STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-09-CV-25

Nationwide Acquisition Corp., et al.,

Plaintiffs,

v.

DECISION AND ORDER
(Motion to Dismiss)

MobilePro Corp., et al.,

Defendants

This matter is before the Court on Plaintiffs' motion to dismiss Counts I through VIII of the Second Amended Counterclaim of Defendant United Systems Access, Inc., d/b/a U.S.A. Telephone (Defendant USA). Plaintiffs Nationwide Acquisition Corp. and L. William Fogg seek dismissal pursuant to M.R. Civ. P. 12(b)(6) for the alleged failure of Defendant USA to state a claim upon which relief may be granted.

Factual Background[1]

In the late summer/early fall of 2005, Plaintiff Fogg offered to purchase Defendant USA. He claimed to represent a group of investors with $6 million of available funds for the purchase. Plaintiff Fogg further asserted that $2 million of the available funds would be derived from his personal assets. After negotiations with Defendant USA's predominate investors, Plaintiff Fogg was offered the role of acting-CEO beginning on October 16, 2005.

[1] The facts as outlined herein are derived from the assertions made in Defendants' Amended Counterclaim, which assertions are deemed admitted for purposes of the motion to dismiss. *Doe v. Graham*, 2009 ME 88 ¶ 3, 977 A.2d 391, 394.

As of January 1, 2007, through an employment agreement, Plaintiff Fogg became a director and officer of Defendant USA, and became an owner through the acquisition of shares in the company. He resigned as a director and officer on March 15, 2008.

According to Defendant USA, during the course of Plaintiff Fogg's term as acting-CEO, CEO, owner and/or board member, he took various actions that were contrary to the best interests of the company. For example, shortly after becoming acting-CEO and without authorization from the board, Plaintiff Fogg increased his flat-fee draw from $15,000 per month to $20,000 per month. Also in 2006, and unbeknownst to the board, Plaintiff Fogg used the assets of Defendant USA to make a down payment on and finance the purchase of a Ford F-350 pickup truck for his personal use.

Defendant USA also alleges that in December 2006 and again in January 2008, without authorization from the board, Plaintiff Fogg increased the salary of telephone operations manager, Michael Carbonneau, to a level that exceeds the range of a reasonable salary for the position; that Plaintiff Fogg caused Defendant USA to hire a number of his friends and relatives; and that contrary to company policy, Plaintiff Fogg did not require his friends and relatives to sign non-compete agreements as a condition of their employment. Further, Defendant USA alleges that Plaintiff Fogg misappropriated various business opportunities to the detriment of Defendant USA, including in connection with an agreement by which Plaintiffs reacquired from Defendant USA the MobilePro companies in consideration of Plaintiff Fogg's relinquishment of his ownership interest in Defendant USA (the USA-Fogg Agreement).

Defendant USA's Amended Counterclaim is comprised of the following counts: Count I: Breach of Fiduciary Duty; Count II: Tortious Interference with an Advantageous Relationship; Count III: Intentional Misrepresentation; Count IV: Negligent Misrepresentation; Count V: Constructive Trust; Count VI: "Failure Under June 4, 2008 Agreement"; Count VII: "Money Owed to DSI"; Count VIII: Unjust Enrichment; and Count IX: Breach of Contract "-Failure to Defend and Indemnify – Failure to Pay." Plaintiffs move to dismiss Counts I-VIII of the Amended Counterclaim.

Discussion

I. Standard of Review.

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)).

II. Whether Counts I-V and VIII Are Barred by the USA-Fogg Agreement.

Plaintiffs argue that Counts I-V and VIII, which relate to Plaintiff Fogg's alleged acts and omissions in his role as Defendant USA's CEO, are barred by a provision in the USA-Fogg Agreement. In particular, Plaintiffs contend that as part of the agreement, Defendant USA released Plaintiffs from any and all claims arising out of Plaintiff Fogg's conduct as an officer, director or shareholder of USA (the Release). The Release,[2] which appears at Section 11 of the USA-Fogg Agreement, provides in relevant part:

> USA, Gilbert, Wijcik and Barkas[3] do hereby unconditionally and irrevocably release, remise and acquit Fogg, [Nationwide] and Unified of any and all claims or causes of

[2] Although a court typically may not consider materials outside the pleadings in the context of a motion to dismiss without converting the motion into one for summary judgment, a court can consider "official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint . . . when the authenticity of such documents is not challenged." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 20, 843 A.2d 43, 47). In this case, a number of Defendant USA's claims are based upon the terms of the USA-Fogg Agreement and there is no dispute regarding its authenticity. Accordingly, the Court can properly consider the terms of the Agreement without converting Plaintiffs' motion into one for summary judgment.

[3] Stephen Gilbert and Lynda Wijcik were at all relevant times on the USA Board of Directors and, as of June 4, 2008, became the predominant shareholders of USA.

action, whether known or unknown, of any kind or nature whatsoever, arising out of or related to Fogg's service as an officer, director or shareholder of USA.

In response, Defendant USA does not dispute that Counts I-V and VIII fall within the scope of the Release. Rather, it argues that the Release is unenforceable because it was procured by fraud. In support of this contention, Defendant USA cites *Glynn v. Atlantic Seaboard Corp.*, 1999 ME 53, 728 A.2d 117, in which case a corporation sued its former president for, among other things, fraud and breach of fiduciary duty as the result of the former president's alleged false representation that he had satisfied a corporate debt. *Id.* ¶ 6 & n.1, 728 A.2d at 119. The corporation maintained that when the parties formalized their separation and executed a release of liability, the former president failed to inform the corporation of his prior misrepresentation. In defense of the corporation's lawsuit, the former president argued that the corporation's claims were barred by a release. The corporation, however, argued that the release was unenforceable because it was procured by fraud.[4] *Id.* ¶ 9.

The trial court granted summary judgment in favor of the former president, having concluded that "although there was ample evidence to establish that [the former president] knowingly made a false representation" upon which the corporation relied to its detriment, "there was no competent evidence that [the former president] made the false representation for the purpose of inducing [the corporation] to grant him a release." *Id.* ¶ 11, 728 A.2d at 119. On appeal, the Law Court vacated the trial court's grant of summary judgment, reasoning that because the former president owed a fiduciary duty to the corporation, a dispute of material fact existed as to whether his failure to disclose the prior misrepresentation at the time of the execution of the release constituted fraudulent misrepresentation upon which the corporation relied in executing the release. *Id.* ¶ 11-13, 728 A.2d at 120 (citing *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996) for the proposition that the failure of a fiduciary to disclose a material fact constitutes fraud by omission).

[4] *See Glynn*, 1999 ME 53, ¶ 10, 728 A.2d at 119 (recognizing that "[a]lthough a valid release will extinguish a cause of action, the release will nevertheless be set aside if shown to be the product of fraud, misrepresentation, or overreaching." *Id.* ¶ 10 (citing *LeClair v. Wells*, 395 A.2d 452, 453 (Me. 1978); and *Harriman v. Maddocks*, 518 A.2d 1027, 1030 (Me. 1986)).

In this case, Defendant USA contends that Plaintiff Fogg committed "numerous and egregious wrongdoings" during the course of his tenure as acting CEO, and that his failure to "follow through on his fiduciary duty to notify USA" of that wrongdoing "prior to execution of the Release" was fraudulent and induced USA to sign the Release.[5] As explained above, dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to *no relief under any set of facts* that he might prove in support of his claim." *Shaw*, 683 A.2d at 503 (emphasis added) (citations omitted). A plaintiff will generally survive a motion to dismiss provided they assert facts sufficient to place the defendant on notice of the nature of the claim. *See Rubin v. Josephson*, 478 A.2d 665, 669 n.4 (Me. 1984) (function of the complaint is to provide fair notice of a claim and a generalized statement of the facts fulfills this function). In the context of a claim for breach of fiduciary duty, the Law Court has previously explained that Maine's notice pleading requirements will be satisfied, and a claim deemed sufficiently pled to survive a motion to dismiss, if the "the plaintiff . . . [sets] forth specific facts constituting the alleged relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship." *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 26, 871 A.2d 1208, 1218 (citations omitted).

Here, Defendant USA alleges that Plaintiff Fogg was an officer and director of USA from January 1, 2007 through March 15, 2008 when he resigned and that he owed Defendant USA a fiduciary duty as its CEO and principal. Although it is generally recognized that an officer's fiduciary duty ceases upon his or her resignation, "where a transaction has its inception while the fiduciary relationship is in existence, an employee [after termination of his employment] cannot . . . subsequently continue and consummate the transaction in a manner in violation of his fiduciary duties." *Moore* v. *Maine Indus. Servs.*, 1995 Me. Super. LEXIS 156 (Apr. 26, 1995) (quoting *Standage v. Planned Investment Corporation*, 160 Ariz. 287, 772 P.2d 1140, 1144 (Ariz. 1988)). Given Defendant USA's assertion that Plaintiff Fogg continued to have some involvement in Defendant USA's business from March through

[5] Def.'s Opp. at 5.

June 4, 2008, Defendant USA has pled facts that could support the conclusion that Plaintiff Fogg had an ongoing fiduciary relationship during at least some of that period. In addition, Defendant USA has alleged an affirmative misrepresentation on the part of Plaintiffs, which, if true, would constitute actionable fraud regardless of whether the representation was made in the context of a fiduciary relationship.[6] Accordingly, the Court cannot conclude at this stage of the proceedings that the Release operates as a bar to the Amended Counterclaim.[7]

III. Whether USA Has Alleged Fraud with Sufficient Particularity.

Plaintiffs also argue that Defendant USA has failed to plead fraud with sufficient particularity. In this argument, however, Plaintiffs acknowledge that insofar as Defendant USA's fraud claim is based on Plaintiffs' alleged representations regarding Sitestar, discussed above, the claim is pled with sufficient particularity. Plaintiffs nevertheless argue that the Sitestar allegations fail because any reliance by Defendant USA was unreasonable.

First, as explained in footnote 7, whether a party's reliance was reasonable requires an assessment of the circumstances at the time of the alleged misrepresentation. The Court cannot make such a determination based solely upon a complaint or counterclaim. Furthermore, because Defendant USA asserts that it has suffered damage through Plaintiffs' actions, and Plaintiff Fogg's failure to disclose certain information, Defendant USA has sufficiently pled a claim for misrepresentation.

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[6] In paragraph 57 of its Amended Counterclaim, Defendant USA alleges that "Plaintiffs represented to USA that Sitestar owed USA $1,750,000 in connection with the sale by USA to Sitestar of the Nationwide subsidiaries." *Id.* Defendant USA further alleges: "[i]n fact, as a result of Plaintiffs' actions in improperly collecting accounts receivables that should have been paid to Sitestar, Sitestart now claims that USA owes Sitestar $300,000. . . . USA and Gilbert relied on the figure quoted by Plaintiffs as owed to USA by Sitestar as consideration for the" USA-Fogg Agreement." *Id.* at ¶¶ 58 & 60.

[7] The Court finds Plaintiffs other arguments in support of dismissal based on the release unavailing. For example, although Plaintiffs contend that Defendant USA's alleged reliance on Plaintiffs' alleged misrepresentation regarding money owed by Sitestar was "unreasonable," the reasonableness of a party's reliance is not an issue to be resolved at this stage of the proceedings. The reasonableness of one's reliance necessarily requires the Court to consider the circumstances under which the alleged misrepresentations were made.

IV. Whether Counts II through IV State Claims Upon Which Relief can be Granted.

Plaintiffs next argue that Defendant USA has failed to plead the essential elements of the claims outlined in Counts II through IV and, consequently, those claims must be dismissed.

A. Count II: Tortious Interference with an Advantageous Relationship.

In order to state a claim for tortious interference under Maine law, a plaintiff must allege: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages." *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 31, 915 A.2d 400, 408 (*quoting Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110). Further, although fraud or intimidation are elements of a tortious interference claim, the Law Court has explained that "intimidation is not restricted to 'frightening a person for coercive purposes,' but rather exists wherever a defendant has procured a breach of contract by 'making it clear' to the party with which the plaintiff had contracted that the only manner in which that party could avail itself of a particular benefit of working with defendant would be to breach its contract with plaintiff. *Id.* (internal quotation marks and citations omitted).

In other words, a plaintiff must demonstrate that the defendant engaged in fraud or intimidation with the intent to interfere with Plaintiff's contractual or other economic advantages. *See* Simmons, Zillman & Gregory, *Maine Tort Law*, § 11.09 at 11-19 (citing *James v. MacDonald*, 1998 ME 148, ¶ 9, 712 A.2d 1054, 1058). As the Law Court explained in *MacDonald*, under the majority rule:

> The tort [of interference with a prospective advantage] began with "malice," and it had remained very largely a matter of at least an intent to interfere. Cases have been quite infrequent in which even the claim has been advanced that the defendant through his negligence has prevented the plaintiff from obtaining a prospective pecuniary advantage; and the usual statement is that there can be no cause of action in such a case.

Id. ¶ 9, 712 A.2d at 1058 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 130, at 1008 (5th ed. 1984)).

In support of their motion, Plaintiffs contend that Defendant USA has failed to allege that Plaintiffs engaged in acts of intimidation with the intent to induce a third party to breach a contract with Defendant USA. More specifically, Plaintiffs argue that there is no allegation that the third-party at issue here, Silicon Valley Bank, ever *breached* a contract with USA. Rather, Plaintiffs contend that Defendant USA merely alleges that Silicon Valley Bank *enforced* its contract with Defendant USA. Further, Plaintiffs maintain that Defendant USA has failed to plead that Plaintiffs acted with the requisite intent in making their alleged misrepresentations.

A review of the Amended Counterclaim reveals that Defendant USA has pled tortious interference with respect to a number of business relationships. Particularly as to Defendant USA's relationship with Silicon Valley Bank and Global Crossing, Defendant USA has pled facts sufficient to avoid dismissal at this stage of the proceedings. That is, Defendant USA has alleged that through their words and actions, Plaintiffs altered the relationship between Defendant USA and at least two business partners. Given all of the assertions in the Amended Counterclaim, one can reasonably infer, and Plaintiffs are on notice, that Defendant USA contends that Plaintiffs took the actions with the intent to harm Defendant USA.

B. Counts III and IV: Intentional and Negligent Misrepresentation.[8]

In Count IV, Defendant USA alleges negligent misrepresentation. The Law Court has previously adopted the definition of negligent misrepresentation outlined in Section 552(1) of RESTATEMENT (SECOND) OF TORTS. *See Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990). Under the RESTATEMENT'S definition:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

[8] The Court has already addressed Plaintiffs' contention that Defendant USA has not asserted its intentional misrepresentation claim in Count III with sufficient particularity. Therefore, the Court will focus on Plaintiffs' arguments regarding Defendant USA's negligent misrepresentation claim in Count IV.

Chapman, 568 A.2d at 830 (*quoting* Restatement (Second) of Torts § 552(1) (1977)).

In support of their motion, Plaintiffs once again contend that even if Defendant USA had adequately pled reliance on Plaintiffs' alleged misrepresentations regarding Sitestar, any such reliance was unreasonable, and Count IV should therefore be dismissed. However, and as noted above, because the Court cannot conclude on this record and under the 12(b)(6) standard that Defendant USA's alleged reliance was unreasonable as a matter of law, dismissal is not appropriate.

V. Count VI: Breach of Contract.

In Count VI, Defendant USA alleges that Plaintiffs breached the USA-Fogg Agreement. The allegations specific to Count VI are as follows:

> Under paragraph 7 of the [USA-Fogg Agreement], [Mr.] Fogg was to put in "substantial funding" of the MobilePro companies, which, upon information and belief, he never did. The consequent underfunding and failure to transfer information as alleged above of the MobilePro companies has caused harm to USA. Fogg and Nationwide failed to make any of the payments or transfers required under Exhibit B of the Agreement.[9]

Plaintiffs argue that neither of the Plaintiffs was under a contractual obligation to perform in the manner alleged by Defendant USA. According to Plaintiffs, paragraph 7 of the USA-Fogg Agreement contains only aspirational language, not a contractual obligation to provide funding. Plaintiffs further contend that nothing in the language of the Agreement obligated Plaintiff Fogg to turn over access codes to Defendant USA.[10] Finally, Plaintiffs argue that Exhibit B of the Agreement does not purport to obligate Plaintiffs to make any payments.

At most, Plaintiffs' arguments demonstrate that the parties dispute the terms of the Agreement, and whether the parties have complied with the terms of the Agreement. Plaintiffs' arguments do not,

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[9] Counterclaim at ¶¶ 105-107.

[10] The failure to "transfer information" as alleged by Defendant USA appears to relate to Plaintiff Fogg's alleged refusal to turn over access codes to USA's data centers accounts following his resignation as CEO "but while still playing a role in USA's operations[.]" *See* Counterclaim at ¶¶ 65-66.

however, compel dismissal of the claim at this stage of the proceedings. Defendant USA has pled the existence of an agreement, a breach of the agreement, and resulting harm. Consequently, dismissal is not warranted.

VI. Count VII: Money Owed to DSI.

In Count VII, Defendant USA alleges that Defendant USA hired DSI, a workout firm, prior to the execution of the USA-Fogg Agreement "to analyze the status of USA and its subsidiaries and to propose a way for USA to remain viable."[11] Defendant USA further alleges that Plaintiff "Fogg promised to pay for the services of DSI[,]" but "[d]espite repeated requests for payment of this bill of DSI, [Plaintiff] Fogg has refused to pay it in full."[12] Defendant USA then asks that the court "order [Plaintiff] Fogg to pay" the DSI bill in full.

Plaintiffs move to dismiss Count VII on the grounds that Defendant USA has failed to allege that it has been damaged by Plaintiff Fogg's alleged failure to pay the DSI bill. In response, and in opposition to Plaintiffs' motion, Defendant USA argues summarily that it has sufficiently placed Plaintiffs on notice that Defendant USA seeks an injunction "mandating that Plaintiffs pay DSI's bill so that DSI will cease efforts to seek payment from USA."[13]

"The basic showing required of any plaintiff in a civil action is that the plaintiff has suffered or is likely to suffer injury as a result of the defendant's conduct. A plaintiff who cannot demonstrate such 'particularized injury' or 'injury in fact' lacks standing to sue." Horton & McGehee, *Maine Civil Remedies* § 5-10(b) at 128 (4th ed. 2004). The fact that injunctive relief is sought generally does not alter the rules relating to who has standing to sue. *Id.*

Count VII appears to be premised on a breach of contract theory. Defendant USA has not, however, alleged that it has been damaged by Plaintiff Fogg's alleged failure to pay DSI. In any breach

[11] Counterclaim ¶ 110.
[12] *Id.* at ¶¶ 111-12.
[13] USA's Opp. at 9.

of contract claim, a plaintiff must suffer damage as a result of the defendant's breach. *See Maine Energy Recovery Co. v. United Steel Structures, Inc.*, 1999 ME 31, ¶ 7, 724 A.2d 1248, 1250 (explaining that the elements of a breach of contract claim include "(1) breach of a material contract term; (2) causation; and (3) damages"). In the absence of any allegation of harm, Defendant USA has failed to state a *prima facie* claim for breach of any contract or otherwise allege facts demonstrating harm. Accordingly, Defendant USA fails to state a claim upon which relief can be granted in Count VII.

Conclusion

Based on the foregoing analysis, the Court denies Plaintiffs' motion to dismiss as to Counts I – VI and VIII of the Amended Counterclaim. The Court grants Plaintiffs' motion to dismiss as to Count VII of the Amended Counterclaim. Count VII is, therefore, dismissed.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 1/4/10

John C. Nivison
Justice, Maine Business & Consumer Docket

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