



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 20, 2020

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Re: Stephen Johnson, et al. v. Bella Gravida, LLC, et al.
CL2019-17643

Dear Counsel,

OPINION LETTER

This matter came before the Court on July 10, 2020 on individual Defendants Jason Wilson (“Wilson”) and Christa Evans’ (“Evans”) demurrers to Stephen and Ann Johnson’s (“Plaintiffs”) Complaint. The Complaint alleges (1) fraud, (2) statutory conspiracy, (3) common law conspiracy, (4) violation of Virginia Limited Liability Company Act, (5) breach of fiduciary duties, (6) conversion, (7) unjust enrichment, and (8) breach of contract. Both Defendants filed individual demurrers to each count. As each of these claims fails as a matter of law, the demurrers are sustained with leave to amend.

Background

This case arises from a failed clothing company, Bella Gravida, LLC (“Bella Gravida”). Defendants Evans and Wilson were co-founders and members of Bella Gravida. Evans was also the CEO and manager. The company was marketed to provide a monthly subscription service for maternity clothing.

In 2015, Plaintiffs signed a Membership Unit Purchase Agreement (“Agreement”) exchanging \$30,000 for membership interests in Bella Gravida. Plaintiffs allege that following the execution of the Agreement the individual defendants failed to properly manage the company, leading to its financial ruin. The Virginia State Corporation Commission terminated Bella Gravida’s LLC status in November 2015. On December 30, 2019, Plaintiffs filed their Complaint as individuals against Wilson and Evans as individuals, and Bella Gravida.

Standard of Review

The Court may sustain a demurrer if a “pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted.” VA. CODE § 8.01-273(A). A demurrer admits the truth of all “properly pleaded material facts” and all reasonable inferences are drawn in favor of the Plaintiff. *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997). However, a Plaintiff’s conclusions of law are not admitted as correct. *Id.* The Court does not decide the merits of a claim when ruling on a demurrer; the Court merely determines whether the Plaintiff’s factual allegations are sufficient to state a cause of action.

Barber v. VistaRMS, Inc., 272 Va. 319, 327 (2006). The decision whether or not to sustain a demurrer is a question of law. *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 489 (2011).

Count I - Fraud

The Complaint fails to set forth a claim for fraud as a matter of law. Plaintiffs set forth three alternative theories of fraud in their Complaint: actual fraud, constructive fraud, and fraud in the inducement. Actual fraud consists of “(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.” *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148 (1994). Constructive fraud exists where “a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of . . . reliance upon the misrepresentation.” *Mortarino v. Consultant Eng’g Serv.*, 251 Va. 289, 295 (1996). Fraud in the inducement consists of “a false representation of a material fact, constituting an inducement to the contract, on which the purchaser had a right to rely,” and is grounds for rescission of the contract and damages. *Abi-Najm v. Concord Condominium* (citing *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 220 Va. 109, 111-112 (1979)).

On demurrer, claims of fraud face a heightened pleadings standard. Where fraud is relied on, the [pleading] must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly, and since [fraud] must be clearly proved it must be distinctly stated.” *Mortarino* at 295 (1996)(quoting *Ciarochi v. Ciarochi*, 194 Va. 313, 315 (1952)).

The Complaint alleges general, conclusory, and non-specific allegations of fraud where “Individual Defendants” gave projections and documents to Plaintiffs in order to induce Plaintiffs to invest in Bella Gravida. Compl. ¶¶ 11, 13-15. However, important factual details are missing from the Complaint. Most importantly, the Complaint fails to distinguish between the actions of each individual defendant and does not attribute specific misleading statements to either Wilson or Evans. There are no specific dates contained within the allegations. At best, the Complaint generally and vaguely sets out dates in a given month or year for the time of the alleged fraud. Finally, the Complaint fails to allege where these fraudulent statements occurred.

Absent these details, the essential elements common to all three theories of fraud, a “false representation” are not adequately pled. Therefore, both demurrers are sustained with leave to amend with respect to count I.

Count II – Statutory Business Conspiracy

The Complaint asserts that Defendants Wilson and Evans committed statutory business conspiracy by harming the Plaintiffs in their business interests as members of the LLC. Statutory business conspiracy in Virginia consists of (1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business; and (2) resulting damage to the plaintiff.” *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 214 (2014) (citing Va. Code §18.2-499). On demurrer, both Defendants claim that Plaintiffs (i) lack standing to bring this claim, (ii) are barred from asserting this claim by the intracorporate immunity doctrine, and (iii) fail to alleged a conspiracy to harm Plaintiffs in their trade and business.

i. Standing

As a threshold matter, Plaintiffs lack standing to bring this statutory business conspiracy claim as a direct suit. Virginia Code § 13.1-1020 provides that “[a] member of a limited liability company, solely by reason of being a member, is not a proper party to a proceeding by or against a limited liability company, except where (i) the object is to enforce a member's right against or liability to the limited liability company or (ii) [in a derivative suit].” VA. CODE. § 13.1-1020. A derivative action is an equitable proceeding in which a member asserts, on behalf of the limited liability company, a claim that belongs to that entity rather than the member. *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 162 (2008).

The Johnsons assert that they were harmed as members of the LLC. Compl. ¶¶ 55-56. In conclusory fashion, the Complaint states that defendants “acted outside the ordinary course of their corporate duties” in committing the conspiracy. *Id.* at ¶ 53. The Plaintiffs are claiming to have been injured as members of the LLC through a tort but are not attempting to enforce a right against the LLC or other members. Instead, Plaintiffs are seeking to assert a tort claim against members of the LLC by managers of the LLC. To do this, they must bring a suit derivatively under Virginia Code §13.1-1028(B) on behalf of the LLC.

ii. Intracorporate Immunity

Individual defendants next assert that Plaintiffs' claim for statutory business conspiracy is prohibited by the intracorporate immunity doctrine. The intracorporate immunity doctrine holds that "a conspiracy between a corporation and agents of that corporation who are acting in the scope of their employment is a legal impossibility." *Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988); see also *Fox v. Deese*, 234 Va. 412, 415. Intracorporate immunity is not destroyed when a corporation and its agents are sued as individuals. *Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988).

In response, Plaintiffs cite a circuit court case recognizing the personal stake exception to this doctrine. *Colgate v. Disthene Group, Inc.*, 86 Va. Cir. 218, 224 (Buckingham Co. 2013). The personal stake exception has been recognized in Eastern District of Virginia. *Buffalo Wings Factory, Inc. v. Mohd*, 622 F.Supp.2d 325, 335–336 (E.D.Va. 2007). Though Virginia circuit courts and federal district courts in the Fourth Circuit have recognized a personal stake exception to the intracorporate immunity doctrine, neither Virginia appellate court has done so. Unlike the intracorporate immunity doctrine which has its roots in *Fox*, the personal stake exception has no such foundation. As there is no controlling Virginia authority recognizing a personal stake exception, the Court declines to create an exception here.

The Complaint states a legal conclusion that "Individual Defendants acted outside of the ordinary course of their corporate duties" in committing statutory business conspiracy. Compl. ¶ 53. However, the factual allegations, as pled by the Plaintiffs, do not support this. In fact, the purportedly wrongful acts committed by the defendants are alleged to have occurred when defendants were representing Bella Gravida to the Plaintiffs. Christa Evans is the registered agent, CEO and co-founder of Bella Gravida. *Id.* ¶ 6-7. Jason Wilson was also a co-founder of the company. *Id.* at ¶ 8. The Complaint alleges that both defendants were the decision makers for Bella Gravida and proposed schemes to entice investors. *Id.* at ¶¶ 9-11. Both individual defendants were alleged to be acting on behalf of Bella Gravida when they made the initial misrepresentations to Plaintiffs. *Id.* at ¶¶ 12-13. Therefore, they cannot legally have conspired with each other under the intracorporate immunity doctrine.

iii. Trade or Business harm

Plaintiffs have failed to allege a conspiracy to harm them in their trade and business. The harm asserted is against Plaintiffs' share of Bella Gravida, not in their trade or business. Compl. ¶ 55, 56. Nowhere does the Complaint claim that Plaintiffs were working in the maternity retail profession, or engaged in the business as more than shareholders. Thus, the count fails to allege a conspiracy to harm them in their trade or business. The demurrers to count II are sustained on this basis as well, with leave to amend.

Count III – Common Law Conspiracy

Relatedly, Plaintiffs assert a count of common law conspiracy against the individual defendants. A claim for common law conspiracy exists where “two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means.” *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402 (1985).

i. Standing

Under the same analysis discussed above, Plaintiffs lack standing to bring a direct lawsuit for common law conspiracy against individual defendants. Instead, that claim must be brought derivatively on behalf of Bella Gravida and the entire LLC membership.

ii. Intracorporate Immunity

Likewise, the individual defendants are alleged to have committed their conspiracy as representatives and agents of Bella Gravida. Under the intracorporate immunity doctrine, they cannot legally conspire with one another. Therefore, the demurrers to Plaintiffs' claim for common law conspiracy is sustained on this basis as well.

iii. Insufficient facts

Defendants further assert that the claim must fail because the Complaint merely recites the elements of a common law conspiracy claim. The court agrees. The Complaint alleges fraud,

and damage through the misuse of funds by individual defendants. As noted above, the underlying wrongful act of fraud was not adequately pled. There are likewise insufficient additional allegations of fact to satisfy a claim for common law conspiracy. The specifics of when a conspiracy occurred, and the facts surrounding the underlying wrongful acts are missing from the Complaint. Therefore, count III is sustained with leave to amend.

Count IV – Violation of the Virginia LLC Act

The Complaint likewise fails to plead a claim for violation of the Virginia LLC Act. The Virginia LLC Act provides that each member of an LLC has the right, upon reasonable request to “[o]btain from the manager or managers . . . true and full information regarding the state of the business and financial condition of the limited liability company.” VA. CODE 13.1-1028 (B)(2)(i).

As discussed above, Virginia law provides for an LLC member to have standing against the LLC or another member when the plaintiff member is attempting to enforce a right or liability as a member or in a derivative suit. Va. Code § 13.1-1020. Here, Plaintiffs are attempting to enforce the rights granted by the Virginia LLC Act against defendants Wilson and Evans personally. Section 13.1-1020 permits a party to bring suit against an LLC or LLC member to enforce a right. The statute does not provide for the enforcement of an obligation against them personally. Furthermore, the Complaint does not allege with any specificity when a demand was made on the individual defendants, or which specific documents were demanded. The extent of the factual allegations is that the Plaintiffs asked Evans “on numerous occasions for an update on the financial condition of the company.” Compl. ¶ 72. No allegation is made of a specific demand on Wilson. Therefore, the Court sustains both demurrers as to Count IV, with leave to amend.

Count V – Breach of Fiduciary Duties

In order to state a claim for breach of fiduciary duty, Virginia law requires that a “plaintiff must allege enough facts to prove (1) the existence of a fiduciary duty, (2) the breach of that duty, and (3) resulting damages.” *Broadhead v. Watterson*, 2016 WL 742127, at *6 (W.D.

Va. 2016) (citing *Cartensen v. Christland Corp.*, 247 Va. 433, 443 (1994)). Plaintiffs allege fiduciary duties arising from common law, the Virginia Stock Corporation Act and the Agreement. All such duties are insufficient to state a claim for breach of fiduciary duties.

Critically, the Supreme Court of Virginia has held that “a claim for breach of fiduciary duty cannot be brought directly by one member of an L.L.C. against another member or manager.” *Remora Invs., LLC v. Orr*, 277 Va. 316, 321 (2009). Here, Plaintiffs are attempting to do just that. By directly suing other members of the LLC for breach of fiduciary duty, Plaintiffs’ claims fail as a matter of law.

Relatedly, Plaintiffs assert the Virginia Stock Corporation Act imposes additional statutory fiduciary duties. However, the Virginia Stock Corporation Act is inapplicable to Bella Gravida, which is a Limited Liability Company. VA. CODE § 13.1-690 et seq. As any statutory duty imposed by this statute is inapplicable to Bella Gravida, the individual defendants cannot be held liable for breaching said duty.

Finally, Plaintiffs plead that individual defendants breached duties created by the Agreement. However, such a claim is prohibited by the source of duty rule, as it sounds in contract not tort. In claims for breach of fiduciary duties, the Supreme Court of Virginia held that “the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.” *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 205 (2007). The fiduciary duties alleged in the Complaint only exist because of the Agreement entered into between the Plaintiffs, Bella Gravida, and the individual defendants. Therefore, any dispute arising from these duties is a contract action, and cannot be converted to a tort claim. As such, the demurrers to this count for breach of fiduciary duty are sustained, with leave to amend.

Count VI – Conversion

Likewise, the Complaint does not plead a claim for conversion as a matter of law. Conversion is the “wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner’s rights.”

Economopoulos v. Kolaitis, 259 Va. 806, 814 (2000) (citing *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 75–76, 92 S.E.2d 359, 365 (1956)). Further, “[a]n action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted. *Id.* (citing *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902, 906 (1994)).

Here, Plaintiffs assert that individual defendants unlawfully converted the \$30,000 and used it for their personal expenses. This cannot be the basis for a claim of conversion on behalf of the Plaintiffs, because the \$30,000 did not belong to them at the alleged time of the tort. Plaintiffs entered into a contract with Bella Gravida and the individual defendants, exchanging the \$30,000 for membership interests in the LLC. At that time, Bella Gravida acquired the property interest in the \$30,000. As such any misuse of the funds would not result in a claim by Plaintiffs individually, but by Bella Gravida, because the Plaintiffs no longer had an individual property interest in the \$30,000. Any claim for recovery on behalf of Bella Gravida for a conversion claim must be brought derivatively. *See Mission Residential, LLC* at 162. Because the individual defendants had no right of ownership over the \$30,000, the court does not need to address defendant’s arguments regarding the economic loss doctrine. The demurrers to count six are sustained with leave to amend.

Count VII – Unjust Enrichment

Count VII fails to allege a claim for unjust enrichment. In order to state a claim for unjust enrichment, a plaintiff must allege that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knew of the benefit and should reasonably have expected to repay the plaintiff; and (3) the defendant accepted or retained the benefit without paying for its value. *James G. Davis Construction Corp. v. FTJ, Inc.*, 841 S.E.2d 642, 650 (Va. 2020).

Here, the Complaint states only that the defendants unjustly enriched themselves, damaging the Plaintiffs. Compl. ¶ 93, 94. The Complaint contains no facts to support this, and fails to plead the elements of an unjust enrichment claim. Count seven states that all Defendants received “investor money and spending it without any accountability and for their own personal

benefit.” Compl. ¶ 93. Viewing this statement in the light most favorable to the Plaintiffs, the first element of unjust enrichment is pled. Specifically, that statement alleges that Plaintiffs’ investor funds benefitted the Defendants personally. However, the claim fails to state the remaining two elements for a cause of action. Nowhere is there a factual allegation that Plaintiff should have expected to repay the Plaintiffs for their \$30,000 investment in Bella Gravida. Similarly, the Complaint does not allege that either individual defendant knew of a benefit conferred on defendants without paying for its value. Thus, Plaintiffs have not set forth an adequate claim for unjust enrichment. The Demurrer to this count is sustained, with leave to amend.

Count VIII – Breach of Contract

The Complaint fails to state a claim for breach of contract against Wilson and Evans individually. A breach of contract action exists where there is “(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant’s violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.” *Filak v. George*, 267 Va. 612, 619 (2004).

Count VIII alleges two provisions of the Agreement were violated. First, the Agreement provided that investors would be notified 10 days prior to the shareholder meeting and “the Company” was obligated to send the investors copies of records and statements. Compl. ¶ 96. Second, the Agreement provided that “[t]he Company agrees that . . . it will comply with all appropriate laws and regulations. . . .” *Id.* at ¶ 98. As alleged in the Complaint, the obligations breached in the contract belonged to Bella Gravida, not the individual defendants. Even though the defendants signed in their individual capacity, the alleged obligations breached did not belong to them. Furthermore, absent a contractual obligation owed by the individual defendants there can be no violation or damages. Therefore, the Complaint’s claim for breach of contract fails as a matter of law. The Demurrer to this count is sustained, with leave to amend.

Plaintiffs’ Complaint contains serious factual deficiencies and improperly identifies the parties or their status. The Johnsons have sued directly where they are required to sue derivatively. They have sued defendants individually instead of as agents and members of Bella

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Gravida. These inadequate allegations and lack of standing are fatal. The individual defendants' demurrers are sustained as to all eight counts, with leave to amend. Should no amendment be filed within 21 days as to any particular count, that count shall be dismissed, with prejudice. Should no amended Complaint be filed within 21 days, then the Complaint, in its entirety, shall be dismissed with prejudice. An order consistent with the court's opinion is enclosed.


Very truly yours,


Thomas P. Mann
Circuit Court Judge

OPINION LETTER

VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

STEPHEN JOHNSON, et al. :
Plaintiffs, :
V. : Case No.: CL2019-17643
BELLA GRAVIDA, LLC, ET AL. :
Defendants. :
_____ :

ORDER SUSTAINING DEMURRER


THIS CAUSE came to be heard on July 10, 2020, on individual defendants Jason Wilson (“Wilson”) and Christa Evans’ (“Evans”) demurrers to Stephen and Ann Johnson’s (“Plaintiffs”) Complaint.

IT APPEARING for the reasons set forth in the Court’s Opinion Letter issued contemporaneously with this Order that the demurrers should be sustained; it is therefore

ORDERED that the demurrers are sustained with leave to amend. Should no amendment be filed within 21 days as to any particular count, that count shall be dismissed, with prejudice. Should no amended Complaint be filed within 21 days, then the Complaint, in its entirety, shall be dismissed with prejudice.

THIS CAUSE CONTINUES.

ENTERED THIS 20TH DAY OF JULY, 2020



Judge Thomas P. Mann