

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

EVENT MARKETING CONCEPTS, INC. : CIVIL ACTION
v. :
EAST COAST LOGO, INC., et al. : NO. 97-6812

MEMORANDUM AND ORDER

HUTTON, J.

June 15, 1998

Presently before the Court is the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6). For the reasons stated below, the defendants' motion is **DENIED**.

I. BACKGROUND

Taken in the light most favorable to the non-moving party, the facts are as follows. On July 16, 1997, the plaintiff, Event Marketing Concepts, Inc. ("EMC"), contacted Dudash Novelty Company ("DNC") in order to purchase 200,000 printed T-shirts. Pl.'s Compl. at ¶ 13. EMC explained that it would later specify the print design to be placed on the T-shirts. Id. Later that day, DNC contacted Eastland Group, Inc. ("ELG") in order to purchase the goods necessary to fill EMC's order. Id. at ¶ 14. Moreover, DNC sent ELG a purchase order directed to Lee Bergman, a Vice President of ELG. Id.

Although DNC negotiated the terms of the agreement with ELG, ELG asked that the check for the shirts be made payable to

East Coast Logo, Inc. ("ECL").¹ Pl.'s Ans. at 3. After negotiating the price and quantity of the order, DNC paid ECL \$288,846.32 for the purchase of 160,000 printed T-shirts. Id. at ¶ 18. DNC tendered the money "in reliance upon defendants' promise to deliver the printed t-shirts by September 1, 1997." Id. This sum represented full payment for the T-shirts. Id.

In July, 1997, the plaintiff forwarded the print design to DNC, who sent the design to the defendants. Id. at ¶ 20. The defendants again assured DNC that the T-shirts would be completed by September 1, 1997. Id. However, as of November 5, 1997, the defendants had not yet delivered the T-shirts to DNC. Id. at ¶ 26. After learning of the alleged breach, DNC assigned all of its rights regarding this transaction to the plaintiff. Id. at ¶ 23.

The plaintiff initiated the instant action by filing its complaint on November 5, 1997. The plaintiff named the following parties as defendants: 1) ELG; 2) ECL; 3) Barnett H. Bergman, the Chief Executive Officer of ELG and ECL; 4) Larry Bergman, the President of ELG and ECL; and 5) Lee Bergman, the Vice President of ELG and ECL. The plaintiff seeks damages under

1. ECL and ELG are both Pennsylvania companies, which, at the time of the purchase, were "acting in concert for their mutual benefit." Pl.'s Compl. ¶ 5. The plaintiff alleges that "Barnett H. Bergman, Larry Bergman, and Lee Bergman were the sole owners, stockholders, officers and directors of ELG and ECL and controlled the activities and business decisions of said Corporations." Id. ¶ 10. Moreover, the plaintiff claims that the "defendants were acting in concert as one entity, commingling funds between the corporate entities and individuals." Id. ¶ 9.

the following legal theories: breach of contract (Count I), fraud (Count II), conversion (Count III), and breach of warranty (Count IV). On December 9, 1997, the defendants filed the instant motion, seeking to dismiss the plaintiff's fraud claim.

II. DISCUSSION

A. Failure to Plead Fraud With Particularity

The defendants argue that Count II should be dismissed because the plaintiff has failed to plead fraud with specificity. Rule 9(b) of the Federal Rules of Civil Procedure provides that:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b).

The Third Circuit has noted that in applying Rule 9(b), "focusing exclusively on its 'particularity' language is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). Instead, the Third Circuit explained that:

Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious

charges of immoral and fraudulent behavior. It is certainly true that allegations of "date, place, or time" fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

Seville, 742 F.2d at 791; see In re Meridian Secs. Litig., 772 F. Supp. 223, 229 (E.D. Pa. 1991) (discussing specificity requirements in fraud claim). With regard to claims of misrepresentation, the Third Circuit has further explained that the complaint need not describe the precise words used; it is sufficient if the complaint "describes the nature and subject of the alleged misrepresentation." Id.

In Count II of the plaintiff's complaint, the plaintiff alleges that:

35. During the negotiation and formation of the contract set forth above, defendants materially misrepresented facts so as to induce the plaintiff and DNC to pay for said goods when defendants had no intention of delivering said goods as promised.

36. Defendants have consistently made material representations to the plaintiff and DNC and these misrepresentations constitute fraud.

37. Defendants' actions and misrepresentations were deliberately made with the intention of inducing the plaintiff and DNC to pay for goods which the defendants had no intention of delivering as promised, and to induce plaintiff to delay filing this claim by stating that the goods would be made available in a few days, that the purchase price could not be returned because the funds

had been placed in an irrevocable letter of credit and that the goods could only be delivered if plaintiffs or DNC made additional purchases from defendants. Plaintiff demanded proof of these claims, but defendants have refused to supply any proof whatsoever.

Pl.'s Compl. ¶¶ 35-37.

This Court finds these allegations sufficient under Rule 9(b). The nature and subject of the alleged misrepresentation are more precise than those alleged in Seville. The Court concludes that these allegations give the defendants sufficient notice of the exact misconduct with which they are charged. Accordingly, the defendants' motion is denied in this respect.

B. Rule 12(b)(6) - Claims Upon Which Relief May Be Granted

The defendants further argue that Count II should be dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),² this Court must "accept as true the facts alleged in the complaint and all reasonable

2. Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

To state a claim for fraud under Pennsylvania law, a plaintiff must allege: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a proximate result. Scaife Co. v. Rockwell-Standard Corp., 285 A.2d 451, 454 (Pa. 1971), cert. denied, 407 U.S. 920 (1972); Woodward v. Dietrich, 548 A.2d 301, 307 (Pa. Super. 1988); see Killian v. McCulloch, 850 F. Supp. 1239, 1252 & n.6 (E.D. Pa. 1994) (discussing damages element).

The Court finds that the plaintiff states a valid claim for fraud under Pennsylvania law. The plaintiff alleges that: (1) the defendants "misrepresented facts so as to induce the

plaintiff and DNC to pay" for the T-shirts; (2) the defendants acted "deliberately";³ (3) the defendants acted with the "intention of inducing the plaintiff and DNC to pay for goods which the defendant had no intention of delivering as promised"; (4) the plaintiff and DNC relied on the defendants' misrepresentations, by paying the defendants for the T-shirts;⁴ and (5) the plaintiff suffered damages as a proximate result. See Pl.'s Compl. ¶¶ 35-37. Accordingly, the defendants' motion is denied in this regard.

An appropriate Order follows.

3. The Pennsylvania requirement of "fraudulent utterance" means as "anything calculated to deceive." See Smith v. Renaut, 564 A.2d 188, 191 (Pa. Super. 1989). Rule 9(b) requires only a general averment for state of mind.

4. In this case, whether the reliance was justified or reasonable involves a determination of factual matters that may not be properly resolved in this motion to dismiss.

