

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

EYEWYRE CORPORATION,
Plaintiff/Counter-Defendant.

vs.

Case No. 18-373-CB

DWM HOLDINGS, INC,
Defendant/Counter-plaintiff.

OPINION AND ORDER

This matter comes before the Court on DWM Holdings, Inc.'s ("Defendant") motion for leave to amend its counterclaim.

I. Background

This collections case concerns competing breach of contract claims. On January 25, 2018, Eyewyre Corporation ("Plaintiff") filed a complaint alleging: Count I, breach of contract and Count II, account stated. Plaintiff alleges that it entered into a consulting agreement with Defendant wherein Plaintiff agreed to provide certain services for compensation. Plaintiff alleges that it did in fact provide such services but has not received payment.

Defendant filed a counterclaim on February 19, 2018 alleging: Count I, breach of contract; Count II, fraudulent misrepresentation; and Count III, unjust enrichment. Defendant now seeks leave to amend its counter-complaint to add claims for negligence and breach of fiduciary duty. Plaintiff filed a response. Defendant filed a reply. The Court heard oral arguments and took the matter under advisement.

II. Standard of Review

Leave to amend pleadings "shall be freely given when justice so requires." MCR

2.118(A)(2). The grant or denial of leave to amend pleadings is within the trial court's discretion. *PT Today, Inc v Commr of Office of Fin & Ins Services*, 270 Mich App 110, 142; 715 NW2d 398 (2006). The amendment rules are designed to facilitate amendment which is generally a matter of right rather than grace. *Id.* at 143. A motion to amend should be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. *Id.* citation omitted.

III. Arguments

Defendant states that it makes custom light poles and engaged Plaintiff to develop a software platform to allow customers to design and order its product. Plaintiff also served as Defendant's Chief Information Officer. According to Defendant, Plaintiff's principal made false representations of progress on the project. Upon a breakdown of the relationship between Plaintiff and Defendant, Defendant argues that it discovered that Plaintiff had engaged in a "scam" and had completed no work on various components of the project. Defendant maintains that it retained an expert in connection with the pending litigation and uncovered further evidence supporting the additional counts of negligence and breach of fiduciary duty.

Defendant argues that leave to amend the counter-complaint should be freely granted, there has been no undue delay, dilatory motive or bad faith and that amendment would not be futile or prejudicial to Plaintiff.

Plaintiff responds that Defendant's proposed additional counts for negligence and breach of fiduciary duty are contractual claims reconstituted as tort claims. Plaintiff

maintains that the claims are legally insufficient and therefore amendment would be futile. Specifically, Plaintiff argues that Defendant's proposed negligence claim rests on duties from the parties' contractual relationship and fails to allege any separate and distinct duty. Plaintiff denies that Defendant has alleged facts supporting the creation of a fiduciary duty.

IV. Law and Analysis

A. Negligence

In the present case, Defendant proposes to amend its Complaint to allege that "as a professional software company, Plaintiff owed a duty of care to Defendant to perform its duties and exercise the degree of care and skill ordinarily exercised in similar localities by persons engaged in those professions with required training, knowledge and experience." Defendant's Exhibit A, ¶ 60. Defendant also seeks to aver that Plaintiff breached its duties by: a.) failing to create a basic project plan; b.) failing to follow basic elements of design; c.) failing to submit detailed billings and invoices; d.) failing to accurately invoice DWM for work performed; e.) misrepresenting the work performed and time spent. *Id.* ¶61.

If a defendant fails to perform a promise, the action lies in contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 469–70; 683 NW2d 587 (2004). If a defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. *Id.* However, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is *separate and distinct* from the promise made. *Id.* emphasis added. Whether a particular defendant owes any duty at all to a particular plaintiff in tort is

generally determined without regard to the obligations contained within the contract. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 171; 809 NW2d 553 (2011) citations omitted.

The proposed allegations clearly rest on the contractual relationship between Plaintiff and Defendant. That is, Plaintiff would not owe a duty to Defendant to create a project plan, submit detailed billing invoices or accurately represent the amount of time it spent performing work unless the parties had an agreement to that effect. Essentially Defendant seeks to allege that Plaintiff failed to complete the contracted-for performance in a satisfactory manner. Such a duty arises out of the intentions of the parties themselves and is owed only to the individuals or entities to whom the promise runs. Plaintiff would owe no such duties to non-contracting parties. Therefore, Defendant has not proposed to allege an action in tort based on duties separate and distinct from any contractual duties.

While a party engaged in any undertaking owes a common law duty to use due care so as to not unreasonably endanger the person or property of others, Defendant has not proposed to allege any facts that would support such a theory of recovery. See, e.g., *Hill v Sears, Roebuck & Co*, 492 Mich 651, 663; 822 NW2d 190 (2012). That is, setting aside any contractual obligations, Defendant has not alleged injury to property or person from the negligent manner in which Plaintiff acted. Instead, Defendant seeks only to aver that Plaintiff failed to satisfactorily perform its promises to Defendant or Plaintiff's performance otherwise fell short of the expected professional conduct. As a result, the amendment to add the proposed claim for negligence would be futile.

Defendant cites to a series of cases regarding the duty of architects but has not shown that those cases apply in the present matter. See, e.g. *Ambassador Baptist Church v Seabreeze Heating & Cooling Co*, 28 Mich App 424, 426; 184 NW2d 568 (1970) (“The responsibility of an architect is similar to that of a lawyer or a physician. The law requires the exercise of ordinary skill and care common to the profession.”). With regard to architects, courts have held that a person lawfully on a premises who becomes injured by the negligence of an architect has a cause of action against the architect. *Swarthout v Beard*, 33 Mich App 395, 401; 190 NW2d 373 (1971). An architect’s liability for personal injury or death may be based upon supervisory activities or upon defects in the plans. *Id.*

Here, clearly Defendant does not allege a claim for personal injury or death. Further, Defendant has not shown that Plaintiff is an architect. The cited cases articulate a specific category of duty of care that architects owe to the public who despite the lack of privity of contract, may incur injury and therefore have a cause of action. Defendant has not convincingly shown that these cases impose a duty on all professionals or extend to the context of a company designing a software program. Therefore, the cases regarding architects are inapposite. For these reasons, leave to amend Defendant’s counter-complaint to add a count for negligence must be denied.

B. Breach of Fiduciary Duty

In addition to adding a count for negligence, Defendant seeks to add a count to its counter-complaint for breach of fiduciary duty. Plaintiff argues that no fiduciary relationship existed because the relationship with Defendant was simply contractual in nature. However, Defendant asserts that Plaintiff served as its Chief Information Officer

and Chief Technology Officer. As such, Defendant argues that Plaintiff owed a fiduciary duty of care and loyalty to Defendant.

“It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve.” *Prod Finishing Corp v Shields*, 158 Mich App 479, 486; 405 NW2d 171 (1987) citation omitted; see also, MCL 450.1541a. A “fiduciary duty” is “[a] duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person.” *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 306–07; 600 NW2d 664 (1999) citation omitted. “One occupying a confidential and fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation.” *Stephenson v Golden*, 279 Mich 710, 736; 276 NW 849 (1937). A fiduciary duty arises from the reposing of faith, confidence, and trust and the reliance on the judgment and advice of another. *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 43–44; 698 NW2d 900 (2005) citations omitted.

At oral argument the issue was raised whether a corporation can serve as a fiduciary. However, the parties have not fully briefed that question and Plaintiff has cited no authority for the proposition that a fiduciary may only be a natural born person. All indication to this Court is that no such rule limits the law of fiduciary duties. See, *IWagner Elec Corp v Hydraulic Brake Co*, 269 Mich 560, 566; 257 NW 884 (1934) (Corporate owner of the controlling interest of stock stands in a fiduciary relation to its stockholders and may not place itself in a position where its interests conflict); *Goolsby v City of Detroit*, 419 Mich 651, 683–84; 358 NW2d 856 (1984), citing cases (A union owes a fiduciary duty to its members). Consequently, given that Defendant has alleged

that Plaintiff was a member, the Court has no basis from which conclude that amendment would be futile. Therefore, Defendant's motion will be granted with regard to its proposed amendment to add a claim for breach of fiduciary duty.

V. Conclusion

For the reasons set forth above, Defendant's motion for leave to amend its counterclaim is GRANTED in part and DENIED in part. Specifically, leave to amend is denied with regard to the proposed negligence claim but granted regarding the breach of fiduciary duty claim. Defendant must file its amended counterclaim within 14 days of the date of the *Opinion and Order*. 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.

Date: SEP 14 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge