

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB- CV-09-27

JOHN J. JOHNSON,

Plaintiff

v.

ORDER ON DEFENDANT’S
MOTION TO DISMISS

JOHN TAYLOR, III,

Defendants

Before the court is Defendant’s motion (a) to dismiss the entirety of Plaintiff’s Complaint pursuant to M.R. Civ. P. 12(b)(7) for failure to join a party under Rule 19, and (b) to dismiss Counts II, III, IV and V of the Complaint pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim

BACKGROUND

Plaintiff’s Complaint contains the following assertions which, for the purposes of the motion to dismiss, are deemed admitted. *Doe v. Graham*, 2009 ME 88, ¶ 3, — A.2d at —.

Defendant owns and operates Northport Marine Services, Inc. (“Northport”). In 2007, Plaintiff gave Defendant Sixty Thousand Dollars (\$60,000) in five installments with the understanding that Defendant would make Plaintiff a partner and/or a shareholder of Northport. However, Defendant has failed to do either. Plaintiff has demanded a return of the money, but Defendant has refused to return it.

In the various counts of the Complaint, Plaintiff further alleges that Defendant “negligently misrepresented” an intention to make Plaintiff a partner in Northport or to transfer shares of the corporation to Plaintiff (Count II); that, as a result, Defendant was unjustly enriched

(Count III); that Defendant's actions were fraudulent (Count IV); and that "Defendant's fraudulent actions entitle Plaintiff to recover punitive damages" (Counts V).

DISCUSSION

I. Joinder

Defendant first moves to dismiss the Complaint for failure to join a necessary party, to wit: Northport. M.R. Civ. P. 12(b)(7) and 19. Defendant asserts that Plaintiff's dealings were with Northport, rather than with Defendant, individually, and that "all monies" were transferred by Plaintiff pursuant to his oral agreement with Northport for investment in the operation of the corporation. Therefore, citing Rule 19,¹ Defendant avers that Northport is a necessary and indispensable party and Plaintiff's failure to join the corporation warrants dismissal of the complaint in its entirety.

However, other than Defendant's bald assertion that he was acting as Northport's agent when dealing with Plaintiff and that the alleged agreement called for the investment of Plaintiff's monies in Northport's operations, Defendant has not presented the court with any corroborated information upon which it can conduct a Rule 19(a) analysis. There is nothing in the record to support a conclusion that Northport in fact has an interest in this dispute that will not be protected absent its joinder.

¹ Rule 19(a) provides, in pertinent part:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

Insofar as Plaintiff paid money in order to acquire a partnership interest in or shares of Northport and did not receive either, Plaintiff does not assert that he dealt with Northport or with Defendant in any representative capacity. Plaintiff only seeks the return of the money he paid to Defendant, rather than specific performance of the alleged agreement – that is, the issuance to him of a partnership interest in or shares of Northport. On its face, as alleged in the Complaint, it appears that Plaintiff only contracted to purchase a portion of Defendant’s interest in Northport.

II. Failure to State a Claim

Defendant also seeks to dismiss Counts II (Negligent Misrepresentation), III (Unjust Enrichment), IV (Fraud) and V (Punitive Damages) for failure to state claims upon which relief can be granted. M.R. Civ. P. 12(b)(6). In this analysis, the court examines the complaint “in the light most favorable to the plaintiff and accept[s] the material facts of the complaint as true.” *Davric Me. Corp. v. Bangor Historic Track, Inc.*, 2000 ME 102, ¶ 6, 751 A.2d 1024, 1028 (citations omitted); *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 7, 843 A.2d 43, 46. The court must “determine whether [the complaint] sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Doe v. Graham*, 2009 ME 88, ¶ 12, — A.2d — (citing *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832 (quotation marks omitted). The action should be dismissed only if “it appears beyond a reasonable doubt that a plaintiff is entitled to no relief under any set of facts that [the plaintiff] might prove to support [their] claim.” *Moody*, 2004 ME 20 ¶ 7, 843 A.2d at 47 (internal citation omitted).

A. Count II: Negligent Misrepresentation

A claim for negligent misrepresentation requires allegations that (1) the defendant supplied false information to the plaintiff (2) failed to exercise reasonable care or competence in obtaining or communicating this information, and that (3) the plaintiff justifiably relied on this

information (4) to the plaintiff's detriment. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990) (quoting RESTATEMENT (SECOND) OF TORTS, § 552(1)).

Maine is a “notice pleading” state. In modern notice pleading practice, the purpose of the complaint is to provide a defendant with fair notice of the claim against him. *Bowen v. Eastman*, 645 A.2d 5, 7 (Me. 1994) (citing *Richards v. Soucy*, 610 A.2d 268, 270 (Me. 1992)). See also M.R. Civ. P. 8(a) & (e)(1).² In counterpoint to this notice requirement is the caution that “[a]ll pleadings shall be so construed as to do substantial justice.” M.R. Civ. P. 8(f). “The intent and effect of the rule is to permit a claim to be stated in general terms, but the pleader must nevertheless supply adequate factual information to disclose the basis of his claim for relief.” M.R. Civ. P. 8, Reporter’s Notes (December 1, 1959).

In order to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must do more than simply allege the ultimate legal conclusion upon which the remedy he seeks would be based. Here, Plaintiff does allege facts sufficient to assert reliance and damage. However, he does little more than simply allege the ultimate legal conclusion – negligent misrepresentation – upon which the remedy he seeks would be based. At no place does he allege that Defendant’s assertions or the information he supplied were false. Instead, and at most, Plaintiff alleges that Defendant failed to follow through on his alleged promise. Failure to perform a promise after it is made does not render the initial promise false. In the absence of any allegation of falsity, the court concludes that Plaintiff has failed to state a claim for negligent misrepresentation upon which relief can be granted.

² Rule 8(a) provides that “[a] pleading which sets forth a claim for relief [] shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief which the pleader seeks.”

Rule 8(e)(1) provides that “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.”

Plaintiff's averments are too sparse and, therefore, are insufficient to state a claim for negligent misrepresentation. The court shall provide Plaintiff with a brief opportunity to amend his complaint to sufficiently plead a claim for fraud. However, a failure to timely file such an amendment will result in the dismissal of Count II, without further notice or hearing.

B. Unjust Enrichment

In order to state a claim for unjust enrichment, a Plaintiff must allege

(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Aladdin Elec. Assocs. v. Town of Old Orchard Beach, 645 A.2d 1142, 1144 (1994) (quoting *A.F.A.B., Inc. v. Town of Old Orchard Beach*, 610 A.2d 747, 749 (Me. 1992)).

The court concludes that Plaintiff has alleged facts sufficient to state a claim for unjust enrichment. He has alleged that he paid money to Defendant based on Defendant's representations that Plaintiff would be made a partner or shareholder in Northport. In this analysis of the motion to dismiss, it is permissible for the court to draw an inference favorable to Plaintiff that Defendant's alleged promise indicates his knowing receipt of the money such that the second element of this claim is satisfied. And, finally, Plaintiff's other factual allegations in the complaint sufficiently assert the inequity of Defendant's alleged retention of the money.

C. Fraud

Under well-established Maine law, a defendant is liable for fraud if he:

(1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Letellier v. Small, 400 A.2d 371, 376 (Me. 1979) (citations omitted).

As Defendant correctly notes, Rule 9(b) provides that, “[i]n all averments of fraud[,] the circumstances constituting fraud [] shall be stated with particularity.” M.R. Civ. P. 9(b). As with the Plaintiff’s claim for negligent misrepresentation, the complaint is devoid of any allegation that Defendant made a false statement or misrepresentation. Further, nowhere on the face of the complaint does Plaintiff assert, much less suggest, a knowing or reckless disregard by Defendant for the truth or falsity of his alleged misrepresentation. Therefore, the court agrees with Defendant that Plaintiff has failed to allege a claim for fraud upon which relief can be granted. The court shall provide Plaintiff with a brief opportunity to amend his complaint to sufficiently plead a claim for fraud. However, a failure to timely file such an amendment will result in the dismissal of Count IV, without further notice or hearing.

D. Punitive Damages

Plaintiff’s claim for punitive damages is pled as a separate count of the complaint. However, punitive damages are a component of damages otherwise recoverable and not a separate theory of recovery. For that reason, the motion to dismiss the claim for punitive damages in Count V is granted.

In the context of the various claims as plead in the complaint, punitive damages are only available, if at all, with respect to an appropriately plead claim of fraud. “In order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice.” *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). Further, punitive damages are generally not recoverable for breach of contract unless the breach also “constitutes an independent tort for which punitive damages would otherwise be available.” Horton & McGehee, *Maine Civil Remedies* § 4.4(a) at 74 (4th ed. 2004).

Plaintiff does not allege that Defendant acted with malice. Therefore, on its face, Plaintiff’s Complaint fails to demonstrate any entitlement to punitive damages. However, as

with the decision regarding the claim for fraud, the court shall provide Plaintiff with a brief opportunity to amend his complaint to appropriately include a claim for punitive damages. However, a failure to timely amend the complaint in that respect will foreclose Plaintiff's entitlement to such a claim in this case, without further notice or hearing.

DECISION

Based upon the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

- A. Defendant's motion to dismiss the entirety of Plaintiff's Complaint for failure to join a party is DENIED.
- B. Defendant's motion to dismiss Count III of Plaintiff's Complaint for failure to state a claim is DENIED.
- C. Defendant's motion to dismiss Count V of Plaintiff's Complaint for failure to state a claim is GRANTED; Plaintiff shall have 15 days from the date of this order within which to file an amendment to the Complaint that appropriately pleads a claim for punitive damages, and Defendant shall have 15 days from such filing within which to file a response; provided, however, if Plaintiff fails to timely file such an amendment, Plaintiff shall be deemed to have waived any claim for punitive damages.
- D. Defendant's motion to dismiss Count II of Plaintiff's Complaint for failure to state a claim shall hereafter be DENIED if within 15 days from the date of this order Plaintiff files an amendment to Count II of the Complaint that sufficiently pleads a claim for negligent misrepresentation; however, if Plaintiff fails to timely file such an amendment, Defendant's motion to dismiss Count II shall be GRANTED without delay and without further notice or hearing; and Defendant shall have 15 days from the filing of such amendment within which to file a response.
- E. Defendant's motion to dismiss Count IV of Plaintiff's Complaint for failure to state a claim shall hereafter be DENIED if within 20 days from the date of this order Plaintiff files an amendment to Count IV of the Complaint that sufficiently pleads a claim for fraud; however, if Plaintiff fails to timely file such an amendment, Defendant's motion to dismiss Count IV shall be GRANTED without delay and without further notice or hearing; and Defendant shall have 15 days from the filing of such amendment within which to file a response.

Dated: September 8, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court