

ESRVC

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

NORTHWOOD, INC.,

Plaintiff,

vs.

Case No. 17-4622-CB

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

Defendants,

and

CHRISTOPHER SHAYA, JEREMIAH MANKOPF,
and DANIEL GLADYS,

Defendants/Counter-Plaintiffs,

vs.

NORTHWOOD, INC.,

Plaintiff/Counter-Defendant,

and

JEREMIAH MANKOPF,

Defendant/Counter-Plaintiff/Cross-Plaintiff,

vs.

CHRISTOPHER SHAYA,

Defendant/Counter-Plaintiff/Cross-Defendant.

OPINION AND ORDER

Plaintiff/counter-defendant Northwood, Inc. ("Northwood") filed a motion for summary disposition under MCR 2.116(C)(10) of the Counter-complaint of Christopher Shaya ("Mr. Shaya") and Daniel Gladys ("Mr. Gladys" or together as "Counterplaintiffs").

I. Background

For the sake of judicial economy, the Court here incorporates the factual and procedural background more fully stated in the parties' cross motions for summary disposition in this case. Essentially though, Northwood, Inc. ("Northwood"), a medical equipment provider, sold blood-glucose test strips to Olympus Global, LLC ("Olympus") and Delta Global, LLC ("Delta") for distribution under the terms of a Distribution Agreement. In this litigation, Northwood claims that Olympus and Delta in turn sold the test strips to buyers outside the permitted distribution network thereby causing Northwood to violate the terms of its contract with its manufacturer, Roche, and incur related losses and fees.

Mr. Mankopf and Mr. Shaya formed Olympus in March 2013. Mr. Shaya and Mr. Mankopf dissolved Olympus and Mr. Shaya and Mr. Gladys formed Delta. Delta continued to distribute the test strips from Northwood. Roche brought suit against Northwood in federal court in Indiana and named Mr. Shaya and Mr. Gladys as additional defendants. Mr. Shaya and Mr. Gladys have since been dismissed from the federal litigation. Mr. Shaya and Mr. Gladys were not parties to the Northwood-Roche contract and, now by Counterclaim, seek recovery from Northwood for money spent defending the Roche litigation.

Specifically, on the theory that Roche named Mr. Shaya and Mr. Gladys as defendants in the federal action because Northwood failed to advise them that its contract with Roche prohibited the sale of strips to Olympus and Delta, Mr. Shaya and Mr. Gladys filed a Counter-complaint against Northwood alleging: count I, negligence;

count II, fraud/misrepresentation; and count III, silent fraud. Northwood filed its present motion seeking summary disposition under MCR 2.116(C)(10) of those counter-claims. The Court heard oral argument on April 26, 2019 and took the matter under advisement.

I. Standard of Review

A motion under MCR 2.116(C)(10) 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. Indeed, “an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4).

II. Arguments, Law and Analysis

A. Count I, Negligence

Northwood seeks summary disposition on count I of the Counter-complaint for negligence because: it fulfilled all of its legal duties to Counter-plaintiffs; it did not know Counter-plaintiffs were selling strips to non-DMEs; and it could not approve of sales

made without its knowledge. Northwood reads the Distributor Agreement with Olympus as requiring the sale of the strips to only approved users and contends that because Mr. Shaya misrepresented the buyers of the strips, the risk of harm—that Counter-plaintiffs would be sued for selling to non-approved customers—was unforeseeable. Finally, Northwood claims that Mr. Shaya knew, through his industry involvement, that the strips had to go to end users. Northwood concludes that it had no duty to inform Mr. Shaya of what he already knows.

Counter-plaintiffs respond that they had no way of knowing—and Northwood failed to advise—that the Northwood-Roche contract forbade Northwood from selling strips to Olympus and Delta or to their end users—which resulted in Counter-plaintiffs incurring substantial legal fees. Counter-plaintiffs argue that Northwood was not permitted to sell the strips to Olympus and Delta in the first place. Further, Counter-plaintiffs contend, even if Northwood did not know the identity of Delta and Olympus' buyers, it still had a duty to inform Counter-Plaintiffs of the restrictions in the Roche agreement to avoid foreseeable harm.

For a negligence claim, a plaintiff must prove the four elements of duty, breach of that duty, causation, and damages. *Brown v Brown*, 478 Mich 545, 552–53; 739 NW2d 313 (2007). “The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff.” *Id.* citation omitted. “Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.” *Id.*

“In the absence of a legal duty, there is no actionable negligence.” *Balcer v Forbes*, 188 Mich App 509, 512; 470 NW2d 453 (1991) citations omitted. “Duty is a question solely for the court to decide and comprehends whether a defendant is under any obligation to plaintiff to avoid negligent conduct.” *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 481; 413 NW2d 433 (1987) citation omitted.

“Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.” *Id.* citation omitted. “As such, it depends in part on foreseeability—whether it is foreseeable that the actor’s conduct may create a risk of harm to the victim.” *Id.* citation omitted. The most important factor to consider in determining whether a legal duty exists is the relationship of the parties. *Roberts v Salmi*, 308 Mich App 605, 614; 866 NW2d 460 (2014). “Before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable.” *Id.*

Here, Counter-plaintiffs failed to establish that Northwood owed them a duty. The Distributor Agreement existed between Northwood and Olympus and not Counter-plaintiffs. Northwood could not reasonably foresee that Roche would sue individuals who were not parties to the Northwood-Olympus Distribution Agreement on the basis that they distributed products outside the scope of the Roche Agreement. Counter-plaintiffs had no relationship with Roche and at least as the Distribution Agreement is concerned, no relationship with Northwood. Therefore, Northwood did not owe Counter-plaintiffs a duty to warn regarding the manner of distribution.

Even if the Court considered Counter-plaintiffs in the stead of Olympus and Delta in terms of parties with a relationship Northwood, Counter-plaintiffs still have not shown

how Northwood would have a duty to advise them that they were selling products outside the parameters of the Northwood-Roche agreement given that Counter-plaintiffs produced no evidence that Olympus and Delta ever informed Northwood of the identity of the actual buyers of the product. It is undisputed that the Counter-plaintiffs represented to Northwood that Olympus was selling strips to HME and Coastal while it was actually selling to Republic and MSSl. Northwood's Exhibit 4, 22, 23, 30.

Put differently, Northwood could not have advised Counter-plaintiffs that the sales by Olympus and Delta to MSSl and Republic were inconsistent with the Roche agreement if Northwood was unaware of MSSl and Republic. Therefore, Counter-plaintiffs have not shown that Northwood owed them a duty to warn or could have reasonably foreseen that Roche would sue Mr. Shaya and Mr. Gladys as individuals. As such, Counter-plaintiffs' claim for negligence in Count I of the Counter-complaint is dismissed.

B. Count II, Fraud/misrepresentation

Northwood next argues that the counter-claim for fraud in count II fails because Counter-plaintiffs cannot prove by clear-and-convincing evidence that it made a misrepresentation. Counter-plaintiffs base the alleged misrepresentation on Northwood's purported approval of the sale of strips—but Northwood contends that Counter-plaintiffs never informed Northwood that it sold strips to MSSl and Republic—and it would be impossible to approve sales of which Northwood had no knowledge. Additionally, Northwood argues that the fraud counter-claim fails for lack of reasonable reliance. That is, the Counter-plaintiffs did not request confirmation from Northwood that the manufacturer approved the sales. Northwood claims that Counter-plaintiffs

could not have relied on any of its statements because it indicated that the DME strips must be sold to DME end-users.

Counter-plaintiffs respond that they properly assert fraud claims—specifically that Northwood advised Counter-plaintiffs that they could sell the strips to certain customers, the representations were false and reasonably relied upon, which caused damages in the form of legal fees and expenses.

“As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.” *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

In this case, Counter-plaintiffs’ claim for fraud fails because they have not established that Northwood made any representation to them. Counter-plaintiffs cite only to the Counter-claim itself as evidence of a misrepresentation. Counter-plaintiffs provide no evidence that Northwood made any representation to them individually—or even to the entities Olympus and Delta—regarding alleged permission of Roche to sell strips to Republic and MSSI. Counter-plaintiffs have not identified the substance of such an alleged representation, the circumstances of when it occurred or to whom. As such, Counter-plaintiffs have not raised any material question of fact on their counter-claim for fraud. Accordingly, Count II of the Counter-claim is dismissed.

C. Silent fraud, count III

Finally, Northwood argues that it made all necessary disclosures to Counter-plaintiffs who knew that DME product had to be sold in DME channels rather than retail. According to Northwood, it had no duty to disclose that the sales were inconsistent with the Roche contract because Northwood did not know about the sales Olympus and Delta were making.

Counter-plaintiffs respond that Northwood relied on the Distributor Agreement, which creates a duty (Section E) for Northwood to approve of Olympus' customers. Therefore, Northwood had an affirmative duty to advise Olympus that it was improperly distributing the strips. Counter-plaintiffs maintain that Northwood never disclosed those material facts.

Michigan has long recognized silent fraud as a cause of action because a "fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Roberts v Saffell*, 280 Mich App 397, 403–04; 760 NW2d 715 (2008), *aff'd* 483 Mich 1089; 766 NW2d 288 (2009) citation omitted.

Silent fraud requires a legal or equitable duty to disclose. *Id.* To prove a claim of silent fraud, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id.* A legal duty to disclose will arise most commonly where defendant makes incomplete replies to plaintiff's inquiries. *Hord v Env'tl Research Inst of Michigan*, 463 Mich 399, 412; 617 NW2d 543 (2000). Silent fraud requires more than proving that awareness and failure to disclose. *Roberts*

v Saffell, 280 Mich App 397, 404; 760 NW2d 715 (2008), *aff'd* 483 Mich 1089; 766 NW2d 288 (2009) citation omitted.

Here, for similar reasons as discussed in section A and B above, Counter-plaintiffs have not shown that Northwood made a misrepresentation or had a legal duty to disclose the restrictions of the Northwood-Roche agreement to Counter-plaintiffs. Counter-plaintiff's reliance on the Distribution Agreement is misplaced. Olympus, the party to the Distribution Agreement, did not assert a counterclaim for silent fraud; Mr. Shaya and Mr. Gladys did. Counter-plaintiffs have not shown how an agreement between Northwood and Olympus, two corporate entities, somehow gives rise to a duty for Northwood to disclose to an individual, even as an agent of an entity, the limitations on the distribution of product from a third-party agreement.

Moreover, silent fraud requires more than mere failure to disclose. Rather, one asserting silent fraud must show some type of representation or action intended to deceive or suppression of a material fact with an obligation to disclose. Counter-plaintiffs have not cited to facts showing how Northwood had an affirmative duty to advise them of the limitations of the Roche-Northwood agreement or that Northwood concealed a material fact with an intent to defraud. As stated above, Counter-plaintiffs have not even shown that Northwood had knowledge of the identity of Olympus' and Delta's buyers. Therefore, Northwood could not have approved of the sales to those buyers. For these reasons, Count III of the Counter-complaint for silent fraud is also dismissed.

D. Conclusion

For the reasons set forth above, Northwood's motion is GRANTED. The Counter-Complaint is dismissed entirely. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.



HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: September 17, 2019

cc: John Sier, Esq.
Carina Kraatz, Esq.
Ed Lennon, Esq.
Andrew Abood, Esq.

