STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Caledonia Unit **Docket No. 21-CV-543**

BURKLYN INN LLC
Plaintiff,
v.

CONSOLIDATED COMMUNICATIONS ENTERPRISE SERVICES, INC. d/b/a/ CONSOLIDATED COMMUNICATIONS INTERNET
Defendant

DECISION
Defendant's Motion to Dismiss

Defendant Consolidated Communications Enterprise Services, Inc. seeks dismissal of Counts I, III, and IV of Plaintiff Burklyn Inn LLC's complaint pursuant to V.R.C.P. 12(b)(6). The claims Defendant moves to dismiss are for violation of the Vermont Consumer Fraud Act, breach of the covenant of good faith and fair dealing, and promissory estoppel. Defendant's motion does not address Plaintiff's breach of contract claim (Count II). Defendant is represented by Attorney Victoria M. Hone. Plaintiff is represented by Attorney Stephen L. Cusick.

Plaintiff operates the Inn at Burklyn, an inn located on Darling Hill Road in Burke, VT, close to the Burke-Lyndon town line. Plaintiff's principal place of business is in Burke. Defendant is a for-profit corporation registered to conduct business in Vermont with a principal place of business in Illinois providing fiber-optic cable internet services. Plaintiff's claims relate to a contract between the parties to provide fiber-optic cable internet service to the Inn at Burklyn. Plaintiff has alleged the following facts in the Complaint, and for the purposes of this motion, the court assumes all factual allegations pled in the Complaint are true. *Dernier v. Mortgage Network, Inc.*, 2013 VT 96, ¶ 23, 195 Vt. 113, 121 (2013).

In August of 2019, Defendant solicited numerous residents in the Darling Hill Road neighborhood, including James Crone, a principal and manager of Burklyn, to extend high-speed internet access from Lyndonville to their neighborhood. Defendant knew that the Darling Hill neighborhood, and the Inn specifically, did not have access to fiber-optic cable service and that it would have to build the necessary infrastructure to extend service from its nearest transmission line in Lyndonville, about 3 miles from the Inn.

Mr. Crone communicated with representatives of Consolidated about the requirements and price of extending fiber-optic service to Burklyn during the fall of 2019. At a meeting that fall with Consolidated representatives and invited property owners, it was determined that the extension from Lyndonville would stop short of the Inn. On February 25, 2020, however, Consolidated agent Parker Ferrell emailed Mr. Crone with an offer to provide fiber-optic service

to two buildings on the property (the main Inn building and nearby Inn restaurant) by extending the cable line 1.26 miles from East Burke instead of the longer distance from Lyndonville. The price Mr. Ferrell offered in his email under a 36-month agreement came to approximately $50,000 in total for both locations (about $25,000 for each building). Plaintiff subsequently entered into a Service Agreement and Service Schedule with Defendant at the prices offered in the February 25, 2020 email.

The approximate $50,000 total price for the fiber-optic service did not include initial costs to Plaintiff to prepare the property to receive the fiber-optic service. The contract between the parties required Plaintiff to install the necessary infrastructure at its own expense, and that work included burying over 500 lineal feet of conduit underground, crossing a paved public road, and installing a new power pole on the property. Consolidated representatives advised that the pole and conduit had to be in place before Consolidated would begin its own performance under the contract. Plaintiff heard from a Consolidated representative on March 13, 2020, that the "conduit needed to be in place by the time we are ready to use it." Plaintiff subsequentiy finished installing the pole and conduit on April 21, 2020, and asked Defendant for an update on timing for its own performance. On May 5, 2020, Mr. Ferrell let Plaintiff know that it could not provide the service at the $50,000 price initially offered and that the new price would be at least $120,000, about 2.5 times higher than originally agreed. By the time Plaintiff learned of the price increase it had already spent approximately $60,000 dollars in preparation for the fiber-optic service.

In Count I of the Complaint, Plaintiff alleges that Defendant violated Vermont's Consumer Fraud Act (CFA) by inducing Plaintiff to enter the contract with a misrepresentation of the cost of providing fiber-optic service to the Inn. Count II is for breach of contract, Count III is a clam for breach of the covenant of good faith and fair dealing, and Count IV concerns promissory estoppel.

Analysis

Defendant requests dismissal of Counts I, III, and IV of the Complaint. Dismissal of a claim pursuant to Rule 12(b)(6) is only appropriate when "it is beyond a 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, 184 Vt. 575, 576. The burden on a motion to dismiss under the V.R.C.P. Rule 8 notice-pleading standard is "exceedingly low," *id.*, as the purpose of a motion to dismiss is to "test the law of the claim, not the facts which support it." *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514, 519.

Defendant argues that the court should apply the heightened V.R.C.P. Rule 9 pleading standard that applies to common law fraud to Plaintiff's CFA claim (Count I) acknowledging that the question has not been resolved. The court will not require the heightened standard, however, as "[s]uch a requirement would be at odds with the remedial nature of the VCFA and the ordinary consumers that it is intended to protect." *Nashef v. AADCO Med., Inc.*, 947 F. Supp. 2d 413, 424 (D. Vt. 2013) (holding that Rule 9 does not apply to the CFA).

Vermont's CFA differs significantly from common law fraud, providing a "much broader right than common law fraud," and without requiring that the misrepresentation be intentional or the heightened clear and convincing standard of proof for common law fraud. *Poulin v. Ford Motor Co.*, 147 Vt. 120, 124, 126 (1986). See also *Bergman v. Spruce Peak Realty*, LLC, 847 F. Supp. 2d 653, 671 – 72 (D. Vt. 2012) (discussing how Vermont Supreme Court distinguished the CFA from common law fraud in *Poulin*, and noting, without deciding, that it is "not likely that the Vermont legislature intended to require a heightened pleading standard"); *Whitney v. Nature's Way Pest Control, Inc.*, No. 5:16-CV-88, 2016 WL 3683525, at *3, fn 2 (D. Vt. July 6, 2016). As summarized in *Nashef*, "[n]othing in the plain language of the VCFA, its legislative history, or the case law interpreting supports a conclusion that a heightened pleading standard must be satisfied." 947 F. Supp. 2d at 424. The court consequently applies the general pleading standard under Rule 8 to each claim.

Count I: Vermont Consumer Fraud Act

Vermont's Consumer Fraud Act prohibits "unfair or deceptive acts or practices in commerce," 9 V.S.A. § 2453(a), authorizing relief for "any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices." *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2012 VT 18, ¶ 26, 191 Vt. 284, 297 (2012) (quoting 9 V.S.A. § 2461(b)). Claimants must be able to show three elements in order to establish unfair or deceptive acts in violation of the statute:

> (1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product.

Greene v. Stevens Gas Service, 2004 VT 67, ¶ 15, 177 Vt. 90, 97. While the CFA provides a broader right than common law fraud, *Poulin*, 147 Vt. at 124, "a mere breach of contract cannot be sufficient to show consumer fraud." *Greene*, 2004 VT 67, ¶ 15. Defendant argues that this clam should be dismissed for failure to differentiate the claim from a breach of contract claim, and for failure to state a false or fraudulent misrepresentation.

The court finds Plaintiff's CFA clam to be distinct from its breach of contract claim, and also to be sufficiently supported by the allegations in the Complaint. Plaintiff's allegation in Count II for breach of contract is that Defendant failed to perform as agreed under the contract. The CFA is concerned with "the contents of advertisements and offers – that is, elements of contract formation – and not conduct that is in breach of an existing contract." *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 136 (1993). The issue Plaintiff alleges in this claim is not one of breach, but misrepresentation. Plaintiff alleges that Defendant violated the CFA by misrepresenting that it could provide fiber-optic service to Plaintiff's two buildings for a total cost that amounted to about $50,000, inducing Plaintiff to enter the contract, before demanding a significantly higher price after Plaintiff had completed its own performance in reliance.

"Under the Act's objective standard, a consumer establishes the first element if she proves that the representation or omission had the tendency or capacity to deceive a reasonable consumer." *Jordan v. Nissan North America, Inc.*, 2004 VT 27, ¶ 5, 176 Vt. 465, 468. The

Complaint supports the inference that Defendant's representations about the cost of extending fiber-optic cable to Plaintiff's property had the capacity to deceive a reasonable consumer. Defendant was the party that should have had knowledge of its own costs, and according to Plaintiff's allegations, they "were fully aware of the logistical difficulties" of extending service to that location, including that they would need to build the necessary infrastructure. Compl. ¶¶ 5 – 8. Defendant made its offer to Plaintiff based on info that was uniquely available to it, and it quoted the approximately $50,000 total explicitly and repeatedly, in both the offer and contract. Compl. ¶¶ 9 – 12. It was reasonable for Plaintiff to rely on Defendant's February 25 representation especially considering the allegations that the specific price terms of offer were set out in the contract, and that Defendant's representatives had been communicating with residents in the area, considering possible options for extending the line, since at least the fall of 2019. Compl. ¶¶ 4, 6 – 12.

Defendant argues that it was not misleading to provide multiple price quotes because the terms of the parties' agreement allowed for additional changes based on contingencies that could arise, such as the need to do additional work, citing *Inkel v. Pride Chevrolet-Pontiac* as support for this point. However, as explained by the Vermont Supreme Court in *Inkel*, contract defenses do not necessarily prevent CFA claims. 2008 VT 6 ¶ 17 ("Because deception can be found where there is no breach of contract or warranty, contract and common law defenses generally do not foreclose consumer-fraud claims")(internal quotation removed). Additionally, the issue Plaintiff alleges in the Complaint is not just that Defendant provided multiple price quotes, but that Defendant required Plaintiff to complete its own performance before Defendant would even begin, and before Defendant communicated the new price quote. As a consequence, Plaintiff spent approximately $60,000 on infrastructure such as the pole and conduit to prepare to receive Defendant's fiber-optic service, before learning that the new cost would be 2.5 times higher than it reasonably believed the price would be. Compl. ¶¶ 14 – 20. Plaintiff's pleadings sufficiently support its CFA claim, including on the element of materiality. The inquiry into whether the misleading effect of the misrepresentation was material is generally an objective one, "premised on what a reasonable person would regard as important in making a decision." *Carter v. Gugliuzzi*, 168 Vt. 48, 56 (1998). The price of a service is an objectively important factor in deciding whether to pay for that service, and it is especially material here where the alleged misrepresentation concealed such a large increase in price.

Dismissal of Plaintiff's Vermont Consumer Fraud Act claim would not be appropriate at this stage.

Count III: Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant's argument on this claim is that the Complaint impermissibly reasserts its breach of contract claim as a breach of the implied covenant of good faith and fair dealing. While a claimant may allege both breach of contract and breach of the implied covenant of good faith and fair dealing, "dual causes of action are permitted only where the different actions are premised on different conduct." *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, ¶ 33, 209 Vt. 244, 263.

As with Plaintiff's CFA claim, the court finds Plaintiff's breach of implied covenant claim to be distinct from its breach of contract claim. The claims are related but they are not based on the same conduct. Plaintiff requests relief under this claim on the basis that Defendant failed to inform Plaintiff during the period of time in which Plaintiff was working to install the infrastructure necessary to receive Defendant's fiber-optic cable that there would be a price increase. The breach of contract claim is based on Defendant's alleged failure to complete performance under the contract at the contracted price. Compl. ¶ 42.

The conduct alleged under this claim is a separate act that operates to the detriment of Plaintiff as a contracting party. A breach of the implied covenant can be established by showing that a contracting party "acted in such a way as to violate community standards of decency, fairness or reasonableness, demonstrate an undue lack of diligence, or take advantage of other parties' necessitous circumstances." *Tanzer*, 2018 VT 124, ¶ 33 (quoting *Monahan v. GMAC Mortgage Corporation*, 2005 VT 110, 179 Vt. 167) (internal quotes and brackets removed). Here, Defendant told Plaintiff that it needed to install the new power pole and conduit before it would begin its own work but failed to inform Plaintiff while it was completing this installation that it would be raising the cost of its service. Compl. ¶¶ 16 – 17. As a result of Defendant's failure to inform Plaintiff in time to give it the opportunity to call off its workers, Plaintiff did not learn of the price increase until after finishing the preparations for a service it expected to be 2.5 times less expensive. This is despite being in communication with Plaintiff during the period that Plaintiff was completing the preparations, and despite having knowledge of the difficulty of providing service to Plaintiff's property prior to coming up with a price for the February 2020 offer. Compl. ¶¶ 8, 16, 29.

Plaintiff's pleadings are sufficient to support its claim of breach of the implied covenant of good faith and fair dealing at this stage.

Count IV: Promissory Estoppel

Defendant seeks dismissal of this claim on the ground that there is a written contract between the parties to this case, and promissory estoppel does not apply when there is a written contract. Plaintiff, in response to Defendant's motion, stated that it does not object to Defendant's request to dismiss Count IV. The court consequently grants Defendant's request to dismiss Count IV.

Order

For the foregoing reasons, Defendant's motion to dismiss three of the claims in Plaintiff's Complaint is denied in part and granted in part. The motion is denied as to Count I and Count III, and granted as to Count IV. The case will proceed on Counts I, II, and III. A stipulation to a pretrial scheduling order is due October 15, 2021.

Electronically signed pursuant to V.R.E.F. 9(d) on September 24, 2021 at 6:02 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge