

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

AUDIOTEXT INTERNATIONAL, :
LTD., et al. :
 : CIVIL ACTION
 :
v. :
 : NO. 03-CV-2110
 :
SPRINT COMMUNICATIONS CO., :
INC., et al. :

SURRICK, J.

MAY 26, 2006

MEMORANDUM & ORDER

Presently before the Court is Counterclaim Defendants Audiotext International, Ltd., New Media Group, Inc., and James Hausman's Motion For Judgment On The Pleadings On Count IV Of Sprint's Amended Counterclaim (Doc. No. 68). For the following reasons, the Motion will be granted.

I. BACKGROUND

The following are the relevant facts in this matter. Audiotext International, Ltd. ("Audiotext") and New Media Group, Inc. ("New Media") are users and brokers of telecommunications services. James Hausman is the chief executive and sole shareholder of both companies. In July 2000, Hausman entered into negotiations with Sprint Communications Company L.P. ("Sprint") to purchase international telecommunications services from Sprint. Audiotext, through Hausman, entered into a contract with Sprint on August 28, 2000 (the "Audiotext Agreement"). The Audiotext Agreement was amended on December 7, 2000 and again on April 23, 2001. (Audiotext Agmt., Doc. No. 68 at Ex. B.) New Media, through

Hausman, entered into a similar contract with Sprint on May 11, 2001, which was then amended on August 7, 2001 (the “New Media Agreement”). (New Media Agmt., Doc. No. 68 at Ex. C.)

On April 1, 2003, Audiotext and New Media filed this breach of contract action against Sprint. Audiotext and New Media allege that Sprint breached the Agreements by unilaterally imposing purported surcharges for calls to mobile phones which they claim is impermissible under the terms of the Agreements, and by terminating the Agreements when Audiotext and New Media did not pay the surcharges. (Doc. No. 68 at 5.) On August 8, 2003, Sprint filed a Counterclaim in which it alleged breach of contract against Audiotext (Count I), breach of contract against New Media (Count II), and, in the alternative, unjust enrichment against Audiotext and New Media (Count III). (Doc. No. 9.)

On August 5, 2004, after some discovery had been completed, Sprint sought leave to amend its Counterclaim by adding Hausman as a counterclaim defendant to Count III and by adding a claim against Counterclaim Defendants for fraudulent inducement. (Doc. No. 28.) In its proposed amended Counterclaim, Sprint alleged that Hausman had misrepresented the nature of Audiotext and New Media’s businesses and had intended for Sprint to rely on these misrepresentations when it entered into the Agreements. (*Id.* at Ex. 12 ¶¶ 47-50.) According to Sprint, Hausman represented that his companies would operate as call-centers. However, Sprint contends that the true purposes of Audiotext and New Media’s businesses were (a) to act as resellers of telecommunications services and (b) to generate purposeless, automated calls to the United Kingdom in order to generate call termination charges. (*Id.* ¶¶ 10-13, 19-22; Feb. 23, 2005 Order, Doc. No. 49 at 4.)

On February 23, 2005, the Honorable James McGirr Kelly denied Sprint's request to amend its Counterclaim with respect to its fraudulent misrepresentation claim alleging resale fraud. (Feb. 23 Order at 18.) Judge Kelly ruled that the parol evidence rule barred Sprint's claim, because the Agreements incorporated by reference Sprint's Tariff No. 11, which explicitly stated that "Sprint services are available for resale by customer." (*Id.* at 18.) Thus, the plain language of the fully integrated contracts permitted Audiotext and New Media to resell Sprint's services, and Sprint could not allege a claim of fraudulent inducement with respect to the alleged misrepresentations regarding the Counterclaim Defendants' resale activities. (*Id.*)

In the same Order, Judge Kelly granted Sprint's motion to amend its Counterclaim in all other respects. (*Id.*) Thus, the Amended Counterclaim includes a claim of unjust enrichment against Counterclaim Defendants (Count III) and a claim of fraudulent misrepresentation against Counterclaim Defendants (Count IV). (Doc. No. 53.) Counterclaim Defendants now seek to dismiss Count IV of the Amended Counterclaim.

II. LEGAL STANDARD

In reviewing a motion pursuant to Federal Rule of Civil Procedure 12(c), we apply the same standard used to review a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Constitution Bank v. DiMarco*, 815 F. Supp. 154, 157 (E.D. Pa. 1993). We may not grant a judgment on the pleadings under Rule 12(c) "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 193 (3d Cir. 1999) (quoting *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)). We must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to

the nonmoving party.” *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988) (quoting *Soc’y Hill Civic Ass’n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)). Of course, to survive a motion for judgment on the pleadings, the non-moving party “must set forth facts, and not mere conclusions, that state a claim as a matter of law.” *Allstate Transp. Co., Inc. v. SEPTA*, Civ. A. No. 97-1482, 1998 U.S. Dist. LEXIS 1740, at *4 (E.D. Pa. Feb. 13, 1998).

“As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). However, the Third Circuit has recognized an exception to this general rule: when a document is “integral to or explicitly relied upon in the complaint,” it may be considered “without converting the motion to dismiss into one for summary judgment.” *Id.* (internal citations and quotations omitted); *see also Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 256 n.5 (3d Cir. 2004) (applying same to motion to dismiss under Rule 12(c)). “The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated where plaintiff has actual notice and has relied upon these documents in framing the complaint.” *In re Burlington Coat Factory*, 114 F.3d at 1426 (internal citations and quotations omitted).

III. LEGAL ANALYSIS

According to Counterclaim Defendants, Count IV of Sprint’s Amended Counterclaim is barred by Pennsylvania’s parol evidence rule.¹ Count IV alleges fraud in the inducement of the Agreements in that Hausman affirmatively misrepresented and omitted the true nature of

¹ In a diversity case such as this, the district court must determine which state’s substantive law will govern. We agree with the parties that the substantive law of Pennsylvania governs this case.

Audiotext and New Media’s businesses by representing that each business was a “call-center” business when it was not. (Doc. No. 53 ¶ 47.) According to Sprint’s Amended Counterclaim, Hausman told Sprint’s representatives that as call-centers, Audiotext and New Media would provide a domestic U.S. telephone number that U.S. customers could call to receive service from the companies’ foreign-based clients and that Hausman’s companies would not answer the call but would forward it to the foreign-based company at no added charge to the U.S.-based caller. (*Id.* at ¶¶ 10, 18.) However, Sprint asserts that in reality, Audiotext and New Media generated automated calls to recorded message services in the United Kingdom that had no legitimate purpose. Sprint contends that these automated calls were intended solely to generate call termination charges in the United Kingdom. (*Id.* at ¶¶ 11, 22.) Sprint refers to this purported scheme as Counterclaim Defendants’ Personal Number Service (“PNS”) fraud. (Doc. No. 71 at 1-3.) Sprint alleges that Hausman’s misrepresentations and omissions were false when made, were material, and were intended to induce Sprint to enter into the Audiotext and New Media Agreements. (Doc. No. 53 ¶¶ 48-49.) Sprint claims that had it known the true nature of Counterclaim Defendants’ businesses, it would not have entered into the Audiotext and New Media Agreements.² (*Id.* ¶ 49.)

² The elements of fraud in the inducement are as follows:

Under Pennsylvania law, inducing another to enter into a contract by means of fraud or a material misrepresentation, when the other party was under no duty to enter into the contract, is a key element of a claim for fraudulent inducement. The misrepresentation must be made knowingly. In determining whether there is a misrepresentation, the law equates concealment of a fact with an affirmative assertion. In certain instances, non-disclosure, as opposed to concealment, is equated with an affirmative assertion. Of course, a party seeking to avoid a contract for misrepresentation must show that it reasonably relied on the misrepresentation in entering into the contract. When all the necessary factors,

Counterclaim Defendants contend that the Agreements are fully integrated so that any prior representations regarding the nature of Audiotext and New Media's businesses are barred by the parol evidence rule. (Doc. No. 68 at 10-11.) In Pennsylvania, the parol evidence rule provides:

Where the parties to an agreement adopt a writing as the final and complete expression of their agreement, as here, evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement. Alleged prior or contemporaneous oral representations or agreements concerning subjects that are specifically dealt with in the written contract are merged in or superseded by that contract. The effect of an integration clause is to make the parol evidence rule particularly applicable. Thus the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony, nor prior written agreements, or other writings, are admissible to explain or vary the terms of the contract.

1726 Cherry St. P'ship v. Bell Atl. Props., Inc., 653 A.2d 663, 665 (Pa. Super. Ct. 1995) (internal citations omitted); *see also HCB Contractors v. Liberty Place Hotel Assocs.*, 652 A.2d 1278 (Pa. 1995). The Supreme Court of Pennsylvania has explained the reasoning behind this rule as follows:

There is not the slightest doubt that if plaintiffs had merely averred the falsity of the alleged oral representations, parol evidence thereof would have been inadmissible. Does the fact that plaintiffs further averred that these oral representations were *fraudulently made* without averring that they were *fraudulently* or by accident or mistake *omitted* from the subsequent complete written contract suffice to make the testimony admissible? The answer to this question is "no"; if it were otherwise the parol evidence rule would become a mockery, because all a party to the written contract would have to do to avoid, modify or nullify it would be to aver (and prove) that the false representations were *fraudulently* made.

factual misrepresentation, materiality, reasonable reliance, etc. are shown, the contract becomes voidable and may be rescinded for fraudulent inducement.

In re Allegheny Int'l, Inc., 954 F.2d 167, 179 (3d Cir. 1992) (internal citations omitted).

Bardwell v. Willis Co., 100 A.2d 102, 104 (Pa. 1953), cited in *HCB Contractors*, 652 A.2d at 1279; see also *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996) (“The Supreme Court of Pennsylvania found that the parol evidence rule barred consideration of prior representations concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently omitted from the contract.”). “Pennsylvania seeks to protect parties from fraudulent inducement claims which could have been prevented by more complete, more thorough contract formation.” *Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc.*, 94 F. Supp. 2d 589, 592 (E.D. Pa. 1999). The Third Circuit has determined that Pennsylvania courts do not recognize a claim of fraud in the inducement as an exception to the parol evidence rule. *Dayhoff Inc.*, 86 F.3d at 1300.

The Audiotext Agreement contains a provision entitled “Reliance” which states:

In accepting this Agreement Customer is not relying on any representations or promises not included in this Agreement. When signed by the parties this Agreement, including the standard terms and conditions for applicable Sprint Services (incorporated by this reference), will: (a) constitute the parties’ entire understanding regarding Services; and (b) supersede all agreements or discussions, oral or written, regarding Services.

(Audiotext Agmt. at 2 § 7.) The New Media Agreement has a similar provision.³ Services are

³ Standard Provision No. 7 of the New Media Agreement provides:

In accepting this Agreement Customer is not relying on any representations or promises not included in this Agreement. When signed by the parties, this Agreement, including the applicable Sprint Tariffs, schedules, Orders, and standard terms and conditions for Services referenced in and incorporated by reference, will: (a) constitute the parties’ entire understanding regarding Services; and (b) supersede all prior agreements or discussions, oral or written, regarding Services; and (c) apply to Sprint’s provision of Services.

(New Media Agmt. at 3 § 7.)

described in both Agreements as “Sprint Real Solutions Annual Outbound, Sprint Real Solutions Annual FONCARD.” (*Id.* at 1 § 2; New Media Agmt. at 1 § 2.) These are the services which Audiotext and New Media used in order to make the allegedly purposeless calls to the United Kingdom. Thus, contrary to what Sprint now argues, these Reliance clauses provide that the Agreements are fully integrated with respect to the subject of Sprint’s services to Audiotext and New Media, the very subject at issue in Count IV of Sprint’s Amended Counterclaim. The integration clauses expressly disclaim all prior representations allegedly made regarding these services. *See Interwave Tech. Inc. v. Rockwell Automation, Inc.*, Civ. A. No. 05-398, 2005 U.S. Dist. LEXIS 37980, at *47 (E.D. Pa. Dec. 30, 2005). “Integration clauses and contract terms that specifically cover the subject matter of the alleged fraudulent inducement frequently result in dismissal of fraudulent inducement claims in the Third Circuit” *Id.* at *51 (citing *Goldstein v. Murland*, No. 02-247, 2002 WL 1371747, at *2 (E.D. Pa. June 24, 2002); *N. Am. Roofing & Sheet Metal Co., v. Bldg. & Const. Trades Council*, Civ. A. No. 99-2050, 2000 WL 230214, at *5 (E.D. Pa. Feb. 29, 2000)).⁴ If Sprint, a sophisticated corporate entity, desired to have a clearer

⁴ Sprint’s reliance on the Superior Court of Pennsylvania’s decision in *Youndt v. First Nat’l Bank of Port Allegany*, 868 A.2d 539 (Pa. Super. Ct. 2005) is misplaced. In that case, appellants claimed that they had been fraudulently induced by the misrepresentations of appellees regarding the status of the property that appellants had purchased. The *Youndt* court held that as a matter of law the appellants had failed to adequately plead a cause of action for fraud pursuant to the Pennsylvania Rules of Civil Procedure. *Id.* at 545. The court held in the alternative that the parol evidence rule would defeat appellants’ claim. As Sprint notes, the *Youndt* court observed that “parol evidence is inadmissible where the contract contains terms that deny the existence of representations regarding the subject matter of the alleged fraud. But when the contract contains no such term denying the existence of such representations, parol evidence is admissible to show fraud in the inducement.” *Id.* at 546. Sprint contends that this reasoning justifies permitting its fraudulent inducement claim to survive Counterclaim Defendants’ Motion, because the Agreements do not address the purpose of Audiotext and New Media’s businesses. (Doc. No. 71 at 6-7.) However, as we have discussed above, the integration clauses in the Agreements do in fact address the subject matter of the alleged fraud. Accordingly, we see no

understanding of the purpose of the calls for which Audiotext and New Media intended to use Sprint's services, Sprint could and should have insisted that such information be included in the Agreements. *See N. Am. Roofing*, 2000 WL 230214, at *7 (if plaintiff intended to rely on a representation, then it should have insisted that the representation be set forth in the integrated written agreements: “[f]ailure to do so results in evidence of the representation being barred”); *Coram Healthcare Corp.*, 94 F. Supp. 2d at 592 (“The Pennsylvania parol evidence rule is premised on the principle that if a sophisticated, well-represented party like [plaintiff] intends to rely on significant representations made prior to the execution of a fully integrated contract, that party can protect itself from fraud or mistake by including those representations in the final written agreement.”).

Even if the integration clauses do not specifically contemplate the intended use of Sprint's services by Counterclaim Defendants, the parol evidence rule nevertheless bars consideration of the misrepresentations allegedly made during prior negotiations. In *Titelman v. Rite Aid Corp.*, Civ. A. No. 00-2865, 2001 U.S. Dist. LEXIS 24049 (E.D. Pa. Nov. 9, 2001), the plaintiff's claim of fraud was based on his allegation that he was induced to leave his law practice for employment with the defendant by the company's publicly disclosed financial information. The plaintiff argued that Pennsylvania's parol evidence rule bars fraud in the inducement only where the subject matter of the allegedly fraudulent statement is included in the final written agreement. *Id.* at *12-13. According to the *Titelman* plaintiff, the rule did not apply

contradiction in our holding here and the reasoning of the *Youndt* court. *Cf. Prof'l Sys. Corp. v. Opex Postal Techs.*, Civ. A. No. 05-2689, 2006 WL 573798, at *3 (E.D. Pa. Mar. 8, 2006) (denying motion to dismiss plaintiff's fraud claim where agreements had no integration clause and subject matter of agreements did not cover the subject matter of plaintiff's allegations).

to his fraud claim because the subject matter of Rite Aid's financial information was not included in his employment agreement. The court, noting that the plaintiff had read the series of Pennsylvania and Third Circuit cases regarding parol evidence "too narrowly," stated:

Bardwell, HCB Contractors, 1726 Cherry St. and *Dayhoff* each involved negotiations between sophisticated business parties, and the negotiations in each case resulted in a final fully-integrated written contract. These courts point not only to the fact that the subject-matter of the allegedly fraudulent statements was included in the contract, but also to the integration clauses in those contracts, as supporting the application of the parol evidence rule.

Id. at *13-14. The *Titelman* court went on to state: "Other judges of this Court, as well as another court in this Circuit, have held that Pennsylvania's parol evidence rule barred a plaintiff's claim of fraud in the inducement even though the subject of the allegedly fraudulent statement was not referred to in the integrated contract at issue." *Id.* at *14-15 (citing *Haymond v. Lundy*, Civ. A. Nos. 99-5015 & 99-5048, 2000 WL 804432, at *7 (E.D. Pa. June 22, 2000); *N. Am. Roofing*, 2000 WL 230214, at *6; *Sunquest Info. Sys. Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999)). The *Titelman* court concluded that "[t]here is no sound reason to allow a fraud in the inducement claim to go forward when the plaintiff alleges that he relied on allegedly fraudulent statements that he did not insist be included in the final written contract." *Id.* at 15. We agree with the reasoning of the *Titelman* court.

As noted above, the subject matter of Sprint's services that were provided to Audiotext and New Media was clearly addressed in both Agreements. Regardless of whether the specific subject of the companies' intended use of Sprint's services—the issue which forms the basis of Sprint's fraud claim—was described in the Agreements, we can find no justifiable reason to permit Sprint's claim of fraud in the inducement to go forward. During contract negotiations,

Sprint failed to demand that representations regarding the intended purposes of Audiotext and New Media's business be included in the integrated Agreements, but Sprint chose to sign both of the fully integrated Agreements anyway. Sprint cannot now expect the Court to rewrite the Agreements to suit its wishes.

Sprint also contends that because Judge Kelly permitted Sprint to amend its Counterclaim to include Count IV, that is the "law of this case" so that Counterclaim Defendants cannot reargue that the parol evidence rule bars Sprint from bringing Count IV. (Doc. No. 71 at 7-8.) The record indicates, however, that the issue of whether the parol evidence rule barred Sprint's claim of fraudulent misrepresentation with respect to the allegedly purposeless calls was not presented to Judge Kelly. Indeed, in Sprint's own pleadings in support of its motion to file an amended Counterclaim, Sprint stated: "Plaintiffs do not claim that the parol evidence rule bars Sprint's claims relating to their PNS fraud." (Doc. No. 34 at 10.) According to Judge Kelly's February 23, 2005 Order, Plaintiffs argued to the Court that it would be futile for Sprint to claim that Plaintiffs' resale activities constituted fraud because of Pennsylvania's parol evidence rule. (Feb. 23, 2005 Order at 16.) The Order does not suggest that Plaintiffs argued that the parol evidence rule similarly barred Sprint's fraudulent misrepresentation claim with respect to the alleged PNS fraud. Accordingly, we reject Sprint's claim.⁵

An appropriate Order follows.

⁵ Counterclaim Defendants also contend that Sprint is barred from bringing Count IV on account of the gist of the action doctrine. Because we will grant Counterclaim Defendants' Motion to Dismiss based on the parol evidence rule, we need not discuss the application of the gist of the action doctrine.

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

AUDIOTEXT INTERNATIONAL,	:	
LTD., et al.	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 03-CV-2110
	:	
SPRINT COMMUNICATIONS CO.,	:	
INC., et al.	:	

ORDER

AND NOW, this 26th day of May 2006, upon consideration of Counterclaim Defendants' Motion For Judgment On The Pleadings On Count IV Of Sprint's Amended Counterclaim (Doc. No. 68), it is ORDERED that the Motion is GRANTED. Count IV of Sprint's Amended Counterclaim is DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

/s R. Barclay Surrick

R. Barclay Surrick, Judge