SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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VISTA FOOD EXCHANGE, INC.,

Plaintiff,

DECISION AND ORDER
Motion Seq. Nos.: 001 -and- 002

-against-

Index No.: 652572/2013

BENEFITMALL a/k/a CENTERSTONE INSURANCE AND FINANCIAL SERVICES, MICHAEL BRACHLOW, ERIN BRACHLOW, DINESMORE/STEELE, and RODNEY STEELE,

Defendants.

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O. PETER SHERWOOD, J.:

As the motions before the court are motions to dismiss the compliant, the facts are taken from the complaint and are assumed to be true. The complaint alleges negligence, breach of contract, breach of fiduciary duty, and malpractice. Plaintiff Vista Food Exchange, Inc. ("Vista") claims that the defendants referred it to non-party People Plus Management to provide human resources, benefits, and payroll administration services for Vista. People Plus self-insured the health and workers' compensation claims and failed to make required tax payments for Vista, leaving Vista potentially liable to employees, the IRS and other taxing agencies.

Vista is a small company in the wholesale food business. Defendant, BenefitMall, a/k/a Centerstone Insurance and Financial Services (BenefitMall) is a company which helps employers identify the "best benefit solutions for their employees . . . [including] accurate and timely payroll" (Complaint at ¶8). Defendants, Michael Brachlow and Erin Brachlow (together, the "Brachlows", and with BenefitMall, the "BenefitMall Defendants") work in the White Plains office of BenefitMall. Defendant Dinesmore Steele ("DS") is a business partner of BenefitMall. Defendant Rodney Steele ("Steele", and with DS, the "DS Defendants") is a principal of DS.

Since the 1990s, Vista received advice from the Brachlows and BenefitMall regarding HR matters. Vista was assured by the Brachlows that the advice would protect Vista's business interests. In 2011, BenefitMall, the Brachlows, and DS recommended that Vista hire People Plus to handle its HR matters. The complaint does not allege that Vista engaged defendants to provide advisory services to act on its behalf or that Vista paid defendants for such services. The

complaint alleges that the defendants knew or should have known that People Plus had not obtained insurance for some health and workers' compensation claims, and that the defendants failed to notify Vista about the risks of that choice, namely that People Plus could get into financial trouble, collect client funds to be paid as taxes (*see id* ¶¶24-26), and fail to pay those taxes. The defendants failed to inform Vista that outsourcing the tax function would not absolve Vista of its tax liabilities, and so would entail risks to Vista (*see id* ¶27). Vista relied on the representations of the defendants when it hired People Plus. In late 2012, multiple tax liens were filed against People Plus entities, but defendants did not inform Vista of the liens. Vista continued to work with People Plus through the first quarter of 2013. The complaint also alleges the defendants received payments or other benefits from People Plus, or provided services to People Plus in 2011-12, creating a conflict of interest (*see id* ¶¶ 35, 54).

The complaint alleges four (4) causes of action as follows:

1) Negligence/Negligent Misrepresentation: Defendants offered to "identify and provide the best benefits solutions" (Complaint at ¶42); defendants had or assumed a duty to "accurately describe the risks and benefits" of the outsourcing solution and to provide a solution that decreased, rather than increased, Vista's risks (*id* at ¶43-44); defendants breached those duties by recommending People Plus, and that Vista suffered damage as a result.
2) Breach of Contract/Breach of Implied Duty of Good Faith and Fair Dealing: The consulting services provided by defendants created contractual duties for the defendants to be competent in their recommendations; defendants were paid by People Plus which Vista claims creates additional obligations; and defendants breached their contract(s) by failing to conduct proper due diligence into People Plus, in recommending People Plus, and in failing to monitor People Plus, as a consequence of which Vista suffered damage.
3) Breach of Fiduciary Duty: Defendants had fiduciary duties to warn Vista about the risks involved in recommending People Plus to Vista without a sound basis and, as a result of defendants' failures to fulfill their duties, Vista suffered damages.
4) Malpractice: Defendants held themselves out as HR consulting specialists, able to provide advice in a "competent and professional manner" (*id* at ¶67); defendants failed to meet the standard of professional care, resulting in damage to Vista.

In separate motions, the BenefitMall Defendants (Motion Sequence Number 001) and the DS Defendants (Motion Sequence Number 002) move to dismiss the entire complaint. Vista opposes the motions and in the alternative seeks leave to amend the complaint.

DISCUSSION

A. Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

B. Negligence/Negligent Misrepresentation

"[N]egligence requires a duty of care owed to a plaintiff, and breach of the duty of care owed by a reasonably prudent person which causes the plaintiff's legally cognizable injury and/or damages" (NYJUR NEGLIGENCE § 1). The BenefitMall Defendants assert that the claim should fail because the defendants had no duty to provide advisory services to plaintiff, that they fulfilled their duty as insurance brokers to introduce Vista to several possible vendors, and that their duties ended there, with the burden to evaluate the vendors falling to Vista (BenefitMall Defendants' Memo, NYSECF Doc. No. 13, at 8, citing cases related to insurance brokers). All defendants argue that Vista's negligence claim should fail because Vista has alleged only the bare legal conclusion that the defendants had or assumed a duty, rather than alleging facts giving rise to such a conclusion (*id* at 9). Additionally, the DS Defendants argue that this claim is barred by the economic loss rule (DS Memo, NYSECF Doc. No. 23, at 11). The economic loss rule provides that "there can be no recovery in tort when the only damages alleged are for economic loss. In other words, a plaintiff who has sustained an economic loss, but has not sustained any injury to person or property is limited to recovery in contract (*see* NYPRAC

TORTS §21:13.10; *see also Robin Bay Assocs. v Merrill Lynch & Co.*, 2008 US Dist LEXIS 43679*16 [SDNY June 3, 2008]).

Vista responds that the allegations of negligence are not based on the BenefitMall Defendants' work as insurance brokers, but on their recommendations for a payroll services company. Accordingly, the general rule that "[a] person undertaking to perform work is charged with the common law duty to exercise reasonable care and skill in the performance of the work" applies (Pl. Opp., NYSECF Doc. No. 30, *quoting Trans Caribbean Airways, Inc. v. Lockheed Aircraft Service-International, Inc.*, 14 A.D.2d 749, 749 [1st Dept 1961]). Vista argues that its allegations that the defendants had, or assumed, or owed, a duty to describe and/or minimize the risks to Vista, are sufficient (*id* at 13, *citing* Complaint, ¶43-44). Vista does not specify how this duty arose.

In reply, the BenefitMall Defendants argue that this claim, as clarified by Vista's Opposition, is duplicative of the breach of contract, malpractice, and breach of fiduciary duty claims, and so should be dismissed (BenefitMall Reply, NYSECF Doc. No. 41, at 11, *citing Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236, 238 [1st Dept 2000]). The BenefitMall Defendants also argue that, in a commercial transaction, negligent misrepresentation can only be imposed on a party with specialized expertise and which is "in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified," (*id*, *quoting Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 [1996]). The twenty-year relationship alleged by Vista is insufficient to create such an obligation. The BenefitMall Defendants maintain that BenefitMall was acting as a finder, with the sole obligation to make introductions or recommendations concerning an entity that could provide the desired services. They did so, and it was Vista's obligation to conduct any due diligence (*Benefit Mall Reply* at 12-13). DS Defendants rely on the economic loss rule and the general insufficiency of the conclusory allegation that the defendants had a duty to Vista.

Absent a contractual relationship between defendants and Vista, the conduct alleged in the complaint is not actionable because defendants have no duty to plaintiff independent of the contract. Because the duty, if any, arises out of the alleged contract, the claim would be duplicative of the breach of contract claim and must be dismissed. Moreover, as the DS Defendants point out, economic loss is not recoverable under a negligence theory.

C. Breach of Contract/of Implied Duty of Good Faith and Fair Dealing

Defendants argue that the Breach of Contract/ Breach of Implied Duty of Good Faith and Fair Dealing claim should be dismissed because no contract is alleged. Defendants assert that the breach of contract claim also fails to specify what contract clause or contractual obligation was breached. Vista claims that it adequately alleged the existence of a contract in its statements that Vista relied on the defendants for their advice and expertise, that defendants had assured Vista that their recommendations would protect Vista, and that defendants received consideration for these consulting services in the form of payment by People Plus, the vendor selected by Vista (Vista Opp. at 9-10, *citing* Complaint at ¶¶14-15, 21, 54).

BenefitMall Defendants argue that Vista has failed to allege what contractual provision (other than that of good faith and fair dealing) was breached by the defendants, and that, in any event, the type of contract alleged is for the provision of a business opportunity, and is required to be in writing pursuant to New York General Obligations Law §5-701(a)(10). That provision states:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking. . . (10) Is a contract to pay compensation for services rendered in . . . negotiating the purchase, sale, exchange, renting or leasing . . . of a business opportunity. . . . "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

Vista has alleged that the defendants agreed to provide competent advice and consulting services to Vista for which it was compensated by People Plus. Vista claims that the defendants breached this agreement by failing to conduct sufficient due diligence or monitor the relationship with People Plus. Giving Vista the benefit of every inference, while ignoring legal conclusions unsupported by factual allegations, one could conclude that Vista is claiming that the breaches were based on obligations in the alleged contract. Additionally, while "[i]t is settled that [New York General Obligations Law §5-701(a)(10)] applies to claims for fees by finders" (*Intercontinental Planning, Limited v Daystrom, Inc.* 24 N.Y.2d 372, 378 [1969]), the allegations made by Vista describe a role for the defendants beyond that of a finder.

The complaint fails to set forth the elements required to support a cause of action for breach of contract. Further, assuming that a proper cause of action had been stated, a finder's role is merely to make an introduction (*Futersak v. Perl*, 27 Misc.3d 897, 904 [Sup Ct, Nassau County 2010]). Vista claims that the defendants had obligations to consult, to perform due diligence, and to continue to monitor the relationship between Vista and People Plus. Conclusory allegations as to additional obligations of defendants are insufficient to transform the nature of defendants' role from that of a finder. The complaint alleges that defendants merely made recommendations and gave advice to Vista. There are no allegations that defendants were involved in the negotiation and consummation of any transactions between Vista and People Plus (*see id* at 903). Accordingly, the allegations are insufficient to support the breach of contract claim.

The DS Defendants also raise the additional argument that Vista failed to allege damages, that the complaint asserts only the prospect of possibly having to pay taxes twice (DS Memo at 10). Having alleged only the possibility of future damages, the breach of contract claim fails (*see* NY JUR DAMAGES § 15-16; *Hernandez v. New York City Transit Authority*, 52 AD3d 367, (1st Dept 2008 [where a medical treatment was recommended but neither currently occurring nor reasonably certain to occur, no damages could be awarded]).

D. Breach of Fiduciary Duty

The BenefitMall Defendants initially argued that the breach of fiduciary duty claim must be dismissed based on BenefitMall's status as an insurance broker. In its opposition, Vista clarifies that it is not suing BenefitMall as an insurance broker, but as an HR consultant, and claims that it need only allege the existence of a fiduciary relationship and misconduct causing damages (Opp. at 14).

> As a general matter, an arms-length . . . contractual relationship may not give rise to a fiduciary obligation . . . . Nor is the mere communication of confidential information sufficient in and of itself to create a fiduciary relationship . . . . At the same time, however, it is not mandatory that a fiduciary relationship be formalized in writing, and any inquiry into whether such obligation exists is necessarily fact-specific to the particular case. Beyond what may be memorialized in writing, a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge. Thus, the ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized by the courts.

(*Wiener v. Lazard Freres & Co.*, 241 AD2d 114 [1st Dept 1998][citations omitted]). Vista has alleged a long-term relationship with the Brachlows and BenefitMall, during which time Vista was "dependent on the Defendants for their advice, recommendations and assistance" (Complaint, ¶14).

The BenefitMall Defendants assert that they should be characterized as "finders," and so owe no fiduciary duty to Vista (BenefitMall Reply at 8, *citing Northeast General Corp. v. Wellington Adver., Inc.*, 82 NY2d 158, 163 [1993]). Vista responds that it has alleged that the defendants were obligated to provide advice and that Vista relied on them for that counsel, and therefore Defendants' role went beyond that of a mere finder. First, as discussed above, the role defendants are alleged to have played is that of a finder. The allegations are also insufficient to support a fiduciary relationship claim (*see Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]["A conventional business relationship, without more, does not become a fiduciary relationship by more allegations"]).

Mandelblatt v. Devon Stores, Inc. 132 AD2d 162, 168 (1st Dept 1987), on which plaintiff relies for the proposition that "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation", does not depart from the well settled rule that generally, a conventional business relationship does not give rise to fiduciary duties (*see Oddo Asset Mgt. v Barclays Bank, PLC*, 19 NY3d 584, 593 [2012]["A fiduciary relationship . . . is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions"]). In *Mandelblatt*, the court allowed the defendant to amend its answer to assert a breach of fiduciary cause of action where the plaintiff (and proposed counterclaim defendant) who was alleged to be "a highly paid consultant, [employed] to give advice and act for [counterclaim plaintiff's] benefit," was alleged to have disparaged defendant before prospective buyers of the company and injured its business opportunity (*Mandelblatt,* 132 AD2d at 168; *see Robin Bay Assocs., LLC*, 2008 US Dist LEXIS 43679*11 [Under certain circumstances, fiduciary obligations may be found where one employed to negotiate on behalf of a principal actively betrays the plaintiffs' trust]). In this case, there are no allegations that defendants were engaged to negotiate with People Plus on behalf of Vista or that defendants abused any trust or confidence arising therefrom through disparagement or fraud (*see*, *id*).

E. Malpractice

Vista claims that the services provided by the defendants "fell below the standard of professional care as its advice and recommendations were unreasonable" (Complaint, ¶67). Defendants argue that this claim should be dismissed, as the defendants are not in the type of profession for which New York recognizes a claim for professional malpractice (Benefit Mall Reply, NYSECF doc no 41, at 2). Defendants note, correctly, that such claims are restricted to learned professionals such as physicians, architects, engineers, attorneys, and accountants, in professions characterized by "extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards" *Chase Scientific Research, Inc. v. NIA Grp., Inc.*, 96 N.Y.2d 20, 29 (2009). In addition, a professional relationship is one of trust and confidence carrying with it a duty to counsel and advise clients *(see id)*.

Vista asserts that "defendants held themselves out as HR consulting specialists with the training and skill to provide such advice in a professional and competent manner" (Compl. ¶67). The specialization referenced by plaintiff is of such a nature which could be said of workers in most fields of endeavor, and is insufficient to state a claim for professional malpractice (*see, e.g. id* at 30 [Alleged misfeasance of insurance agents and brokers toward their clients is not malpractice]; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440 [1979][Refusing to recognize a claim for "educational malpractice']; *Atkins Nutritionals, Inc. v Ernst & Young U.S., LLC*, 301 AD2d 547, 548 [2d Dept 2003][No cause of action for professional malpractice by computer consultants]). In a conventional business relationship, New York does not recognize a claim for the tort of malpractice independent from breach of contract *(see id)*. The malpractice cause of action must be dismissed.

F. The Individual Defendants

Finally, because the claims in the complaint are related to the alleged contracts between Vista and the corporate parties and there are no contracts between Vista and the individual defendants, all claims against the individuals must be dismissed for this additional reason. Moreover, any actions of the individual defendants arose in their business capacities, and as such, there is no basis for asserting responsibility against them individually.

G Request for Leave to Amend

Plaintiff's alternative request for leave to serve and file an amended complaint will be granted as to the breach of contract claim against the corporate parties only, there being no showing that restatement of the other causes of action pleaded are likely to fair any better than the existing claims (*see Eighth Ave. Garage Corp. v HKL Rlty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). Accordingly, it is hereby

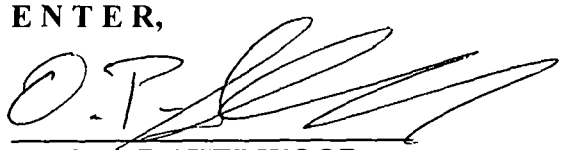
ORDERED that the motions of defendants to dismiss the complaint against the corporate parties are granted in their entirety; and it is further

ORDERED that plaintiff is granted leave to file an amended complaint as to its second cause of action only within twenty days of the date of service of this Decision and Order with Notice of Entry.

This constitutes the decision and order of the court.

DATED: June 9, 2014

E N T E R,



O. PETER SHERWOOD
J.S.C.