

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

TSA CORPORATE SERVICES, INC.,

Plaintiff,

v.

No. CIV 05-1115 BB/KBM

**HAYDEN CONSTRUCTION, INC.,
STEPHEN LIN HAYDEN, and
KATHLEEN KYAN HAYDEN,**

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiff's January 24, 2006 motion to dismiss Defendants' counterclaim for failure to state a claim upon which relief may be granted (Doc. 13). Having reviewed the submissions of the parties and the relevant law, the Court finds that Plaintiff's motion should be GRANTED in part and DENIED in part.

Standard for Reviewing a Rule 12(b)(6) Motion to Dismiss

In addressing a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court is required to accept as true all well-pleaded facts alleged in the claimant's complaint or counterclaim. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266 (10th Cir. 1989); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1267 (10th Cir. 2003). The Court does not, however, accept conclusory allegations as true. *E.F.W. v. St. Stephens Indian High Sch.*, 264 F.3d 1297, 1306 (10th Cir. 2001). In determining whether the complaint or counterclaim states a claim, this Court is not limited to the legal theories argued by the claimant, but must examine the complaint or counterclaim to determine whether the allegations provide for relief under any theory.

EXHIBIT K - part 1

See Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1375, n.5 (10th Cir. 1980). The issue in reviewing the sufficiency of a complaint or counterclaim is not whether the claimant ultimately will prevail, but whether the claimant is entitled to offer evidence to support his or her claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). This Court will dismiss the complaint or counterclaim, or claims contained therein, only if it appears that the claimant can prove no set of facts in support of her claim that would entitle it to relief. *Phelps*, 886 F.2d at 1266.

Plaintiff TSA Corporate Services, Inc. (“TSA”) attached the Summary Fixed Price Construction Agreement and General Condition for Construction to its memorandum of law in support of its motion to dismiss (Doc. 14). Typically, a court is required to convert a motion to dismiss into a summary judgment motion if “matters outside the pleadings are presented to and not excluded by the court” and “all parties . . . [are] given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” FED. R. CIV. P. 12(b). However, if a document is not incorporated by reference or attached to the complaint, but is referred to in the complaint and is central to the claim, the defending party may submit an “indisputably authentic copy to the court to be considered on a motion to dismiss.” *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). Defendant-Counterclaimant Hayden Construction, Inc. (“Hayden Construction”) does not dispute the authenticity of the appended documents and the documents are also central to its counterclaims. Therefore, the Court will consider these attached documents but will not convert this motion into one for summary judgment.

Factual Allegations

Over the past seven to eight years, Hayden Construction has contracted with TSA to build and remodel retail stores located throughout the country for TSA. (Counterclaim ¶ 3.) During this

time, the work Hayden Construction performed for TSA constituted eighty to ninety percent of Hayden Construction's total workload. (Counterclaim ¶ 8.)

The heart of Hayden Construction's counterclaim is its allegation that, over the past several years, TSA forced it to do certain things in order to continue to receive these construction and remodeling contracts. First, Hayden Construction was required to open "regional" offices in various states and staff these offices with friends of a TSA officer. (Counterclaim ¶ 10.) Second, TSA required Hayden Construction to remodel private real estate owned by a different TSA officer at a discounted cost. (Counterclaim ¶ 12.) TSA told Hayden Construction that it would be further compensated for this discounted remodeling at some point in the future, but this promise was never fulfilled. (Counterclaim ¶¶ 12, 31.) Third, Hayden Construction requested that TSA make cash payments to a TSA officer and pay for travel and entertainment expenses for the same officer. (Counterclaim ¶ 13.) TSA assured Hayden Construction that it would be able to recover these costs on future TSA projects, but this promise was likewise never fulfilled. (Counterclaim ¶¶ 13, 31.)

Recently, between May 2004 and March 2005, TSA and Hayden Construction executed seven Summary Fixed Price Construction Agreements (collectively referred to as the "Contracts" or "Written Contracts") for construction and remodeling work at several TSA store locations throughout the country. (Compl. ¶ 6.) Under the terms of the Contracts, Hayden Construction was to serve as the general contractor and was authorized to enter into subcontracts for performance of the work required. (Compl. ¶¶ 7-8.) The Contracts also set forth a "draw/payment" process whereby TSA would make incremental payments to Hayden Construction as the projects reached various stages of completion. (Compl. ¶ 9.)

Under the Contracts, Hayden Construction was responsible for making the necessary payments to its subcontractors. (Compl. ¶ 9.) Further, in order to receive the incremental payments, Hayden Construction was required to submit to TSA sworn statements affirming that all payroll, bills for equipment and materials, and other bills connected with the projects had been satisfied. (Compl. ¶ 10.)

In early 2005, several subcontractors informed TSA that they had not been paid and that, as a consequence, mechanic's liens against the properties subject to the Contracts had been or would be filed. (Compl. ¶ 15.) After investigation, TSA determined that it had disbursed to Hayden Construction the \$555,661.64 in fees owed to the subcontractors and that an officer of Hayden Construction issued the required sworn affidavits for such disbursements. (Compl. ¶¶ 11, 13.) TSA subsequently filed this action on October 21, 2005 (Doc. 1).

Hayden Construction filed its Answer on December 12, 2005 (Doc. 10). Hayden Construction also asserted four counterclaims against TSA based on the allegations that TSA required Hayden Construction to perform discounted remodeling work and pay for travel and entertainment expenses but failed to allow Hayden Construction to recover these costs on future projects as promised. The counterclaims asserted by Hayden Construction are: intentional misrepresentation, violation of the New Mexico Unfair Practices Act, breach of the implied covenant of good faith and fair dealing, and economic duress. TSA filed a motion to dismiss these counterclaims on January 24, 2006 (Doc. 13). The Court will now address each counterclaim in turn.

Discussion

I. The Intentional Misrepresentation Counterclaim

Hayden Construction alleges that TSA intentionally and fraudulently represented that it would be able to recover the costs of the discounted remodeling work on future TSA projects. (Counterclaim ¶ 24). Hayden Construction also alleges that TSA intentionally and fraudulently represented that it would be able to recover the costs of the travel and entertainment expenses on future TSA projects. (Counterclaim ¶ 25.)

As Hayden Construction concedes, this counterclaim is governed by Rule 9(b)'s heightened pleading requirement. Rule 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). This heightened pleading requirement is intended to provide fair and adequate notice of the claim and to protect the accused party from reputational damage that "improvident charges of wrongdoing" may cause. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir. 1992).

To comply with Rule 9(b)'s heightened pleading requirement, and survive TSA's motion to dismiss this counterclaim, Hayden Construction must set forth the "time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997); *Midgley v. Rayrock Mines, Inc.*, 374 F. Supp. 2d 1039, 1047 (D.N.M. 2005).

Hayden Construction's counterclaim does not satisfy these requirements. First, Hayden Construction does not state exactly when the allegedly fraudulent statements were made. Rather, the counterclaim vaguely asserts that the statements occurred "several years ago." (Counterclaim ¶ 9.) This general allegation does not satisfy Rule 9(b).

Second, the counterclaim fails to allege the place where these statements were made.

Third, Hayden Construction does not set forth the specific contents of the allegedly false representations. Instead, it only generally states that “TSA, its employees, officers, or agents intentionally and fraudulently represented to Hayden Construction, Inc., that Hayden Construction, Inc., would be able to recover amounts on future projects for work or payments Hayden Construction, Inc. made on behalf of TSA,” and that “cash payments made to [Michael] Quaintance and entertainment, hotels and travel would be recoverable.” (Counterclaim ¶¶ 24-25.) These broad allegations do not satisfy Rule 9(b). *See U.S. ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 329 (5th Cir. 2003).

Fourth, Hayden Construction does not specifically allege who made the purportedly fraudulent statements. It is true that the counterclaim identifies the specific TSA officer, Greg Waters, whose private real estate was remodeled and the specific TSA officer, Michael Quaintance, whose entertainment and travel expenses Hayden Construction covered. (Counterclaim ¶¶ 12-13.) However, the counterclaim does not assert that these individuals made the allegedly fraudulent statements that (1) Hayden Construction would be able to recover the remodeling discount on future projects or (2) that cash payments, entertainment, hotel and travel expenses would be recoverable. Thus, the counterclaim has not identified the individuals responsible for the allegedly fraudulent statements which when combined with the failure to allege the time and place of the statements fails to provide the specificity required by Rule 9. *Arena v. Wal-Mart Stores, Inc.*, 221 F.R.D. 569, 572 (D. Kan. 2004); *Samuel v. Pace Membership, Inc.*, 686 F. Supp. 873, 875 (D. Colo. 1988).

Thus, Hayden Construction’s intentional misrepresentation counterclaim is dismissed, with leave to amend, for failure to comply with the pleading requirement of Rule 9(b). The Court

reiterates that, to avoid dismissal, an amended counterclaim on this count must allege with particularity the time, place, and identity of each individual who made each misrepresentation, and the language of the misrepresentation made by each individual.

II. The New Mexico Unfair Practices Counterclaim

Hayden Construction alleges that TSA “violated the New Mexico Unfair Trade [sic] Practices Act by knowingly making false and misleading statements in connection with a Contract for services.” (Counterclaim ¶ 38.) In order to establish standing to state a claim under any statute, including the New Mexico Unfair Practices Act (“UPA”), the claimant must demonstrate that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute.” *Key v. Chrysler Motors. Corp.*, 918 P.2d 350, 354 (N.M. 1996). Hayden Construction has failed to make such a demonstration in its counterclaim.

The UPA provides that “[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful.” N.M. STAT. § 57-12-3 (2006). The UPA contemplates a plaintiff-purchaser and a defendant-seller. *Santa Fe Custom Shutters & Doors v. Home Depot U.S.A., Inc.*, 113 P.3d 347, 352 (N.M. App. 2005), *cert. denied*, 113 P.3d 345. Therefore, “Consistent with its purpose as consumer protection legislation, the [UPA] gives standing only to buyers of goods or services.” *Id.* at 353. (citations omitted); *see also Ashlock v. Sunwest Bank*, 753 P.2d 346, 348 (N.M. 1988), *overruled on other grounds by Gonzalez v. Surgidev Corp.*, 899 P.2d 576 (N.M. 1995), (stating “the [UPA] lends the protection of its broad application to innocent consumers”). (emphasis added.)

Hayden Construction acknowledges that the UPA only gives standing to purchasers. It contends in its response, (Doc. 18), however, that “services were being provide by both parties to