



STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

NORTHWOOD, INC,

Plaintiffs,

vs.

Case No. 2017-4622-CB

OLYMPUS GLOBAL, LLC, DELTA
GLOBAL, LLC, CHRISTOPHER SHAYA,
JEREMIAH MANKOPF and DANIEL
GLADYS,

Defendants.

OPINION AND ORDER

Defendant Jeremiah Mankopf has filed a motion for summary disposition. In addition, the remaining Defendants, Olympus Global, LLC ("Defendant Olympus"), Delta Global, LLC ("Defendant Delta"), Christopher Shaya ("Defendant Shaya") and Daniel Gladys ("Defendant Gladys")(collectively, "Shaya Defendants"), have filed a separate motion for summary disposition. Plaintiff has filed a response to both motions and requests that they be denied.

Facts and Procedural History

Plaintiff is a durable medical equipment ("DME") provider network and DME benefit manager. Plaintiff's claims in this case arise out of the allegation that Defendants participated in a scheme to defraud Plaintiff by diverting blood-glucose test strips ("Strips") to companies outside of the approved DME insurance network. The Strips are manufactured by Roche Diagnostics Corp. and Roche Diabetes Care, Inc. (collectively, "Roche"). Roche has brought suit against Defendants and Plaintiff in the

United States District Court for the Southern District of Indiana, Case No. 1:17-cv-949-TMP-DML ("Roche Action") based on Defendants' allegedly fraudulent conduct.

Defendant Mankopf and Defendant Shaya formed Defendant Olympus in 2013. Defendant Shaya had previously been an officer of one of Plaintiff's competitors. After forming Defendant Olympus, Defendants Mankopf and Shaya approached Plaintiff about the possibility of working with certain DME providers in Florida.

On May 2, 2014, Plaintiff and Defendant Olympus entered into a distributor agreement ("Distributor Agreement") under which Defendant Olympus would purchase DME products from Plaintiff through participating insurance plans. The Distributor Agreement contains an indemnification provision. After purchasing the DME Strips, Defendant Olympus, without Plaintiff's knowledge or consent, allegedly distributed the DME Strips outside the terms of the Distributor Agreement and Plaintiff's agreement with Roche.

On January 30, 2015, Defendant Olympus was dissolved and replaced by Defendant Delta, which was formed by Defendant Shaya and Gladys. Defendant Shaya informed Plaintiff that Defendant Delta would be taking Defendant Olympus's place but that the relationship would stay the same. Defendant Delta, like Defendant Olympus, allegedly continued to distribute DME Strips outside the terms of the Distributor Agreement. Allegedly due to Defendants' actions, Roche terminated its relationship with Plaintiff and filed the Roche Action.

On February 26, 2017, Plaintiff filed its first amended complaint in this matter ("Complaint"). The Complaint contains the following claims: Count I- Negligent Misrepresentation, Count II- Fraudulent Misrepresentation, Count III- Fraud in the

Inducement, Count IV- Innocent Misrepresentation, Count V- Silent Fraud, Count VI- Breach of Contract against Defendants Olympus and Delta, Count VII- Civil Conspiracy, Count VIII- Contractual Indemnity against Defendants Olympus and Delta, Count IX- Common Law indemnity against Defendant Delta, Count X- Piercing the Corporate Veil against Defendant Shaya, Gladys and Mankopf, and Count XI- Tortious Interference with a Contract.

On March 23, 2018, Defendant Mankopf filed his instant motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1). On March 27, 2018, the Shaya Defendants filed their instant motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has since filed responses to both motions. On May 7, 2018, the Court held a hearing in connection with the motions and took the matters under advisement.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtko v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in

opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In their motions, Defendants make numerous arguments that they maintain provide bases for summary disposition of Plaintiff's claims. The Court will address each argument in turn.

(1) Sufficiency of Plaintiff's Fraud Claim under MCR 2.112(B)(1)

In their motions, Defendants first argues that Plaintiff has failed to plead its fraud claims against them with particularity. MCR 2.112(B)(1) provides that: "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." Federal courts have interpreted this requirement to mandate that a plaintiff plead who, what, when, where and how of the alleged fraud. *United States ex rel Ge v Takeda Pharm Co Ltd*, 737 F3d 116, 123 (CA 1, 2013); *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 70-71; 852 NW2d 103 (2014) (Cavanagh, J., concurring). However, application of MCR 2.112(B)(1) must remain flexible and merely requires that a plaintiff sufficiently plead its claims to alert the defendant as to the particulars of their alleged misconduct so that they may respond. *State ex rel Gurganus*, 496 Mich at 70-71.

In this case, Plaintiff has alleged that on March 6, 2014 Defendants Mankopf and Shaya fraudulently misrepresented that they were working with a DME provider in Florida. (See Complaint, at ¶17.) Further, Plaintiff has alleged that on March 27, 2014 Defendants Mankopf and Shaya stated to it that they, through Defendant Olympus, would provide access to Florida health plans for the distribution of DME blood glucose

strips. (Id. at ¶18.) Plaintiff also alleged that those statements were made to induce Plaintiff into entering the Distributor Agreement with Olympus. (Id. at ¶21.) Further, the Complaint alleges that those statements were false as the Strips were sold to non-DME providers. (Id. at ¶¶23, 27-28, 34.) Moreover, Plaintiff has alleged that Defendant Shaya, on behalf of Defendant Delta, represented that it would take over Defendant Olympus's duties under the Distributor Agreement. The Court is satisfied that such allegations are sufficient to satisfy MCR 2.112(B)(1).

However, these allegations merely assert that Defendants Mankopf and Shaya, on behalf of Defendant Olympus, and Defendant Shaya, on behalf of Defendant Delta, made allegedly fraudulent statements. There are no specific allegations within the Complaint that Defendant Gladys made any fraudulent misrepresentations. While Plaintiff has generally alleged that Defendants repeatedly assured it that the Strips were to be distributed in accordance with the Distributor Agreement (Id. at 31.), there are no specific allegations implicating Defendant Gladys. Moreover, while Plaintiff has alleged that misrepresentations were made in September 2015, it is unclear from the face of the pleadings who made the statements in question. Consequently, the Court is convinced that Plaintiff's fraud claims against Defendants Gladys must be dismissed.

(2) Whether Plaintiff's Fraud Allegations are based on Future Promises Rather than Present or Existing Fact.

In both motions, Defendants argue that the fraud claims against them should be dismissed because they are based on promises of future conduct, not past or existing fact. An action for fraudulent conduct must be based on a statement of past or existing fact rather than future promises as such promises are contractual in nature. *Hi-Way*

Motor Co. v International Harvester Co., 398 Mich 330, 336; 247 NW2d 813 (1976). In this case, Plaintiff alleges that Defendant Mankopf and Shaya made two types of fraudulent statements. First, Plaintiff alleges that Defendant Mankopf and Shaya stated that they had an opportunity to work with DME providers in Florida. (See Complaint, at ¶¶17-20.) Such allegations provide that Defendant Mankopf's and Shaya's statements were as to existing fact, not a future promise. As a result, they may form the basis for a fraud claim.

The second type of alleged misrepresentation is Defendant Mankopf's and Defendant Shaya's statements that the Strips would be sold to DME providers. (See Complaint, at ¶¶17, 19-20.) These statements sound in contract as they are merely promises that the Strips would be sold to DME providers. In its response, Plaintiff argues that its fraud claims based on these promises can nevertheless be maintained because a claim for fraudulent misrepresentation may be based on a promise of future conduct when the promise was made in bad faith without intention of performing. *Hi-Way Motor Co*, 398 Mich at 337. However, Plaintiff has failed to allege that Defendant Mankopf and/or Shaya made the promise in question was in bad faith. Rather, Plaintiff merely alleges that "sometime after purchasing the DME Packaged Strips" Defendants began selling the Strips outside the terms of the Distributor Agreement. (See Complaint, at ¶27.) Consequently, the allegations in the Complaint do not assert that Defendant Mankopf and/or Shaya made the promise in bad faith. As a result, the portion of Plaintiff's fraud claims against Defendants based on the promise the Strips would be sold to DME providers must be dismissed.

(3) Whether Rescission is Sole Remedy for Fraud in the Inducement.

In their motion, the Shaya Defendant argue that Plaintiff's claim for fraud in the inducement must be dismissed because rescission is the sole remedy for such a claim. In support of their position, the Shaya Defendants rely on *Samual D. Begola Services, Inc. v Wild Bros*, 210 Mich App 636; 534 NW2d 217 (1995). While in that case, the Michigan Court of Appeals held that a remedy for fraud in the inducement is rescission, it did not state that rescission is the sole remedy. Moreover, the Michigan Supreme Court, in *Nowicki v Podgorski*, 359 Mich 18, 25; 101 NW2d 271 (1960), has recognized that monetary damages are also available for fraud in the inducement. As a result, the Shaya Defendants' position is without merit.

(4) Piercing the Corporate Veil

Next, Defendants argues that several of Plaintiff's fraud claims must be dismissed because they was not in privity of contract with Plaintiff and/or because they did not owe Plaintiff a duty to provide it with accurate information. While it is undisputed that the individual defendants were not parties to the Distributor Agreement, Plaintiff has alleged that they remain liable for the entity defendants' allegedly wrongful conduct under the piercing the corporate veil doctrine. "Piercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff." *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 510; 802 NW2d 712 (2010). In the Complaint, Plaintiff alleges that Defendants Shaya and Mankopf used Defendant Olympus, and Defendants Shaya and Gladys used Defendant Delta, as a mere instrumentality of themselves to

commit frauds and/or wrongs, and that it has been injured as a result. (See Complaint, at ¶¶ 92-95.) As a result, Plaintiff has sufficiently plead a piercing the corporate veil theory against the individual defendants.

As Plaintiff has sufficiently plead a piercing the corporate veil claim against the individual Defendants, they remain potentially liable for Defendant Delta and/or Defendant Olympus's allegedly wrongful. However, to the extent that Plaintiff seeks to bring negligent representation and/or silent fraud claims against the individual defendants independent of piercing the corporate veil, those claims must be dismissed as Plaintiff has failed to identify a duty those defendants owed it to provide accurate information. Moreover, since Plaintiff and the individual defendants were not in privity of contract, Plaintiff's innocent misrepresentation claim against them must be dismissed to extent Plaintiff seeks to bring such claims independent of its piercing the corporate veil claim. See *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118-119; 313 NW2d 77 (1981).

(5) Tortious Interference with a Contract

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843 (2005). Defendants maintain that their alleged instigation of Plaintiff's breach of its contract with Roche was motivated by legitimate personal or business interests, and therefore cannot form the basis for a tortious interference claim.

"[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Michigan Podiatric Med Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989), quoting *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 779; 421 NW2d 289 (1988), quoting *Feldman v. Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). In the Complaint, Plaintiff does not allege that Defendant intended for their actions to cause Plaintiff to breach its contract with Roche. Consequently, Plaintiff has failed to sufficiently plead a claim for tortious interference and Count XI must be dismissed.

(6) Breach of Contract

In their motion, the Shaya Defendants argue that Defendant Olympus nor Defendant Delta breached any contract with Plaintiff. First, the Shaya Defendants argue that no contract existed between Plaintiff and Defendant Delta. While the ultimate determination remains outstanding, the material fact for the purposes of the Shaya Defendants' motion under (C)(8) is that Plaintiff has alleged that Defendant Shaya, on behalf of Defendant Delta, offered to assume Defendant Olympus's obligations under the Distributor Agreement, that Defendant Delta continued to outwardly honor those obligations under the Distributor Agreement by placing orders and utilizing the same shipping pick-up and delivery information. (See Complaint, at ¶¶29-30.) Further, Plaintiff has alleged that Defendant Delta has breached its obligations, as assumed, under the Distributor Agreement, and that said breach has

caused it damages. The Court is satisfied that such allegations sufficiently state a claim for breach of contract against Defendant Delta.

In addition, the Shaya Defendants argue that they did not breach the Section E of the Distributor Agreement. Section E provides:

[Plaintiff] agrees to make certain products under [Plaintiff] manufacturer/distributor agreements and associated price/terms available for purchase by Distributor for distribution to end-user health plan members and other insureds as approved by [Plaintiff] and each contracted manufacturer/distributor.

(See Distributor Agreement, Exhibit 1B to Defendant Mankopf's Motion.)

The Shaya Defendants argue that Section E does not bar them from doing anything. The purpose of analyzing a contract is to determine the parties' intent. *Quality Prod. & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003). The unambiguous language of the contract reflects the intent of the parties, so the court must enforce the contract as written. *Id.* When interpreting a contract, the court must give the "words their plain and ordinary meanings." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). A court "may not impose an ambiguity on clear contract language." *Id.*

In this case, the Court is satisfied that Section E specifically and unambiguously provides that Plaintiff would make certain products available for distribution to certain entities/individuals. Accordingly, if Plaintiff made the products available and Defendants distributed the items to entities/individuals that did not fall within the requirements of Section E then it would constitute a breach of the Distributor Agreement. As a result, Defendants' position is without merit.

Defendants also aver that they did not breach Section II(3) of the Distributor Agreement, which provides:

[Plaintiff] will assist Distributor, as reasonably requested by Distributor, to ensure that the Members do not distribute the Products in an inappropriate manner.

(See Distributor Agreement, Exhibit 1B to Defendant Mankopf's Motion.)

Accordingly, Section II(3) of the Distributor Agreement merely requires Plaintiff to provide assistance to Defendant Olympus, and Defendant Delta if it assumed Defendant Olympus's obligations, to ensure that "Members" do not distribute products in an inappropriate way. Therefore, the only way that Section II(3) could obligate Defendants to do anything, or refrain from doing something, is if they are "Members" under the Distributor Agreement. "Member" is defined in the Distributor Agreement. Plaintiff does not appear to argue that any of the Defendants qualify as "Members." The Court is convinced that Plaintiff's breach of contract claim must be dismissed to the extent that is based on Defendants' allegedly breaching Section II(3) of the Distributor Agreement.

(7) Contractual Indemnification

The Shaya Defendants also argue that Plaintiff's claim for contractual indemnification fails because the contractual provision in question only requires indemnification in the event that the "Distributor" engages in gross negligence or "intentional misconduct." Specifically, the Shaya Defendants argue that there is no duty to indemnify because Plaintiff's tort and breach of contract claims should be dismissed. However, for the reasons discussed above, many of Plaintiff's claims need not be dismissed. As a result, the Shaya Defendants' position is without merit.

(8) Common Law Indemnification

The Shaya Defendants argue that Plaintiff is not entitled to relief via common law indemnity from Defendant Delta because Plaintiff has been accused of negligence in the Roche Action. A person seeking indemnity must plead and prove freedom from person fault, which means that the party seeking indemnity must be free from active or causal negligence. *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1982). While Roche may have accused Plaintiff of active negligence in the Roche Action, no such negligence has been proven and any determination as to whether any potential findings in that case would operate to bar Plaintiff's common law indemnity claim in this case is premature. As a result, the Shaya Defendants are not entitled to summary disposition of Plaintiff's common law indemnification claim at this time.

(9) Civil Conspiracy

Defendants argue that Plaintiff's conspiracy claim fails because summary disposition should be granted in their favor with respect to Plaintiff's tort claims. However, for the reasons discussed above, Plaintiff's position is without merit.

Conclusion

Based upon the reasons set forth above, Defendant Mankopf's and the Shaya Defendants' motions for summary disposition are GRANTED, IN PART, and DENIED, IN PART. Specifically:

- (1) Counts I-V, VII and XI against Defendant Gladys are DISMISSED;

(2) Counts I-V, to the extent they are based on the allegation that Defendant Shaya and/or Defendant Mankopf promised that the product Defendants purchased from Plaintiff would be sold to DME providers, are DISMISSED;

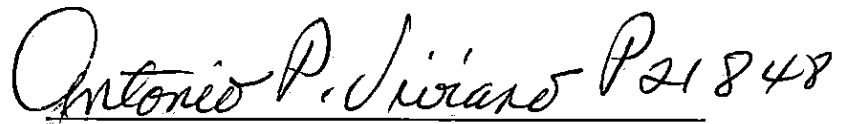
(3) Counts I and V against Defendants Shaya and Mankopf to the extent brought against them independently of Plaintiff's piercing the corporate veil claim are DISMISSED;

(4) Count VI to the extent based on Section II(3) of the Distributor Agreement is DISMISSED; and

(5) The remainder of Defendants' motions is DENIED.

This Opinion and Order neither resolves the last claim nor closes the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Handwritten signature of Antonio P. Viviano in cursive script, with the case number P21848 written to the right of the signature.

ANTONIO P. VIVIANO
In Absence of RICHARD L. CARETTI
Circuit Court Judge

Dated: May 9, 2018

cc: John M. Sier, Attorney for Plaintiff
Edward Lennon, Attorney for Defendants Olympus Global, Delta Global,
Christopher Shaya and Daniel Gladys
Joseph R. Furton, Jr., Attorney for Defendant Mankopf