

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD H. ROTHMAN, et al. : CIVIL ACTION
:
v. :
:
SPECIALTY CARE NETWORK, INC. : 00-2445

MEMORANDUM AND ORDER

J. M. KELLY, J.

OCTOBER,

2000

Presently before the Court is a Motion for Reconsideration of the Court's Order of July 19, 2000, filed by the Plaintiffs, Richard H. Rothman, M.D. ("Rothman"), Todd J. Albert, M.D. ("Albert"), and Alexander R. Vaccaro, M.D. ("Vaccaro") (collectively referred to as the "Plaintiffs"). That Court Order granted a motion to dismiss Count II of Plaintiffs' Complaint, filed by the Defendant, Specialty Care Network, Inc. ("SCN"). The Court granted the motion as uncontested. Because the Court finds that Plaintiffs failed to properly respond to SCN's motion to dismiss, and further finds that granting Plaintiffs leave to amend their Complaint would be futile, Plaintiffs' Motion for Reconsideration is denied.

I. BACKGROUND

Accepting as true the facts alleged in the Plaintiffs'

Complaint and Amended Complaint, and all reasonable inferences that can be drawn from them, the facts of the case are as follows. Plaintiffs own and operate Reconstructive Orthopaedic Associates II, P.C. ("ROA"), which provides surgical and other medical treatment to its patients in Philadelphia, Pennsylvania. SCN, a Delaware corporation with its principal place of business in Colorado, provided management services to medical practice groups like ROA.

In 1996, SCN purchased some of ROA's assets. In exchange, ROA received cash and shares of SCN stock. In November, 1996, SCN and ROA agreed that SCN would provide ROA with management services for ROA's Philadelphia office. SCN also entered into similar agreements throughout the country.

In 1998, after deciding to change its business strategy, SCN sought to restructure its business arrangements with ROA and other physician groups. On March 9, 1999, SCN and ROA entered into a restructuring agreement. The agreement provided that ROA would repurchase the non-medical assets it had sold SCN in 1996. In exchange, ROA would make cash payments to SCN and would transfer to SCN some shares of SCN common stock owned by Plaintiffs, the owners of ROA.

In April, 1999, after the parties entered into their restructuring agreement, Plaintiffs considered purchasing additional shares of SCN common stock. Plaintiffs contacted SCN

and asked whether, in SCN's judgment, Plaintiffs could purchase those shares. SCN assured Plaintiffs that their purchasing shares of SCN common stock was legal and acceptable to SCN. Plaintiffs, relying on these assurances, proceeded to purchase additional shares of SCN common stock. On April 28, 2000, however, Plaintiffs received a letter from SCN that accused Plaintiffs of "inappropriate and wrongful" conduct regarding their purchase of additional SCN shares of stock. Specifically, the letter claimed that Plaintiffs had purchased the shares of SCN common stock while they had material non-public information. The letter threatened Plaintiffs with legal action. Based on the sudden change of heart demonstrated by the letter, Plaintiffs now believe that SCN made its earlier assurances fraudulently.

Plaintiffs subsequently filed this action. Plaintiffs' Complaint, which they filed on May 11, 2000, contained three counts: Count I sought a declaratory judgment that the Plaintiffs' purchases of SCN common stock were lawful; Count II alleged fraud and misrepresentation based on SCN's assurances to Plaintiffs; and Count III sought to enjoin SCN from making similar accusations and threats in the future.

On June 27, 2000, SCN filed an Answer to Plaintiffs' Complaint. SCN's Answer responded to Counts I and III of Plaintiffs' Complaint, but not to Count II. Instead, SCN contemporaneously filed a motion to dismiss Count II of that

Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). Rather than respond to SCN's motion, Plaintiffs attempted to render it moot by filing an Amended Complaint on July 11, 2000, several days after SCN filed its Answer. Plaintiffs have yet to respond to SCN's motion to dismiss.

Because Plaintiffs failed to respond to SCN's motion to dismiss other than by filing an Amended Complaint, the Court granted SCN's motion as uncontested. See E.D. Pa. Fed. R. Civ. P. 7.1(c) ("In the absence of a timely response [to a motion other than a motion for summary judgment], the motion may be granted as uncontested"). Plaintiffs subsequently filed this Motion for Reconsideration of the Court's July 19, 2000 Order granting that motion to dismiss.

II. STANDARD OF REVIEW

Local Civil Rule 7.1(g) of the United States District Court for the Eastern District of Pennsylvania allows parties to file motions for reconsideration. These motions should be granted sparingly. A motion should only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to correct a clear error of fact or prevent manifest injustice. See, e.g., General

Instrument Corp. v. Nu-Tek Electronics, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), aff'd, 197 F.3d 83 (3d Cir. 1999); Environ Products, Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1996). Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. See Burger King Corp. v. New England Hood and Duct Cleaning Co., 2000 U.S. Dist. LEXIS 1022 (E.D. Pa. Feb. 4, 2000).

III. DISCUSSION

A. Plaintiffs Failed to Respond to SCN's Motion to Dismiss

Under the Federal Rules of Civil Procedure, a party may only file an amended complaint as of right before the service of a "responsive pleading." See Fed. R. Civ. P. 15(a). After service of a responsive pleading, a party may only file an amended pleading with leave of the court. See id. An answer is certainly a pleading. See Fed. R. Civ. P. 7(a). Plaintiffs are of the opinion, however, that an answer is not a "responsive" pleading if, like SCN's Answer, it responds to fewer than all of the counts of a complaint. Under their reading of the Rules, Plaintiffs properly filed their Amended Complaint after SCN filed its Answer and thereby rendered SCN's motion to dismiss moot. The Court disagrees.

Rule 15(a) makes no mention of a level of responsiveness required of a pleading; it only requires that the pleading be

responsive. The plain language of Rules 15(a) and 7(a) deal with pleadings in their entirety, not individual counts and responses to those counts. An answer is not, as Plaintiffs suggest, unresponsive merely because it fails to address fewer than all of the counts in a complaint. An answer, by definition, responds to a complaint and therefore qualifies as a responsive pleading. Consequently, in cases with only one defendant, the filing of an answer extinguishes the plaintiff's right to file an amended complaint without leave of the court. Faced with almost identical facts as those in the instant case, the United States District Court for the Eastern District of Virginia reached the same result. See Vanguard Military Equip. Corp. v. David B. Finestone Co., 6 F. Supp. 2d 488, 492 (E.D. Va. 1997) ("If the answer does not adequately address 'each claim asserted' as required by Fed. R. Civ. P. 8(b), it may be deemed to be a deficient answer, but it is still an answer nonetheless.").¹

Accordingly, Plaintiffs could not file their Amended Complaint without leave of the Court. Their filing the Amended

¹ In contrast, the cases cited by Plaintiffs are inapposite. See, e.g., Centifanti v. Nix, 865 F.2d 1422 (3d Cir. 1989) (holding that motions to dismiss are not responsive pleadings); Barksdale v. King, 699 F.2d 744, 747 (5th Cir. 1983) (holding that, when there are multiple defendants, a plaintiff may amend its complaint against a non-responding party even though other defendants have already answered the complaint). Centifanti does not apply to the instant case because SCN filed an answer as well as a motion to dismiss. Barksdale is also unpersuasive because the instant case involves only one defendant who did, in fact, answer the Complaint.

Complaint neither rendered SCN's motion to dismiss moot nor served as a proper response it. Therefore, the Court properly granted that motion as uncontested.

B. Granting Leave to Amend the Complaint Would Be Futile

Even though Plaintiffs could not have filed their Amended Complaint as of right, the Court could grant Plaintiffs leave to amend their Complaint. Doing so would render SCN's motion to dismiss moot. The Federal Rules of Civil Procedure express a preference for liberally granting leave to amend. See Fed. R. Civ. P. 15(a). Nevertheless, granting leave to amend is not always appropriate. "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997); see also Foman v. Davis, 371 U.S. 178, 182 (1962). In the absence of these factors, courts should grant leave to amend. See Id.

In the instant case, even if the Court were inclined to grant leave to amend, the Court cannot do so because amending Count II of Plaintiffs' Complaint would be futile. Futility of amending a complaint is governed by the same standard of legal sufficiency that applies under Rule 12(b)(6). See In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1435. In other words, if a complaint, as amended, would still not survive a

motion to dismiss, the court should not grant leave to amend that complaint. In considering whether to dismiss a complaint under Rule 12(b)(6) for failing to state a claim upon which relief can be granted, the court must accept as true all facts alleged in the complaint. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1983); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir. 1994). Moreover, the court must view the complaint in the light most favorable to the plaintiff. See Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). The threshold for satisfying pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In the instant case, Count II of Plaintiffs' Complaint and Amended Complaint alleges fraud.² Allegations of fraud, in order to survive a Rule 12(b)(6) motion to dismiss, must aver the appropriate elements fraud. Although Plaintiffs' Amended Complaint does not specify whether they base their fraud charge on federal or state law, the elements for both are substantially similar. Under federal law, a fraud claim for false

² Count II also includes a claim for "negligent misrepresentation." The only reference to negligence, however, is an allegation that SCN acted "without due regard" to the falsity of its statements. Count II otherwise fails to plead the elements of a negligence action and inconsistently characterizes SCN's actions as "intentional." Am. Compl. ¶ 31.

representation contains the following five elements: (1) the defendant's making of a specific false representation of material fact; (2) the defendant's knowledge of its falsity; (3) the plaintiff's ignorance of its falsity; (4) the defendant's intent that it be acted upon; and (5) the plaintiff's acting upon it to his damage. See Shapiro v. UJB Financial Corp., 964 F.2d 272, 284 (3d Cir. 1992); Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983). Under Pennsylvania law, plaintiffs alleging fraudulent misrepresentation must establish five similar elements: (1) a misrepresentation, (2) a fraudulent utterance, (3) an intention to induce action on the part of the recipient, (4) a justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result. See Banks v. Jerome Taylor & Assocs., 700 A.2d 1329, 1333 (Pa. Super. 1997); Briggs v. Erie Ins. Group, 594 A.2d 761, 764 (Pa. Super. 1991).

After satisfying Rule 12(b)(6), an allegation of fraud must also meet the heightened pleadings requirements set forth in Federal Rule of Civil Procedure 9(b). In order to provide defendants notice of the claims against them, protect their reputations and reduce the number of frivolous lawsuits, Rule 9(b) requires that plaintiffs plead the "circumstances" of fraud "with particularity." Fed. R. Civ. P. 9(b). Rule 9(b) is not, however, an insurmountable hurdle. For example, Rule 9(b) itself

allows that "[m]alice, intent, knowledge, and other conditions of mind . . . may be averred generally." Fed. R. Civ. P. 9(b). Courts applying Rule 9(b) should also respect the "general simplicity and flexibility" of the Federal Rules of Civil Procedure. Christidis, 717 F.2d at 100.

Moreover, courts are mindful that a stringent application of the Rule prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud." Id. at 99-100. For example, general averments of the "circumstances" of fraud will suffice when, especially in cases of corporate fraud, plaintiffs cannot readily discern the facts before discovery begins. See Shapiro, 964 F.2d at 285; In re Craftmatic Sec. Litig., 890 F.2d 628, 645 (3d Cir. 1990). To satisfy this relaxed reading of Rule 9(b), plaintiffs need only: (1) accompany their allegation of fraud with a "statement of facts upon which their allegation is based," which can, if necessary, be based on information and belief; (2) allege that more particular information lies in defendants' exclusive control; and (3) "delineate at least the nature and scope of plaintiff's effort to obtain, before filing the complaint, the information needed to plead with particularity." See Shapiro, 964 F.2d at 285.

Even under a relaxed application of Rules 12(b)(6) and 9(b), and taken in a light most favorable to the Plaintiffs, their

Amended Complaint cannot survive scrutiny.³ The Court will discuss each element of the fraud claim in turn.

Plaintiffs properly pleaded the first element of fraud, that SCN made a specific misrepresentation of a material fact. Plaintiffs' Amended Complaint sufficiently identifies SCN's representations that it did not object to Plaintiffs' purchasing shares of SCN stock and considered such purchases legal. See Am. Compl. ¶¶ 16, 28. The Amended Complaint also set forth the dates of those representations and the parties making them. See Id. Because there are other obvious defects in the Amended Complaint, the Court will accept without further inquiry that this was a representation of fact that would have been material to Plaintiffs.

Plaintiffs also properly pleaded the second element of fraud, that SCN knew that its representation was false. The Amended Complaint states that SCN's representations were "knowingly false and/or were made with reckless indifference to their truth or falsity and/or were made without due regard to their truth or falsity." Id. ¶ 29. Plaintiffs offer no facts in support of this contention. Rule 9(b) permits this, however, as

³ The Court will consider Plaintiffs' Amended Complaint even though they improperly filed it in response to SCN's motion to dismiss. As a response to that motion, the Amended Complaint includes more facts pertaining to the fraud claim and, as such, is a better indicator of whether amending the Complaint would be futile.

knowledge and other states of mind may be averred generally. See Fed. R. Civ. P. 9(b).

The third element of Plaintiffs' claim is the Plaintiffs' ignorance of the misrepresentation's falsity.⁴ In other words, Plaintiffs must allege that they did not know SCN's representations were false. Plaintiffs have twice failed to plead, even generally, this element of their claim. Neither their original Complaint nor their Amended Complaint allege that Plaintiffs were unaware of the falsity of SCN's representations. Rather, the Amended Complaint only alleges that Plaintiffs "reasonably relied" on those representations. See Am. Compl. ¶ 30. This allegation is sufficient, however, to give SCN notice of the precise misconduct with which they are charged. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998). It is logical to infer Plaintiffs' ignorance from the reasonableness of their reliance, as relying on a known misrepresentation would be patently unreasonable.

The fourth element of Plaintiffs' claim requires a showing that SCN intended for Plaintiffs to rely on their representations. This element applies both to federal and Pennsylvania fraud claims. See, e.g., Shapiro, 964 F.2d at 284;

⁴ Ignorance is not an element that plaintiffs must plead under Pennsylvania law. See Banks, 700 A.2d at 1333. Instead, this element seems subsumed within the requirement that the plaintiff's reliance have been reasonable. Plaintiffs did allege that their conduct was reasonable. See Am. Compl. ¶ 30.

Banks, 700 A.2d at 1333. Despite the fact that Rule 9(b) allows general averments of intent, Plaintiffs' Amended Complaint does not contain one. Plaintiffs clearly approached SCN with the intent to rely on SCN's opinion. There is no allegation, however, that SCN had a similar intent. Although Plaintiffs should have included this element in their Amended Complaint, the Court is again willing to infer this element of their claim from the context of the facts alleged in it.

The fifth and final element of the fraud claim is damages. Plaintiffs must allege that damages resulted from their reliance on SCN's representations. Rule 9(b) requires that Plaintiffs plead their damages with particularity. The Amended Complaint describes, however, only theoretical damages. It states:

SCN is liable to the plaintiffs for any damage or injury suffered as a result of the misrepresentations described in paragraph 28 hereof, including without limitation plaintiffs' costs and attorneys fees associated with this litigation, the loss in value during the pendency of this litigation of any shares of SCN common stock that plaintiffs now hold, and punitive damages for SCN's intentional and malicious conduct.

Am. Compl. ¶ 31. This accounting of Plaintiffs' injuries is insufficient for several reasons. First, although SCN may be liable for punitive damages, court costs and attorneys fees if SCN committed fraud, these amounts should not be characterized as injuries resulting proximately from that fraud. Second, it is unclear whether Plaintiffs allege that the value of their stock

has actually decreased. Finally, even if the value of their stock did decrease, such a decrease in the value of Plaintiffs' stock, occurring "during the pendency of litigation," cannot be claimed as an injury from a fraud that is the source of that litigation.

Therefore, both Plaintiffs' original Complaint and Amended Complaint have failed to properly plead their fraud claim. Allowing Plaintiffs to draft their claim a third time would be futile. Plaintiffs filed their Amended Complaint, albeit improperly, as a response to SCN's motion to dismiss Count II of their original Complaint. Plaintiffs must have, ostensibly, included in their Amended Complaint any additional facts that they could muster in order to address the pleading deficiencies raised by SCN. See Pls.' Mot. for Recons. at 2 ("[C]ounsel for plaintiffs advised SCN's counsel that plaintiffs would be filing an amended complaint . . . to meet all of the perceived deficiencies in Count II as claimed in SCN's motion to dismiss."). Because Plaintiffs did not at that time correct the deficiencies in their Complaint, the Court can infer that information necessary to satisfy Rules 12(b)(6) and 9(b) does not exist. Accordingly, the Court does not grant Plaintiffs leave to amend their Complaint, and denies Plaintiffs' Motion for Reconsideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD H. ROTHMAN, et al. : CIVIL ACTION
 :
 :
 :
 :
SPECIALTY CARE NETWORK, INC. : 00-2445

O R D E R

AND NOW, this day of October, 2000, in consideration of the Motion for Reconsideration filed by Plaintiffs, Richard H. Rothman, M.D., Todd J. Albert, M.D., and Alexander R. Vaccaro, M.D. (Doc. No. 13), the Response of Defendant, Specialty Care Network, Inc., and Plaintiffs' Reply thereto, it is ORDERED that Plaintiffs' Motion for Reconsideration is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.