the Declaratory Judgment Act. Plaintiff attempts
8 to buttress its argument by referencing materials outside of the pleadings. As discussed, the Court
9 does not consider such materials at this time, and as a result, finds that Plaintiff’s argument fails.
10 Accordingly, Plaintiff’s Motion to Dismiss Defendants’ first Counterclaim is denied.

11 Additionally, Plaintiff seeks that the Court dismiss Defendants’ second counterclaim for
12 breach of the implied covenant of good faith and fair dealing, arguing that Defendants do not have
13 standing to bring a claim arising from Visions’ bankruptcy proceedings.

14 Defendants’ second counterclaim states,

15 Counterdefendant breached the covenant of good faith and fair dealing with
16 Counterclaimants and Visions Properties, Inc. dba Century 21 Aadvantage Gold by
17 failing to honestly and fairly negotiate, cooperate, assist and credit, Visions
18 Properties, Inc. dba Century 21 Aadvantage Gold and Counterclaimants, during
19 Visions Properties, Inc. Chapter 11 reorganization, causing damages to
20 Counterclaimants in excess of \$75,000.00 the full amount to be proven at trial.

21 (Defs.’ Answer and Counterclaim at ¶ 9.) The Court has examined the counterclaim, together with
22 Plaintiff’s Motion, yet cannot determine the behavior upon which Counterclaimants are making their
23 claim for relief. Accordingly, the Court orders *sua sponte*, that Counterclaimants file a more definite
24 statement pursuant to Fed. R. Civ. P. 12(e) regarding their second counterclaim in order that
25 Plaintiffs may reassert any arguments regarding standing.
26

1 **V. Conclusion**

2 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Dismiss (#19) is
3 **DENIED.**

4 **IT IS FURTHER ORDERED** that Defendants shall file a more definite statement on or
5 before March 19, 2009. Failure to file a more definite statement may result in dismissal of
6 Defendants' second counterclaim.

7 DATED this 9th day of March 2009.

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Kent J. Dawson
United States District Judge

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