VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-02085

The Stratton Corporation v. Snowbridge Homeowners Association

ENTRY REGARDING MOTION

Title: Motion to Dismiss Claims Added in Amended Counterclaim (Motion: 11)
Filer: The Stratton Corporation
Filed Date: February 08, 2023

The motion is GRANTED IN PART and DENIED IN PART.

In this case, both Plaintiff Stratton Corporation and the SnowBridge Homeowners Association Inc. seek a declaration from the court that the other is responsible for repair and maintenance of the three bridges in the SnowBridge development which was created by Stratton and is adjacent to its ski area. The Association is responsible for "common roadways" under the original development documents. The issue for declaratory relief is which party is responsible for repair to the structures of the three bridges that support the roadways as they cross over two ski trails and a brook in the Stratton ski resort. The development was created in 1997. Stratton apparently raised the issue in 2017. The development documents do not specifically address responsibility for bridges.

The Association's Motion to amend its Counterclaim was granted and resulted in the addition of two causes of action: bad faith/breach of contract, and consumer fraud. Plaintiff Stratton Corporation moves to dismiss the breach of contract claim for failure to state a claim pursuant to V.R.C.P. (b)(6), and seeks dismissal of the consumer fraud claim on both grounds of failure of standing as a matter of subject matter jurisdiction pursuant to V.R.C.P. 12(b)(1), and failure to state a claim pursuant to V.R.C.P. (b)(6).

Bad Faith – Breach of Contract Claim

The Association's breach of contract claim is that Stratton retained responsibility for the bridges in the original development agreements and documentation, and that it is now, after over 20 years of exercising that responsibility, seeking a declaration that the Association is responsible for bridge maintenance. Stratton argues that the Association has failed to allege damages related to this claim. Stratton is correct that both damages and causation, in addition to a contract and breach, are essential elements of a breach of contract claim. To prevail on a breach of contract claim, a plaintiff must show that it was damaged by the alleged breach of contract. *Smith v. Country Vill. Int'l, Inc.*, 2007 VT 132, ¶ 9. "Failure to prove damages is fatal

to a claim for breach of contract." *Id.* at ¶ 10. While "proof" is not required in a complaint, there must be at least allegations of damages and causation since those are essential elements of a claim.

Stratton claims that the Amended Counterclaim sets forth no facts showing damages suffered by the Association because neither the Association nor any owner has "paid even one dollar toward bridge repairs" to date. Stratton thus argues that the Association has failed to adequately plead a claim for breach of contract.[1]

The Association argues that it has sufficiently pled a claim and points to paragraph 50 of the Amended Counterclaim, in which it alleges that Stratton has failed to provide funds since 1997 to maintain the bridges or establish reserve funds to use for preventive maintenance or repairs or capital improvements or replacement as needed over time, and further points to paragraph 56 in which it alleges that the failure to maintain the bridges has caused deterioration that will make the condition of the bridges more expensive to correct than if ongoing maintenance had been performed by Stratton.[2]

The purpose of a Rule 12(b)(6) motion is to test the law of the claim, not the facts that might support it. *Kane v. Lamothe,* 2007 VT 91, ¶ 14. While causation and damages are essential components of a breach of contract claim and there must be some allegations of injury and causation, the court will only grant a motion to dismiss for failure to state a claim "when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint that would entitle the plaintiff to relief." *Bock v. Gold,* 2008 VT 81, ¶ 4. In examining a Rule 12(b)(6) motion, the court assumes that all factual allegations in the complaint are true and must also "accept as true all reasonable inferences that may be derived from plaintiff's pleading." *Richards v. Town of Norwich,* 169 Vt. 44, 48–49 (1999).

The Association has alleged that Stratton's failure to maintain the bridges from 1997 to the present will result in injury to the Association in the event that the court declares the Association responsible for bridge maintenance, with the injury being costs of maintenance that exceed what they otherwise should have been had Stratton fulfilled its contract responsibilities for preventive maintenance. The court has not yet ruled on the competing claims of the parties for a declaration of which party is responsible for bridge maintenance. The Association's pleading is sufficient to identify the basis for injury and causation that may become pertinent if the court determines that the Association is responsible for bridge maintenance. While an injury based on speculation about uncertain future events is not a sufficient allegation of injury, *Kelly v. University of Vermont Medical Center,* 2022 VT 26, ¶ 32, in this case, at this point, the nature of the injury is quite specific if it occurs and easily quantifiable. It is not speculative in the same sense as a claim for lost profits from a business venture that never occurred. The amount is

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[1] Stratton also argues that because the Association has failed to allege damages, it has no standing to bring a breach of contract claim. Resolution of this argument rests on the determination of whether there is a sufficient allegation of injury and causation.

[2] The Association sought to add other components of injury by Motion #13, which was apparently filed in response to Stratton's Motion to Dismiss. The court denied Motion #13 on the grounds that the causes of action which the Association sought to supplement had already been allowed when the Association's motion to amend the counterclaim was granted.

ascertainable and the likelihood of occurrence is 50-50 brought on by the complaint filed by Stratton in this case. Whether it will occur will become certain at the conclusion of this case. This is an allegation of injury to the Association with sufficient specificity to overcome a claim that it is only speculative.

The Association identified further components of alleged injury in its Motion to Amend the Amended Counterclaim (Motion #13) and on page 4 of its Opposition to the Motion to Dismiss. These are potential loss of property value, overpayment for the units, and attorney fees and expenses related to Stratton's belated assertion that the Association is responsible for maintenance of the bridges. Potential loss of property value and attorney fees are closely related to the allegations of injury identified in the Amended Complaint and are reasonably inferred from them. They are common to all members of the Association[3] and are thus allowed as components of injury alleged by the Association based on reasonable inferences. *Richards* at 49. Overpayment for units constitutes injury to individual owners rather than the Association and appears to be part of the consumer fraud counterclaim. The standing challenge related to this particular allegation is addressed below.

The court cannot conclude that it is beyond doubt that there are no facts or circumstances that would entitle the Association to relief for breach of contract. The Association has alleged causation and injury sufficiently to withstand dismissal of the breach of contract claim under the liberal standards of pleading in Vermont law. The motion to dismiss this claim is denied.

Consumer Fraud

As to this counterclaim, Stratton argues that the Association lacks standing to bring such a claim on behalf of its members, and moreover that the Association has failed to meet the required standard for pleading a claim of consumer fraud. Understanding the basis of the consumer fraud claim first will be helpful to the analysis concerning standing.

Stratton's argument re failure to state a claim

Stratton identifies the elements necessary for a consumer fraud claim: (1) a representation, practice, or omission likely to mislead a consumer, (2) the consumer interpreted the message reasonably under the circumstances, and (3) the misleading effects were material, "that is, likely to affect the consumer's conduct or decision with regard to a product." *Lang McLaughry Spera Real Estate, LLC v. Hinsdale,* 2011 VT 29, ¶ 32 (citing *Greene v. Stevens Gas Serv.,* 2004 Vt 67, ¶ 15). Stratton also relies on the requirement that fraud claims must be pled with particularity. *Id.;* V.R.C.P. 9 (b) ("in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity").

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[3] The attorneys' fees and expenses are reasonably claims of the Association itself, and not individual owners, as Stratton has sued the Association, and it is the Association itself, as a legal entity, that is presumably incurring the cost of the suit as a primary obligor, even if such costs are subsequently passed on to and shared by owners. Potential loss of property value would result from increased expenses to the Association for common roadway maintenance, for which the Association is initially responsible, divided equally among unit owners on a per unit basis through assessments. See Declaration attached to Complaint as Exhibit A, Articles I, IV, XI, and VII.

The Association notes that the factual allegations of misrepresentation are based on specific marketing materials attached to the Amended Counterclaim that (a) invite purchasers to "cross our [Stratton's] bridge" and did not disclose that maintenance of bridges over Stratton's streams and ski trails would be the responsibility of the Association or owners, and (b) that prospective buyers were provided with details of projected ongoing ownership costs but that such projections did not include any costs associated with maintaining bridges.

Stratton argues that "[N]o reasonable person would find that, in the absence of any alleged specific statement to a potential buyer in which Stratton affirmatively took responsibility for bridge maintenance costs at the time of sale, that the documentary evidence attached to the amended counterclaims would influence a consumers' [sic] conduct or decision." Motion to Dismiss, pages 10-11. Ultimately whether the representations and materials were misleading, reasonably interpreted by buyers, and material are questions of fact to be decided by the factfinder. The allegations are sufficiently specific to meet the requirement that fraud claims be pled with particularity. Based on the allegation that Stratton referenced the bridge as its own and provided specific information about future ongoing costs of ownership without including bridge maintenance costs, the court cannot conclude that it is beyond doubt that there are no facts or circumstances that would entitle a proper plaintiff to relief under the consumer protection statute.

Standing

The question then becomes whether the Association is a proper plaintiff, i.e., whether it has standing to bring such a claim against Stratton on behalf of 36 unit owner members of the Association.

The Association itself does not qualify as a "consumer" entitled to consumer fraud relief under the definition in 9 V.S.A. §2451(a). The Association seeks to pursue consumer fraud claims on behalf of unit owners. This calls for a determination of whether the Association can assert associational standing on behalf of its members.

The parties disagree as to the legal requirements for associational standing. Stratton relies on the elements set forth by the United States Supreme Court in *Hunt v. Washington State Apple Adver. Comm,* 432 U.S. 333, 343 (1977): "[a]n association has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action." Stratton argues that the third element cannot be met because the pleadings do not show that all unit owners were original purchasers who relied on the materials that form the basis of the claim. It argues that some may have purchased recently with knowledge of this litigation and the issue. It argues that since individualized proof would be required with respect to each unit, the third required element for associational standing cannot be met.

The Association acknowledges that Vermont adopted the U.S. Supreme Court's *Hunt* doctrine of associational standing in *Parker v. Town of Milton,* 169 Vt. 74, 78. It argues that the

third element is not constitutionally rooted, and may be modified by legislation, citing *United Food & Commer. Workers Union Local 751*, 517 U.S. 544 at 546 and 558. It argues that the Vermont Legislature has done so in enacting first 27 V.S.A. § 1327, which authorized an organization to litigate on behalf of two or more owners with respect to any cause of action "relating to the common areas and facilities of more than one apartment or site," and subsequently 27a V.S.A. §3-102(a)(4), which authorizes a homeowners' association to litigate claims "on behalf of itself or two or more unit owners on matters affecting the common interest community."

The Association cannot meet the third required element of associational standing for unit owner's consumer fraud claims no matter which set of standards is used. It cannot meet the *Hunt* third element because participation of individual members would be necessary: not all current unit owners bought at the same time or relied on the same original marketing materials containing an allegedly misleading representation about a bridge. The circumstances of alleged misrepresentations would require individualized participation and proof.

As to the Association's reliance on a statutory alternative to the third element, the parties dispute whether 27 V.S.A. § 1327 or 27a V.S.A. §3-102(a)(4) is applicable. The court declines to resolve this issue because the consumer fraud claims that the Association wishes to assert on behalf of owners would not qualify for associational standing under either statutory provision.

The Association cannot meet the 27a V.S.A. §3-102(a)(4) requirement that an association can litigate on behalf of owners *"on matters affecting the common interest community."* The consumer fraud claims are distinct with respect to each unit owner, as not all were positioned equally with respect to the claimed basis for the alleged consumer fraud. 'Matters affecting the common interest community' are most reasonably those in which all owners have the same interest and are affected in the same manner. All owners have the same interest with respect to whether the Association will or will not become responsible for bridge maintenance and repair because the outcome will affect all owners in the same way, and for that reason, the Association has associational standing (as well as direct standing) with respect to the breach of contract claim. However, with respect to consumer fraud, each owner may have different circumstances with respect to both initial representations relied on at the time of purchase as well as different measures and calculations of injury.

Nor can the Association meet the requirement in 27 V.S.A. § 1327 because the elements of a consumer fraud claim do not relate to "common areas and facilities" in a direct manner. They are based on individual reliance on representations made to owners and used by them in making individual decisions about a financial investment. The alleged injury is to an owner's financial interest in their investment rather than to a shared benefit in a common area or to a common responsibility for costs or expenses of maintaining common areas or facilities.

The Association relies on *Meadowbrook Condominium Ass'n v. South Burlington Realty Corp.,* 152 Vt 16 (1989), but such reliance is misplaced. The Supreme Court did not ultimately rule on the issue of the association's standing to bring consumer fraud claims because none of the damages were upheld based solely on a consumer fraud cause of action. Damages were

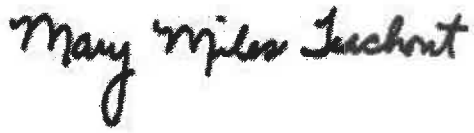
awarded "on a breach of contract theory as well" which was not challenged, so the issue was moot. In addition, the Court "did not reach the issue of the Act's applicability because we hold that the punitive damages award must be vacated on an independent ground." *Id* at 28. Thus the Court did not establish law that supports the Association's claim for standing with respect to the owners' consumer fraud claims.

Because consumer fraud allegations and injuries are necessarily distinct for different unit owners, they require individualized participation by unit owners and individualized proof. While various owners may have a basis for such claims, their bases are not common to other owners and do not affect the common interest community in the same way. Therefore, the Association has not shown that it has standing to represent the interests of unit owners with respect to the consumer fraud claim. Stratton's motion to dismiss this claim is granted.

Summary

For the foregoing reasons, the motion to dismiss is *granted* with respect to the Association's consumer fraud counterclaim, and *denied* with respect to the Association's breach of contract counterclaim.

Electronically signed May 24, 2023 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned