

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Andrew Hall,
Plaintiff

v.

Case No. 16-cv-418-SM
Opinion No. 2017 DNH 110

Lorettann Gascard and
Nikolas Gascard,
Defendants

O R D E R

Plaintiff, Andrew Hall is an art collector. He collects both post-war and contemporary art. Over a two-year period beginning in 2009, he purchased twenty-four works of art from the defendants, Lorettann Gascard and her son, Nikolas Gascard. Hall says he purchased some of those pieces directly from the Gascards, while others were purchased indirectly through auction houses to which the Gascards had consigned the works. And, says Hall, the Gascards affirmatively represented that each of the twenty-four works he purchased were original pieces produced by the American artist Leon Golub. In early 2015, however, Hall discovered that those twenty-four works are forgeries.

In this action, Hall advances six common law and statutory claims against the Gascards. The Gascards move the court to

dismiss each of those claims, asserting that none states a viable cause of action. See generally Fed. R. Civ. P. 12(b)(6). For the reasons discussed, that motion is granted in part and denied in part.

Standard of Review

When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must "accept as true all well-pleaded facts set out in the complaint and indulge all reasonable inferences in favor of the pleader." SEC v. Tambone, 597 F.3d 436, 441 (1st Cir. 2010). Although the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), it must allege each of the essential elements of a viable cause of action and "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and internal punctuation omitted).

In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Instead, the facts alleged

in the complaint must, if credited as true, be sufficient to “nudge[] [plaintiff’s] claims across the line from conceivable to plausible.” Id. at 570. If, however, the “factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal.” Tambone, 597 F.3d at 442.

As to his fraud claim, Hall must meet the heightened pleading standard imposed by Federal Rule 9(b), which provides that when alleging fraud, “a party must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). That means the complaint must, at a minimum, allege “the identity of the person who made the fraudulent statement, the time, place, and content of the misrepresentation, the resulting injury, and the method by which the misrepresentation was communicated.” Clearview Software Int'l Inc. v. Ware, 2009 WL 2151017, at *1, n. 3 (D.N.H. July 15, 2009) (quotation omitted). See also Rodi v. S. New England Sch. of Law, 389 F.3d 5, 15 (1st Cir. 2004) (“This heightened pleading standard is satisfied by an averment of the who, what, where, and when of the allegedly false or fraudulent representation.”) (citation and internal punctuation omitted).

Background

Accepting the allegations of Hall's complaint as true - as the court must at this juncture - the relevant factual background is as follows. Beginning in approximately 1998 and until quite recently, Loretann Gascard was a professor of art history and fine arts at Franklin Pierce University, where she also served as the university's art historian and the director of its art gallery (the Thoreau Art Gallery at Franklin Pierce University). She is "also an artist in her own right." Complaint (document no. 1-4) at para. 3. See also Gascard v. Franklin Pierce Univ., 2015 WL 1097485 at *1, 2015 DNH 49, at 3 (D.N.H. March 11, 2015). Nikolas Gascard is her adult son.

Leon Golub was an American artist who died in 2004. According to the complaint, "Golub's work has been featured in numerous solo exhibitions throughout the United States and abroad," Complaint at para. 7, and his work "has long been represented in many of the world's most important art museums and public art collections, among them, the Metropolitan Museum of Art, the Art Institute of Chicago, the Israel Museum, the Boston Museum of Fine Arts, the Carnegie Museum of Art, the Corcoran Gallery of Art, the Fogg Museum at Harvard University, the Tate Modern, and the Whitney Museum of American Art." Id. at para. 8. Hall says that in 2003, shortly before Golub died,

he began acquiring Golub's works from a variety of sources. By 2009, he had acquired approximately forty paintings and drawings by the artist. And, from September of 2009 through approximately November of 2011, Hall says he acquired an additional twenty-four works of art either directly or indirectly through the Gascards, all of which were represented to have been original works produced by Golub. Specifically, Hall alleges the following:

On September 23, 2009, he purchased a painting called "Untitled" from Christie's New York Auction House for \$47,000, which he says was consigned by one or both of the Gascards, who represented it was an original work by Golub which they had acquired directly from the artist.

In March of 2010, Hall acquired three more works from Christie's New York for \$75,000, each of which he says was consigned by one or both of the Gascards, who represented to Christie's that they were original pieces by Golub.

In September of 2010, Hall acquired another work purportedly painted by Golub, this time from Sotheby's and at a cost of \$31,250. Again, he says the work was consigned by one or both of the Gascards, who represented that it was an original work by Golub.

In March of 2011, Hall acquired two more works from Christie's, at a cost of \$53,750. He claims those works were consigned by one or both of the Gascards, who represented that they were original works by Golub.

Around the same time, Hall says he was in direct contact with the Gascards after learning that they had listed another ostensible Golub work on an online auction house. In that transaction, Hall acquired

another work he says the Gascards represented was an original Golub, at a cost of \$28,750.

Following that transaction, Hall says Nikolas Gascard informed him that his mother, Loretann Gascard, had a collection of Golub works that the Gascards wished to sell. Nikolas also offered to sell a number of ostensible Golub works from his own collection as well.

In March of 2011, Hall acquired ten works from Nikolas Gascard's collection, each of which was represented to be an original piece by Golub, for a total purchase price of \$275,000.

In October of 2011, Hall says Nikolas Gascard brokered a sale of six more alleged original Golub works from Loretann Gascard, for a total purchase price of \$165,000.

Complaint at paras. 10-17.

Hall alleges that, beginning in February of 2015, he began to discover that the pieces he purchased from the Gascards, whether directly or indirectly, are not original works by Golub. Instead, he says, all are clever forgeries. As to each of the transactions described in the complaint and summarized above, Hall alleges that one or both of the Gascards knowingly made false statements (either directly to Hall or to the auction house) about the particular work's provenance, and falsely represented that each of the paintings Hall purchased was an original painting by Golub when, in fact, the Gascards knew that those paintings were forgeries. See, e.g., Id. at paras 1, 10,

and 30. And, says Hall, he would not have purchased any of the works at issue in this case had he known that it was a forgery. In other words, the "authenticity of each of the Challenged Works was clearly material to Hall's decision to purchase each one." Id. at para. 31.

In September of 2016, Hall filed this action against the Gascards.¹ In his complaint, he advances six claims: fraud (count one); conspiracy to defraud (count two); breach of common law and statutory warranties (count three); breach of contract (count four); unjust enrichment (count five); and unfair and deceptive trade practices, in violation of New Hampshire's Consumer Protection Act (count six). As noted above, the Gascards move to dismiss all claims, asserting that none states a viable cause of action. See generally Fed. R. Civ. P. 12(b)(6). Hall objects.

¹ Hall has represented to the court that, after filing this action against the Gascards, he reached settlements with both Christie's and Sotheby's. Pursuant to the latter, Sotheby's cancelled its sale to Hall and refunded the entire purchase price. With respect to the six purchases made through Christie's, Hall says Christie's has agreed "to a substantial, but not complete refund of the [total purchase] price." Defendant's Memorandum in Opposition to Dismissal (document no. 10-1) at 12 n.3. So, as to those transactions, Hall seeks damages from the Gascards "to the extent his settlement with Christie's did not make him completely whole for the price he paid for [those six] fake Golub works." Id.

Discussion

I. All Claims Involving Sotheby's and Christie's.

The Gascards first move to dismiss all of Hall's claims that relate to the purchases he made through Christie's and Sotheby's, asserting that: (1) the complaint fails to adequately allege that the works purchased through those auction houses were actually consigned by defendants; and (2) the complaint fails to allege with sufficient specificity which of the two defendants made the allegedly false statements to the auction houses about the various works' provenance. In particular, defendants seem to believe that because some of the factual allegations in Hall's complaint are based upon "information and belief," the complaint fails to adequately plead a viable claim for relief. The court disagrees.

Viewed in its entirety, the complaint adequately and plausibly alleges that the works at issue originated with defendants and that defendants knowingly made false statements about the provenance and authenticity of those works. See generally Iqbal, 556 U.S. at 678. And, the fact that some of the complaint's factual allegations are made upon "information and belief" does not render Hall's claims, when viewed in their entirety, legally insufficient. Indeed, as required, the complaint adequately sets forth supporting facts sufficient to

demonstrate the basis upon which the "information and belief" is founded. See, e.g., Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 96 (1st Cir. 2007) (noting that, under the PLSRA, "if an allegation regarding the [fraudulent] statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed," and also noting that those pleading requirements are "congruent and consistent with pre-existing standards of this circuit under Rule 9(b)"). See also Aldridge v. A.T. Cross Corp., 284 F.3d 72, 78 (1st Cir. 2002) ("[We have previously held] that the PSLRA did not alter this circuit's rigorous reading of the standards for pleading fraud [under Rule 9(b)]. The plaintiff in a securities fraud action must specify each allegedly misleading statement or omission including its time, place and content. The plaintiff must provide factual support for the claim that the statements or omissions were fraudulent, that is, facts that show exactly why the statements or omissions were misleading. If the plaintiff brings his claims on information and belief, he must set forth the source of the information and the reasons for the belief.") (citations and internal punctuation omitted).

II. Count One - Fraud.

Next, defendants move to dismiss Hall's fraud claim on grounds that the complaint fails to adequately allege that Hall's reliance on the false statements attributed to the Gascards was "justifiable." In short, the Gascards seem to suggest that because Hall was a sophisticated purchaser of Golub's work, he was not entitled to rely upon their allegedly false assurances that the works at issue were genuine pieces painted by Golub. Instead, say the Gascards, Hall was required to independently verify the authenticity of the works prior to purchasing them. And, having failed to do so, he must bear the consequences of that failure and accept the fact that he paid several hundred thousand dollars for twenty-four clever forgeries.

Assuming for the moment that Hall had some duty to verify the accuracy of the representations of authenticity, even the cases upon which the Gascards rely suggest that the reasonableness of a party's reliance is a factual question. See Defendant's Memorandum (document no. 7 at 9) (citing ACA Galleries, Inc. v. Kinney, 928 F. Supp. 2d 699, (S.D.N.Y. 2013)). See also Rodi v. S. New England Sch. of Law, 532 F.3d 11, 15 (1st Cir. 2008) (noting that "the reasonableness of a party's reliance is ordinarily a question of fact for the jury,"

but acknowledging that it is an issue that, under certain circumstances, could be resolved on summary judgment).

Whether the "reasonableness" of Hall's reliance on the false statements attributed to the Gascards can be resolved on summary judgment is, at this juncture, unclear. It is, however, plain that the grounds advanced by the Gascards do not support dismissal of Hall's fraud claim under Rule 12(b)(6).

The Gascards also assert that Hall's fraud claim is barred by the economic loss doctrine. Generally speaking, the economic loss doctrine operates "to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Plourde Sand & Gravel Co. v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007). See also Wyle v. Lees, 162 N.H. 406, 412 (2011) (noting that the economic loss doctrine precludes claims that "merely relate to a breached promise to perform the terms of the contract or attempt to recharacterize a breach of contract claim as a negligent misrepresentation claim."). In simpler terms, "[a] plaintiff cannot recover damages in tort for a negligently performed contract." Androscoggin Valley Reg'l Refuse Disposal Dist. v. R.H. White Constr. Co., 2017 WL 1906612 at *4, 2017 DNH 93 (D.N.H. May 8, 2017).

There is, however, an exception to the economic loss doctrine that permits a plaintiff to recover in tort for misrepresentations, unrelated to any material terms of the contract, that induced him or her to enter into the agreement. As the New Hampshire Supreme Court has noted,

Where a negligence claim is based only on breach of a contractual duty, the law of contract rightly does not punish the breaching party, but limits the breaching party's liability to damages that naturally flow from the breach. It is an altogether different situation where it appears two parties have in good faith entered into a contract but, in actuality, one party has deliberately made material false representations of past or present fact, has intentionally failed to disclose a material past or present fact, or has negligently given false information with knowledge that the other party would act in reliance on that information in a business transaction with a third party. The breaching party in this latter situation also is a tortfeasor and may not utilize the law of contract to shield liability in tort for the party's deliberate or negligent misrepresentations.

Wyle v. Lees, 162 N.H. at 411 (quoting United Int'l Holdings, Inc. v. Wharf (Holdings), Inc., 210 F.3d 1207, 1226-27 (10th Cir. 2000) (emphasis in original)).²

² In Wharf, the Court of Appeals for the Tenth Circuit went on to note that, "A negligent misrepresentation claim is based not on a contractual duty but on an independent common law duty requiring a party, in the course of business, to exercise reasonable care or competence in obtaining or communicating information on which other parties may justifiably rely. Consequently, the economic loss rule does not bar [a plaintiff's] negligent misrepresentation claim." Wharf, 210 F.3d at 1227. See also Schaefer v. Indymac Mortg. Servs., 731

So it is in this case - at least according to the allegations set forth in Hall's complaint. The Gascards knowingly and intentionally provided false information (both directly to Hall and indirectly, through a third party) about material matters (i.e., the various works' provenance) in an effort to fraudulently induce Hall to enter into various contracts to purchase what he thought were original works of art by Golub. The fraudulent statements preceded contract formation and were (allegedly) uttered for the very purpose of inducing Hall to enter into the contracts. Under the facts as pled, Hall's fraud claim is not barred by the economic loss doctrine. See, e.g., Wyle, 162 N.H. at 411 ("In other words, where the misrepresentation of present fact serves as an inducement for the contract, it is not duplicitous of the breach of contract claim," and, therefore, a claim for fraud is not barred by the economic loss doctrine) (citation and internal punctuation omitted).

The Gascards remaining assaults on Hall's fraud claim lack merit. It is sufficient to state that the complaint adequately alleges, with the requisite degree of specificity, the essential elements of a viable fraud claim.

F.3d 98, 108-09 (1st Cir. 2013). That reasoning is equally applicable to a plaintiff's fraud claim.

III. Count Two - Conspiracy to Defraud.

"A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987) (quoting 15A C.J.S. Conspiracy § 1(1), at 596 (1967)). So, to state a viable civil conspiracy claim, the complaint must plausibly allege: (1) that Loretann Gascard and Nikolas Gascard; (2) agreed to accomplish some goal (either an unlawful goal to be achieved through lawful means, or a lawful goal to be achieved through unlawful means); (3) that the Gascards undertook one or more unlawful acts in furtherance of the agreement; and (4) as a proximate result, Hall suffered damages. See Jay Edwards, 130 N.H. at 47. In support of their motion to dismiss, the Gascards assert that the complaint fails to adequately allege the existence of any agreement between them to defraud Hall.

The civil conspiracy claim is not subject to dismissal on the grounds advanced by the Gascards. It adequately alleges an agreement between Loretann Gascard and Nikolas Gascard to defraud Hall by, among other things, corroborating the false statements issued by the other, "as part of a concerted effort by the Gascards to sell the bulk of their collection of forged

Golubs to Hall." Complaint at para. 35. In support of that assertion, the complaint alleges that Loretann Gascard and Nikolas Gascard each represented that the paintings they were selling to Hall were originals produced by Golub, and that such paintings were either acquired directly from the artist, or through a family member who had acquired them directly from the artist. See, e.g., Id. at paras. 12, 13, and 16. It also alleges that the Gascards worked together to sell forged paintings from each other's collections to Hall, and that Nikolas "brokered" the sale of six alleged Golub works from his mother's collection to Hall. See Id. at paras. 15-17. And, after Hall began to harbor suspicions that the works might not be authentic, the Gascards sought to reassure Hall by falsely representing that Loretann Gascard was a longtime and close personal friend of the artist. See Id. at paras. 18 and 34.

The allegations set forth in the complaint adequately set forth the essential elements of a viable claim for civil conspiracy. Accordingly, the Gascards' motion to dismiss that claim must necessarily be denied.

IV. Count Three - Breach of Warranties.

In count three of his complaint, Hall advances both common law and statutory claims for breach of warranty. As to the

common law claims, the Gascards assert that there is no claim for breach of warranty under New Hampshire common law when the transaction at issue is governed by New Hampshire's version of the Uniform Commercial Code. See Defendants' Memorandum (document no. 7-1) at 20 (citing Willard v. Park Indus., 69 F. Supp. 2d 268, 274 (D.N.H. 1999) ("As there is no common law of breach of warranty in New Hampshire, plaintiff's right of recovery, if any, is governed by New Hampshire's [Uniform Commercial Code].")). Hall does not disagree (or, at a minimum, his memorandum is silent on this issue). Accordingly, to the extent the complaint advances claims for common law breach of warranty, those claims are dismissed.

As for Hall's warranty claims under the Uniform Commercial Code, N.H. Rev. Stat. Ann. ("RSA") ch. 382-A, the Gascards assert that they are barred by the statute's four year limitations period. See RSA 382-A:2-725. That statute provides that an "action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . . A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." RSA 383-A:2-275(1) and (2). But, says Hall, the limitations periods applicable to his various claims (including

his breach of warranty claims) were tolled by the discovery rule and/or the fraudulent concealment doctrine.³

At this juncture, the court cannot conclude that, as a matter of law, Hall's statutory breach of warranty claims are barred by the applicable limitations period. Whether equitable doctrines operate to toll that limitations period turns on questions of fact (and will require additional legal briefing by both parties). Defendants are obviously free to raise their arguments concerning the limitations periods applicable to Hall's various claims in the context of summary judgment, when (presumably) both the record and the parties' briefing on this issue will be more fully developed.

V. Count Four - Breach of Contract.

As they did with regard to Hall's breach of warranty claim, the Gascards assert that Hall's breach of contract is barred by the applicable statute of limitations. But, for the reasons just discussed, the court cannot resolve that issue on an undeveloped factual record.

³ While the express language of the statute may preclude operation of the discovery rule, the parties have not briefed that issue. Nor have they addressed in any detail whether the fraudulent concealment doctrine might properly apply in this case.

VI. Count Five - Unjust Enrichment.

Next, the Gascards assert that, "Hall has [] plausibly inferred [sic] the existence of a contract under the UCC for every transaction he allegedly entered into with the defendants." Defendants' Memorandum at 21. Consequently, say the Gascards, Hall cannot simultaneously seek to recover on a theory of unjust enrichment. Specifically, the Gascards assert that, "It is a well-established principle that the court ordinarily cannot allow recovery under a theory of unjust enrichment where there is a valid, express contract covering the subject matter at hand." Id. (quoting Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 211-12 (2009)).

Again, however, the Gascards argument would seem to be premature. As this court (Laplante, C.J.) has noted:

Under New Hampshire law, the court ordinarily cannot allow recovery under a theory of unjust enrichment where there is a valid, express contract covering the subject matter at hand. However, unjust enrichment may be available to contracting parties where the contract was breached, rescinded, or otherwise made invalid, or where the benefit received was outside the scope of the contract. Moreover, pleading in the alternative is an appropriate course to follow at this stage of the proceedings.

Aftokinito Properties, Inc. v. Millbrook Ventures, LLC, No. 09-CV-415-JD, 2010 WL 3168295, at *5 (D.N.H. Aug. 9, 2010)

(citations and internal punctuation omitted). At this stage of the litigation, the court cannot determine whether Hall may, or may not, recover on his unjust enrichment claim - the factual record is not sufficiently developed. But, as permitted by the Federal Rules of Civil Procedure, Hall has plausibly pled a claim for unjust enrichment in the alternative to his claim for breach of contract. See Fed. R. Civ. P. 8(a)(3) (“[A] demand for the relief sought . . . may include relief in the alternative or different types of relief.”).

Stated somewhat differently, barring unusual circumstances, it is unlikely that Hall will be able to recover on both an unjust enrichment claim and a breach of contract claim. But, he is certainly entitled to plead his claims in the alternative.

VII. Count Six - Consumer Protection Act.

Finally, the Gascards move to dismiss Hall’s claim under New Hampshire’s Consumer Protection Act, RSA ch. 358-A. That statute makes it unlawful for “any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within” the state of New Hampshire. RSA 358-A:2. The statute defines “trade and commerce” broadly, to include: “the advertising, offering for sale, sale, or distribution of any services and any property,

tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state." RSA 358-A:1, II. Although that statute "casts a wide net," Anderson v. Century Prods. Co., 943 F. Supp. 137, 153 (D.N.H. 1996), it does not apply to transactions that are "strictly private in nature" and are "in no way undertaken in the ordinary course of a trade or business." Hughes v. DiSalvo, 143 N.H. 576, 578 (1999) (quoting Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973, 975 (1978)).

According to the Gascards, Hall's complaint fails to adequately alleged that "any of the alleged transactions took place in a trade or business context." Defendants' Memorandum at 22 (citation and internal punctuation omitted). In response, Hall says:

The allegations set forth in the Complaint fall squarely within the purview of the CPA as they are based on commercial transactions. At least eight of the Works were purchased at a public auction held at two different auction houses at multiple different auction dates. (Compl. ¶¶ 10-14). Those transactions were indisputably not private business transactions. Moreover, the direct purchases only arose after Hall purchased a Work from the Gascards through an online auction site, and N. Gascard offered additional Works for sale. (Compl. ¶ 14). The direct purchases were not isolated single-shot transactions. Rather, they were repeated transactions, involving the purchase of sixteen different Works. (Compl. ¶¶ 16-17). And Hall

did not acquire all of the putative Golub Works on offer from the Gascards, leaving the possibility that they have sold other fake Golubs to other unsuspecting art collectors.

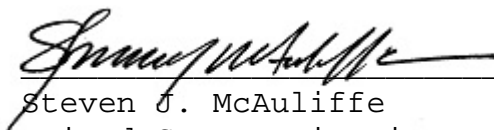
Plaintiff's Memorandum (document no. 10-1) at 21-22.

At this stage, Hall's complaint adequately alleges that the Gascard's various sales of allegedly fraudulent works of art were not "strictly private in nature," but were instead made in the ordinary course of trade or business. Hall's Consumer Protection Act claim must, therefore, survive defendants' motion to dismiss. Should the Gascards continue to press their argument that the Consumer Protection Act does not apply to any of the transactions referenced in the complaint, that claim can be better addressed on summary judgment. As the New Hampshire Supreme Court has noted, "To determine whether the Consumer Protection Act applies to a particular transaction, we analyze the activity involved, the nature of the transaction, and the parties to determine whether a transaction is a personal or business transaction." Brzica v. Trustees of Dartmouth Coll., 147 N.H. 443, 451 (2002) (quoting DiSalvo, 143 N.H. at 578). Perhaps a more fully developed record will provide the necessary factual support for the Gascards' argument.

Conclusion

For the foregoing reasons, as well as those set forth in Plaintiff's Memorandum of law, defendants' motion to dismiss (document no. 7) is denied in all respects, except as to plaintiff's common law breach of warranty claims (a portion of count three), which are dismissed.

SO ORDERED.



Steven J. McAuliffe
United States District Judge

June 12, 2017

cc: Ted Poretz, Esq.
Samantha D. Elliott, Esq.
Lorettann Gascard, pro se
Nikolas Gascard, pro se