

VERMONT SUPERIOR COURT
Washington Unit
65 State Street
Montpelier VT 05602
802-828-2091
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 23-CV-00326

Dejung Gewissler v. Ruben Ramirez et al

Opinion and Order on Defendant Ramirez' Motion to Dismiss

This case is a business dispute between Plaintiff Dejung Gewissler and Defendant Ruben Ramirez, both allegedly members of Defendant Herb Craft LLC. Mr. Gewissler seeks judicial dissolution of Herb Craft and has asserted several claims for damages against Mr. Ramirez, who in turn has filed a motion to dismiss for failure to state a claim.¹ The Court entertained oral argument on the motion. Based on the filings and the contentions of counsel, the Court makes the following determinations.

I. The Allegations of the Complaint and the Motion to Dismiss

The complaint is exceptionally vague and conclusory. The nature of Herb Craft's business is not even clear except that it has something to do with food or canned beverages.² Mr. Gewissler asserts that he and Mr. Ramirez are Herb Craft's two members and they orally agreed that Mr. Ramirez would manage operations and Mr. Gewissler would manage production. They also agreed that Mr. Ramirez would contribute a minimum of \$150,000 and up to \$250,000. There are no allegations as to

¹ The complaint does not assert any derivative claims on behalf of Herb Craft, in which case it would be the real party in interest as plaintiff. The complaint says on page 1 that "The Plaintiff is seeking a finding and damages for the harm he has suffered as a member of Herb Craft."

² At oral argument, counsel confirmed that business focuses on natural, healthy drinks.
Order
23-CV-00326 Dejung Gewissler v. Ruben Ramirez et al

how and when any such contributions were required to be made. Nor is there any clear allegation that Mr. Ramirez failed to make any required contributions. Indulging inferences, however, the complaint can be read to say that he failed to pay the full amounts promised on a reasonable schedule. The thrust of the complaint is that Mr. Gewissler believes that if Mr. Ramirez had made all the promised contributions and bigger contributions sooner, then the business would have done better.

Mr. Gewissler further alleges that Mr. Ramirez did an exceptionally poor job as operations manager. Several times, it is alleged, he failed to order materials or supplies causing the business to lose sales. When confronted by Mr. Gewissler, it is alleged that he responded in confusing and nonsensical ways and otherwise maintained that everything was fine. Eventually, Mr. Gewissler asserts, Mr. Ramirez made a final contribution of \$10,000, withdrew most of it two days later (presumably without right), and quit his operations role, causing havoc with suppliers and creditors. Mr. Gewissler alleges that he has been running the business exclusively ever since, implying that it is not insolvent.

Based on these factual allegations, Mr. Gewissler seeks judicial dissolution of Herb Craft under 11 V.S.A. § 4101(a)(4) or (5), asserting that the parties are in “deadlock” (Count 1). The other 8 claims are as follows: (2) intentional infliction of emotional distress (IIED); (3) breach of fiduciary duty; (4) breach of the covenant of good faith and fair dealing; (5) unjust enrichment; (6) detrimental reliance; (7) fraud; (8) misrepresentation; and (9) violation of Vermont Consumer Protection Act (CPA), 9 V.S.A. §§ 2451–2466c.

Mr. Ramirez seeks dismissal of all claims as follows. He cites extra-record evidence (a filing with the Secretary of State's office) referring to Mr. Gewissler as a manager and himself as a member, asserts that Mr. Gewissler therefore is a manager and not a member, and argues that, as a manager, Mr. Gewissler cannot seek judicial dissolution (Count 1) and Mr. Ramirez only had a fiduciary duty (Count 3) and the duty of good faith and fair dealing (Count 4) to the company and other members, not Mr. Gewissler. Otherwise, the theme running through Mr. Ramirez's arguments in support of dismissal of all other claims (other than the CPA claim) is that the factual allegations of the complaint are impermissibly vague and conclusory. He also argues that the economic loss doctrine bars the IIED and misrepresentation claims; the detrimental reliance claim really is an impermissible promissory estoppel claim; and the fraud claim is not pleaded with particularity, Vt. R. Civ. P. 9(b). Finally, Mr. Ramirez argues that this is a private business dispute and there is no transaction within the contemplation of the CPA.

I. Dismissal Standard

The Vermont Supreme Court disfavors Rule 12(b)(6) motions to dismiss.

"Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (citation omitted). In considering a motion to dismiss, the Court "assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume[s] that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.)

(internal quotation marks, brackets, and ellipses omitted). Courts are not required to accept as true, however, “[c]onclusory allegations or legal conclusions masquerading” as facts. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 9 (citation omitted).

II. Analysis

A. Whether Mr. Gewissler is a Member of Herb Craft

Mr. Ramirez has submitted one Herb Craft filing with the Secretary of State’s office as proof that Mr. Geissler is a manager and not a member. He asserts that the “Court can consider matters outside the pleading for jurisdictional purposes on 12(b)(6),” citing to *Messier v. Bushman*, 2018 VT 93, ¶ 12, 208 Vt. 261, 267. Mr. Ramirez’s Motion to Dismiss at 2 n.1 (filed March 21, 2023). The *Messier* Court simply said, “On a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, or insufficiency of service of process, consideration of matters outside the pleadings is permissible.” *Id.*

Mr. Ramirez’s suggestion that a matter of subject matter jurisdiction is properly presented under Rule 12(b)(6), that Mr. Gewissler’s status as member or manager is jurisdictional in this case, or that *Messier* would support using extrinsic evidence in support of dismissal here all are incorrect. One may seek dismissal for lack of subject matter jurisdiction under Rule 12(b)(1), not Rule 12(b)(6). If Mr. Gewissler is a manager and not a member, that may affect his success with some of his claims but it has nothing to do with the Court’s subject matter jurisdiction, and *Messier* does not counsel otherwise.

Otherwise, Mr. Ramirez has not asked the Court to take judicial notice of the Secretary of State filing, and the Court would not do so in any event. Mr. Gewissler

clearly alleges that he is a member of Herb Craft. The Secretary of State filing could be inaccurate, misleading, or he may wear two hats at the company. Because this was the basis for dismissal of Counts 1, 3, and 4, Mr. Ramirez's motion is denied as to those Counts.³

B. All Other Claims But the IIED, Fraud and CPA Claims

In the complaint, Mr. Gewissler asserts the allegations summarized above, and then asserts claims of unjust enrichment, detrimental reliance, and misrepresentation. No doubt, the allegations of the complaint are short on detail. Nonetheless, under the liberal Rule 12(b)(6) standard, the Court cannot conclude that there no grounds that could support the asserted claims. *Bock*, 2008 VT 81, ¶ 4, 184 Vt. at 576.

The elements of an unjust enrichment claim are: “(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.” *Reed v. Zurn*, 2010 VT 14, ¶ 11, 187 Vt. 613, 616 (citation omitted). The complaint can be read to contend that Defendant obtained a beneficial interest in the company, made promises to support the effort, and reneged on those assurances to Plaintiff's detriment. That suffices to state a claim.

Mr. Gewissler presumably intends by “detrimental reliance” to assert a claim of promissory estoppel. Promissory estoppel is described as follows: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the

³ To the extent Mr. Ramirez's motion may be read to imply that Count 3 (fiduciary duty) and Count 4 (good faith and fair dealing) are insufficiently pled, the Court declines to dismiss. At a minimum, Mr. Gewissler alleges that Mr. Ramirez withdrew funds contributed to, and thus owned by, Herb Craft without right. Counts 3 and 4 will be better resolved once the evidence has developed.

promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” *Tour Costa Rica v. Country Walkers, Inc.*, 171 Vt. 116, 120 (2000) (citation omitted). It applies “where there is no contract, where the promise is gratuitous, and there is unbargained-for reliance.” *Hayes v. Town of Manchester Water & Sewer Boards*, 2014 VT 126, ¶ 37, 198 Vt. 92, 109 (citation omitted). To the extent no enforceable contract exists, the circumstances noted above plus Plaintiff’s change of position in reliance upon Defendant’s statements can be read to state a claim.

Negligent misrepresentation is generally described as follows: “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.” Restatement (Second) of Torts § 552 (1977). The allegations noted in the preceding paragraphs are sufficient to state a claim in this regard as well. To the extent Defendant maintains that Plaintiff can only recover certain types of damages via this tort, the Court defers ruling on that issue. The Court does not construe the complaint as seeking only one category of damages and any determination as to the scope of damages would be better made on an evidentiary record.

Accordingly, the motion to dismiss is denied as to the claims of unjust enrichment, detrimental reliance, and misrepresentation.

C. IIED

Despite the nature of the Rule 12(b)(6) standard, a complaint must still provide “fair notice” to defendant of the claim against him, Vt. R. Civ. P. 8, Reporter’s Notes, and must contain factual allegations supporting each element of the claims asserted. *Colby*, 2008 VT 20, ¶ 10, 184 Vt. at 9. The IIED claim fails on both counts.

“The elements of an IIED claim are: ‘(1) conduct that is extreme and outrageous, (2) conduct that is intentional or reckless, and (3) conduct that causes severe emotional distress.’” *Baptie v. Bruno*, 2013 VT 117, ¶ 24, 195 Vt. 308, 318 (citation omitted). As the Supreme Court has held: “Plaintiff’s burden on this claim is a ‘heavy one’ as he must show defendants’ conduct was ‘so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable.’” *Fromson v. State*, 2004 VT 29, ¶ 14, 176 Vt. 395, 399–400 (citation omitted).

Here, the complaint provides Defendant with no notice of conduct that might meet the elements of IIED. Indeed, the complaint includes no allegations fairly describing any extreme and outrageous conduct or severe emotional distress. Nor can any allegations that might reach the high standard described above be inferred.

The IIED claim is dismissed.

D. The Fraud Claim

The fraud claim founders on the shoals of Vt. R. Civ. P. 9(b). “To maintain a cause of action for fraud, plaintiff must demonstrate five elements: ‘(1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party’s knowledge; (4) that the defrauded party act[ed] in

reliance on that fact; and (5) is thereby harmed.” *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129, ¶ 13, 200 Vt. 465, 472 (2015) (citation omitted). Additionally, the allegations of fraud must be pled with particularity. Vt. R. Civ. P. 9(b); *Sutton v. Vermont Reg’l Ctr.*, 2019 VT 71A, ¶ 73, 212 Vt. 612, 238 A.3d 608, 636 (“[O]ne of the primary objectives of Rule 9(b) is to provide the defendant with sufficient information to enable [them] to effectively prepare a response.” (citation omitted)).

Here, while some inferences might be drawn in support of some of the elements of a fraud claim, they are incomplete and most vague, and do not address each of the elements of fraud. They are certainly not pled with the particularity required by Rule 9(b).⁴

The fraud claim is dismissed.

E. The CPA Claim

The complaint plainly describes a private dispute between the members of a limited liability company. It does not describe a transaction within the contemplation of the CPA. The CPA applies to transactions “in commerce.” As the Vermont Supreme Court has explained:

[W]e hold that the “in commerce” requirement narrows the [CPA’s] application to prohibit only unfair or deceptive acts or practices that occur in the consumer marketplace. To be considered “in commerce,” the transaction must take place “in the context of [an] ongoing business in which the defendant holds himself out to the public.” Further, the practice

⁴ In the complaint, Mr. Gewissler vaguely alleges that once the business had gone south, Mr. Ramirez in some manner attempted to renegotiate the parties’ respective ownership interests in his favor in exchange for further investment in the business. That is far too vague to describe fraud. In briefing, Mr. Gewissler further asserts that Mr. Ramirez, from the start, invested substantial sums in the business with a plan to purposely lose the value of his investment to somehow wrest ownership away from Mr. Gewissler. Apart from considerations as to why anyone would do that, these allegations are highly speculative and conclusory and do not appear in the complaint in any event.

must have a potential harmful effect on the consuming public, and thus constitute a breach of a duty owed to consumers in general. By contrast, transactions resulting not from “the conduct of any trade or business” but rather from “private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort and property law” remain beyond the purview of the statute.

Foti Fuels, Inc. v. Kurrle Corp., 2013 VT 111, ¶ 21, 195 Vt. 524, 536 (citation omitted). So it is here. Mr. Gewissler does not assert any transaction with Mr. Ramirez in the consumer marketplace. Rather, he asserts a private business dispute.

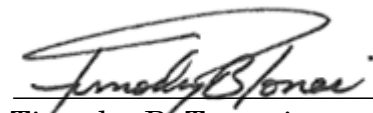
The CPA claim is dismissed.

Conclusion

In summary, Count 2 (IIED), Count 7 (fraud), and Count 9 (violation of the CPA) all are dismissed for failure to state a claim. Remaining in the case are Count 1 (dissolution), Count 3 (breach of fiduciary duty), Count 4 (breach of good faith and fair dealing), Count 5 (unjust enrichment), Count 6 (detrimental reliance), and Count 8 (misrepresentation).

For the foregoing reasons, Mr. Ramirez’s motion to dismiss is granted, in part, and denied, in part.

Electronically signed on Tuesday, September 12, 2023, pursuant to V.R.E.F. 9(d).


Timothy B. Tomasi
Superior Court Judge