

Global Access Networks, LLC, et al.,

Plaintiffs

v.

DECISION AND ORDER

Michael Griggs, et al.,

Defendants

and

VVD Networks, LLC,

Party-in-interest

This matter is before of the Court on Counterclaim Defendants' (Global Access Networks, LLC, and Timothy Varney) Motion to Dismiss. As part of their response to the motion, Counterclaim Plaintiffs Michael Griggs and Accessible Networks' have filed an amended counterclaim. The Court has reviewed and considered the parties' submissions.

Factual Background

According to Counterclaim Plaintiffs' Amended Counterclaim, Counterclaim Plaintiff Michael Griggs has extensive knowledge and experience in the wireless and broadband internet service industry. Amended Counterclaim at ¶¶ 1 & 3. Counterclaim Plaintiff Griggs owns Counterclaim Plaintiff Accessible Networks, a duly organized and existing Maine corporation. *Id.* at ¶ 2.

Counterclaim Defendant Timothy Varney owns and controls Counterclaim Defendant Global Access Networks, a Maine limited liability company. *Id.* at ¶ 4. Counterclaim Defendant Global

was allegedly formed in order to hold Counterclaim Defendant Varney's interest in VVD Networks, an internet service provider company formed in 2006. *Id.* at ¶¶ 4 & 9. According to Counterclaim Plaintiffs, during the summer of 2006, Counterclaim Plaintiff Griggs and Counterclaim Defendant Varney entered into an agreement whereby Counterclaim Defendant Varney personally agreed to fund the start-up of VVD Networks until such time that it became profitable. *Id.* at ¶ 12. Counterclaim Plaintiffs contend that this alleged promise by Counterclaim Defendant Varney was made in consideration for Counterclaim Plaintiffs' Griggs' provision of technical assistance to VVD Networks, and in consideration of Counterclaim Plaintiff Accessible Networks' making its assets available for the support of VVD Networks. *Id.* at ¶¶ 16, 19. Counterclaim Plaintiff Griggs and Counterclaim Defendant Global each allegedly owned 50% of VVD Networks. *Id.* at ¶ 10.

According to Counterclaim Plaintiffs, after organizing and forming VVD Networks, Counterclaim Plaintiff Griggs "applied his know-how and knowledge in developing an internet provider business". *Id.* at ¶ 13. Counterclaim Plaintiffs further allege that Counterclaim Defendants agreed to pay Counterclaim Plaintiff Accessible in exchange for the use of Accessible's equipment and employees to develop VVD Network's business. *Id.* at ¶ 16. However, Counterclaim Plaintiffs contend that Counterclaim Defendants stopped funding the operation and, and failed to pay Counterclaim Plaintiff Accessible as agreed. *Id.* Counterclaim Plaintiffs maintain that Counterclaim Defendants' actions constitute fraud.

Counterclaim Defendants have moved to dismiss the Counterclaim, arguing that Counterclaim Plaintiffs have failed to state a claim for fraud upon which relief can be granted. Specifically, Counterclaim Defendants assert that the Counterclaim fails to allege fraud with sufficient particularity and, as a result, it must be dismissed.

The Amended Counterclaim

Although Counterclaim Plaintiffs did not file a separate motion to amend their counterclaim, in their response to the motion to dismiss, Counterclaim Plaintiffs asked the Court to permit the filing of the Amended Counterclaim if the Court determined that the original Counterclaim lacked the specificity necessary to sustain a fraud claim. Without commenting on whether the original Counterclaim included sufficient specificity for the fraud claim, given that leave to amend should be freely allowed,¹ the Court grants Counterclaim Plaintiff's request to file the Amended Counterclaim, and will consider the Amended Counterclaim when assessing Counterclaim Defendants' Motion to

¹ M.R. Civ. P. 15(a).

Dismiss. See *Sherbert v. Remmel*, 2006 ME 116, ¶ 8, 908 A.2d 622, 624 (explaining that motions to amend must be considered and acted upon prior to ruling on dispositive motions) (citations omitted).

Motion to Dismiss

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)). “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law.” *Bean v. Cummings*, 2008 ME 18, ¶ 7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

As outlined above, Counterclaim Plaintiff Griggs alleges that Counterclaim Defendants Varney and Global fraudulently promised to fund VVD Networks and, presumably, compensate Mr. Griggs, until such time as Counterclaim Plaintiff Griggs was able to develop VVD Networks into a self-sustaining, profitable internet service provider. Counterclaim Plaintiff Griggs alleges that Counterclaim Defendants made that promise in order to induce Mr. Griggs to invest his experience and know-how in VVD Networks so that VVD Networks would become a profitable business.²

² Specifically, Counterclaim Plaintiff Griggs alleges that Counterclaim Defendant Varney promised Counterclaim Plaintiffs:

that he would continue to fund individually or through his other businesses [VVD Networks] as long as [Counterclaim Plaintiff Griggs] would continue to operate [VVD Networks] until [VVD Networks] had reached the appropriate number of subscribers to become profitable. These representations were made in several face to face meetings between [Counterclaim Plaintiff Griggs] and [Counterclaim Defendant] Varney in Varney’s office in Bangor, Maine beginning during the Summer of 2006 and continuing through early October 2006 as well as in various telephone conversations between these parties.”

Amended Counterclaim at ¶ 12.

According to Counterclaim Plaintiffs, these “representations were made with the intent of inducing Counter Plaintiffs to apply his know how and technical knowledge to [VVD] Networks experience and bring that company to a point where it could provide internet provider services to numerous subscribers.” *Id.*

In order to establish fraud, a party must demonstrate: (1) the making of 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 refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff. *Petit v. Key Bank of State*, 688 A.2d 427, 430 (Me. 1996). Under M.R. Civ. P. 9(b), “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *Id.* Rule 9(b) is generally construed “to impose on the pleader an obligation to allege the time, place, and content of [the] alleged false representation.” *Sprague Energy Corp. v. Massey Coal Sales Co.*, 2006 U.S. Dist. LEXIS 10582 (D. Me. 2006) (internal quotation marks omitted) (citing *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980)).

In this case, Counterclaim Plaintiffs have alleged the time, place and the content of the alleged misrepresentations made by the Counterclaim Defendants. More specifically, Counterclaim Plaintiffs allege (a) that in the summer of 2006 and thereafter, in Bangor, Maine, through in person meetings and during telephone conversations, Counterclaim Defendant Varney represented that the subject business endeavor would be funded until profitable (Amended Counterclaim, ¶¶ 12, 16), (b) that in reliance on the representations, Counterclaim Defendants devoted time and resources to the business (Amended Counterclaim, ¶¶ 12, 16, 19), (c) that Counterclaim Defendants’ representations were false and were made to induce Counterclaim Plaintiffs to devote resources to the business, and (d) that Counterclaim Defendants stopping providing resources to the business contrary to their representations. Amended Counterclaim, ¶¶ 14, 15, 19.

While Counterclaim Defendants accurately note that the Amended Counterclaim does not allege the extent of the resources that Counterclaim Defendants’ promised or the period of time for which Counterclaims Defendants were to provide the resources, the allegations in the Amended Counterclaim are sufficient to notify Counterclaim Defendants of the claim and to satisfy M.R. Civ. P. 9(b). That is, the specificity requirement of Rule 9(b) does not mandate that the pleading contain definite terms, but rather that the “circumstances constituting fraud ... be stated with particularity”. M.R. Civ. P. 9(b). By setting forth Counterclaim Defendants’ alleged representations, the way in which Counterclaim Plaintiffs relied upon the representations, Counterclaim Defendants’ alleged failure to act in accordance with their representations, and Counterclaim Plaintiffs’ loss as the result of Counterclaim Defendants’ failure act in accordance with the representations, Counterclaim Plaintiffs have satisfied that requirement of M.R. Civ. P. 9(b) in this case.

Conclusion

Based on the foregoing analysis, the Court orders as follows:

1. The Court allows the Amended Counterclaim. Counterclaim Defendants shall file a responsive pleading to the Amended Counterclaim within 10 days of receipt of this Decision and Order.
2. The Court denies Counterclaim Defendants' Motion to Dismiss.

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

Date: 1/5/09


Justice, Maine Business & Consumer Docket