



Ellen Pomeroy, et al v. James Sligar, et al

DECISION ON MOTIONS TO DISMISS
(Motions 4-6)

In this case, Plaintiffs Ellen Pomeroy and Salvatore Iannuzzi—purported members of the Woodstock Foundation, Inc. Board of Trustees—allege that various other members of the Board engaged in a common scheme to prevent their investigation into mismanagement and misconduct related to the Foundation’s subsidiaries.¹ Plaintiffs assert derivative actions on behalf of the Foundation, actions in tort in their personal capacities, and a claim for retaliatory suspension and termination. Pl.’s First Am. Compl, 2–4 (filed Feb. 7, 2023). Before the court, now, are three separately filed to dismiss four counts pursuant to Rules 12(b)(6) and 9(b). Mot. to Dismiss Count III for Legal Malpractice (#4) (filed Mar. 3, 2023); Mot. to Dismiss Counts IV and V of Fraud (#5) (filed Mar. 10, 2023); Mot. to Dismiss Count VII Defamation (#6) (filed Mar. 15, 2023). The court denies the Motions to Dismiss Counts III–V. The court grants the Motion to Dismiss Count VII, with leave to amend.

Discussion

“The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it.” *Powers v. Off. of Child Support*, 173 Vt. 390, 395 (2002). “Motions to dismiss for failure to state a claim are disfavored and rarely granted.” *Colby v. Umbrella Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (citing *Gilman v. Me. Mut. Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.)). To succeed, Defendants’ motions must demonstrate that “it is beyond a doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” *Boland v. Est. of Smith*, 2020 VT 51, ¶ 5, 212 Vt. 386 (quotation omitted). “[T]his Court assumes all factual allegations [pled] in the complaint are true, and we disregard all of defendants’ contrary assertions.” *Powers*, at 395. Using this lens, the court makes the following conclusions.

¹ Defendants named in this action are as follows: James S. Sligar, Michael D. Nolan, John T. Hallowell, Douglas R. Horne, David M. Simmons, William S. Moody, Gail Waddell, and Angela K. Ardolic. Each are Board of Trustees members.

Count III—Legal Malpractice

The court first addresses Defendants’ Motion to Dismiss Plaintiffs’ derivative claim on behalf of the Foundation for legal malpractice against Mr. Sligar and Mr. Nolan. To this end, Defendants argue that the complaint fails to allege that Mr. Sligar and Mr. Nolan formed an attorney-client relationship with the Foundation. Defendants aver that the First Amended Complaint “merely makes vague references to unspecified legal advice or legal services purportedly provided to the Foundation without alleging the existence of the requisite attorney-client relationship.” Mot. to Dismiss Count III for Legal Malpractice, at 4.

Whether an attorney-client relationship has been formed is a fact specific inquiry. *See, e.g., Cody v. Cody*, 2005 VT 116, ¶¶ 18–20 (evaluating various standards in other courts for determining whether an attorney-client relationship had been formed). Here, the question is whether Plaintiffs have alleged enough facts to provide notice of the grounds of their claim. *See Endres v. Endres*, 2006 VT 108, ¶ 4, 180 Vt. 640 (mem.) (“The complaint need only give the defendant fair notice of the plaintiff’s claim and the ground upon which it rests.” (citing *Lane v. Town of Grafton*, 166 Vt. 148 (1997))). It does.

The amended complaint alleges that Mr. Sligar and Mr. Nolan are lawyers, that they gave legal advice to the Foundation, its subsidiary, and the Trustees of both. Further, Plaintiffs allege that the Foundation, its subsidiary, and the Trustees relied on this advice to their detriment. “Our procedural rules do not require a specific detailed statement of facts constituting the cause of action.” *Endres*, at ¶ 4. As this court presumes the allegations of the complaint to be true, these allegations are sufficient to foreclose Defendants’ argument; the conduct allege could support a conclusion that the relationship existed. *See Meyers v. Mulligan*, 889 P.2d 509, 513 (Wyo. 1995) (“the existence of an attorney-client relationship . . . may be implied from the conduct of the parties, such as the giving of advice or assistance”); *see also* V.R.P.C., Scope (“Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”).

Count IV—Fraudulent Misrepresentation

The court next addresses Defendants’ request to dismiss Count IV of the amended complaint. Here, Plaintiffs allege that Defendants Hallowell, Horne, Moody, Simmons, Sligar, and Nolan made fraudulent misrepresentations when they withheld material information from the Foundation’s Board of Trustees related to the operation of the Woodstock Inn & Resort (“Resort”) and Billings Farm (“Farm”)— both owned or operated by the Foundation. Generally, Defendants argue that the complaint fails to plead sufficient facts to advance a *prima facie* fraudulent misrepresentation or concealment

case.² They contend that the amended complaint fails to plead the necessary elements, and that it fails to plead with the particularity required by Rule 9(b).

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” V.R.C.P. 9(b). While knowledge may be averred generally under Rule 9(b), “plaintiffs must still plead the events which they claim give rise to an inference of knowledge.” *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014). Fraudulent nondisclosure (or fraudulent concealment) “involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose coupled with an intention to mislead or defraud.” *Silva v. Stevens*, 156 Vt. 94, 103 (1991). Thus, to survive Defendants’ motion here, Plaintiffs must have pleaded the facts and circumstances of each of the elements of fraud with particularity. *Id.* at 105.

As pled by Plaintiffs, the Foundation owns and operates the Resort as well as WRC Holdings, LLC (“Holdings”). Both the Holdings and the Resort provide financial support to the Farm. Plaintiffs allege that they discovered misconduct and mismanagement at the Farm and the Resort due to investigation started by employee complaints, as opposed to reports by the responsible trustees (Messrs. Horne, Hallowell, and Simmons). The amended complaint alleges that Defendants Hallowell, Horne, Moody, Simmons, Sligar, and Nolan each knew of and failed to disclose material information, including: use of Resort maintenance staff at Mr. Hallowell’s home; certain staff layoffs; and inappropriate sexual relationships between managerial staff and subordinates. Plaintiffs further allege that they received multiple complaints from employees describing misconduct by officers, managers, and employees of the Resort and that the above-mentioned Trustees condoned such misconduct. Finally, Plaintiffs allege that if the information was presented sooner action would have been taken, and that Defendants’ omissions were to the Foundations detriment.

In total, Plaintiffs’ complaint alleges that each of the named Defendants knew of specific misconduct and mismanagement, that each had an obligation to disclose that information as Trustees, that they did not do so, and that such omissions resulted in detriment to the Foundation. This satisfies Rule 9(b)’s pleading requirements. *See Silva*, 156 Vt. at 106 (discussing that fraud pled with particularity provides defendant with sufficient information to enable her to effectively prepare a response); *see also Sutfin v. Southworth*, 149 Vt. 67, 70 (1987) (“in the circumstances of the particular case such duty is present, failure to disclose a material fact with intention to mislead or defraud is

² The parties quibble over whether this action is appropriately called “misrepresentation” or “concealment.” *Compare* Def.’s Mot. (#5), at 2 *with* Pl.’s Opp’n, at 15 n. 30 (filed Apr. 21, 2023). This argument is academic; the parties agree to the necessary elements of this claim. *Compare* Def.’s Mot. (#5), at 2 *with* Pl.’s Am. Compl., at 29.

equivalent to concealment of the fact and stands no better than the affirmation of material representation”).

Count V—Removal of Directors by Judicial Proceeding

In Count V of the amended complaint, Plaintiffs seek removal of Mr. Sligar, Mr. Nolan, Mr. Hollowell, Mr. Horne, Mr. Simmons, Mr. Moody, Ms. Waddell, and Ms. Ardolic pursuant to 11B V.S.A. § 8.10. Pl.’s Am. Compl., at 30. Plaintiffs base this request on the fraudulent conduct alleged to support Count IV. *Id.* As with Count IV, Defendants argue this count should be dismissed for failure to plead the underlying fraud in accordance with Rule 9(b) and 12(b)(6). Def.’s Mot. (#5), at 6. Since the court concludes that Count IV was adequately pled, it reaches the same conclusion here.

Count VII—Defamation

Defendants’ final motion to dismiss targets Plaintiffs claim for defamation. The amended complaint alleges defamation against Mr. Sligar, Mr. Nolan, Mr. Hollowell, Mr. Horne, and Mr. Simmons. Defendants move to dismiss this count pursuant to Rule 12(b)(6) and 9(g). Def.’s Mot. (#6). The elements for defamation are well-settled:

The general elements of a private action for defamation (libel and/or slander) are: (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

Lent v. Huntoon, 143 Vt. 539, 546–47 (1983) (footnote omitted). Defendants contend that Plaintiffs’ allegations are too broad and vague to plead a viable claim.³ They argue that Plaintiffs have failed to identify which Defendants made false statements about Plaintiffs, what statements were actually made, and where identified, whether those statements were false. These concerns are well-taken.

Responsively, Plaintiffs point to various claims in the amended complaint to assert that they identify as defamatory statements, but Plaintiffs overstate what is actually pled in the amended complaint. Generally, the paragraphs Plaintiffs allude to fail to identify who is speaking or what specifically was said or how it was defamatory or whether the statement was factually false or whether the statements themselves were made intentionally or negligently. And when the exact language is quoted, and the speaker is identified, Plaintiffs do not allege if the statements are factually false.

³ The court would note that Plaintiffs’ defamation allegations are not limited to paragraphs 173 and 174 of the amended complaint — paragraph 172 incorporates paragraphs 1–150. Pl.’s Am. Compl., at ¶ 172. Here, Defendants attempt to indict the amended complaint for being lengthy and not offering a “simple, concise, and direct” “short and plain statement of the claim” as required by V.R.C.P. 8 to demonstrate their claim for defamation. While the court can appreciate Defendants’ frustration, Defendants cites no authority to suggest that this court can ignore that incorporation. Indeed, such pleading practice is necessary to prevent complaints from even greater prolixity.

Vermont law permits a complaint to be a “bare bones statement that merely provides the defendant with notice of the claims against it” but it must at least do that. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1. “[W]hile Vermont’s pleading standards are liberal, a party claiming defamation must set forth enough information about the content of the communication complained of, the date on which it occurred, and the parties to whom the communication was made, to enable the defendants to defend themselves[.]” *Gardner v. Hokenson*, No. 1007-10-17 Cncv, 2018 WL 11243023, at *3 (Vt. Super. Ct. May 10, 2018) (Mello, J.). Plaintiffs’ pleadings with respect to Count VII do not meet this requirement.⁴ While this defect may be curable, Defendants should not have to resort to either a motion for more definite statement or discovery to know the allegations against which they must defend. Accordingly, the court grants the request to dismiss count VII, without prejudice to Plaintiffs’ right to amend to meet their pleading requirements.

ORDER

For the foregoing reasons:

- Defendants’ Motion to Dismiss Count III is DENIED.
- Defendants’ Motion to Dismiss Counts IV and V are DENIED.
- Defendants’ Motion to Dismiss Count VII is GRANTED, without prejudice to Plaintiffs’ right to replead. Any motion to amend Count VII must be filed within 14 days of this Order. If Plaintiffs fail so to amend, the dismissal will become with prejudice.

Electronically signed pursuant to V.R.E.F. 9(d): 8/25/2023 11:45 AM



Samuel Hoar, Jr.
Superior Court Judge

Vermont Superior Court
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Windsor Unit

⁴ Since the court decides this matter on Rule 12(b)(6), the court declines to evaluate whether the statements would be defamation *per se* and the effect of Rule 9(g) on that conclusion.