

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

JONATHAN KING,)
)
Plaintiff,)
)
VS.) NO. 16-30-BC
)
DEAN CHASE,)
)
Defendant.)
)
DEAN CHASE, D.F. CHASE, INC.,)
and SANDRA CHASE,)
)
Counterclaim and Third-Party)
Plaintiffs,)
)
VS.)
)
JONATHAN KING and TAYLOR)
KING, DAVID KING, NV PARTNERS,)
LEE KENNEDY, AUSTIN)
PENNINGTON, THE ROSEMARY)
GRACE DUNN 2004 IRREVOCABLE)
TRUST, ROBERT BUSBY, and the)
JAMES W. CARRELL ESTATE,)
NV MUSIC ROW, LLC,)
)
Counter-Defendants and)
Third-Party Defendants.)

**MEMORANDUM AND ORDER: (1) CONCLUDING AS A MATTER OF
LAW CERTAIN OF PLAINTIFFS' BREACH OF FIDUCIARY DUTY
CLAIMS ARE NOT BARRED; (2) GRANTING PLAINTIFFS LEAVE TO
FILE SECOND AMENDED COMPLAINT; AND (3) SETTING DEADLINE
TO SCHEDULE RULE 16 CONFERENCE**

Preliminary Matters

This matter is before the Court on two motions: *Defendant/Counter-Plaintiff Dean Chase's Motion for Partial Judgment on the Pleadings and Memorandum* and Plaintiffs' *Second Motion for Leave to Amend Complaint*. After reviewing these motions and the Plaintiffs' *Opposition* and Defendant Chase's *Reply and Response*, the Court determines that the matters can be decided on the papers. It is therefore ORDERED that oral argument shall not be conducted on the motions and they are removed from the June 9, 2017 docket.

An additional preliminary matter is that the pending motions do not interface. The disconnection is that Defendant Chase's motion for partial judgment on the pleadings is directed at the Plaintiffs' present operable pleading: Plaintiff's Revised First Amended Complaint, filed April 26, 2017. Plaintiffs' motion to amend, however, would replace the Plaintiffs' present operable pleading of the Revised First Amended Complaint with the Second Amended Complaint, which varies, somewhat, from the content to which Defendant Chase's motion for partial judgment on the pleadings is directed.

Counsel eliminated some inefficiency of this disconnection by agreeing to consolidate oral argument on the two motions and by Defendant Chase filing a consolidated response and reply.

The Court, as well, addresses the inefficiency by issuing below a ruling as a matter of law on Defendant Chase's challenge in his partial motion for judgment on the pleadings to a portion of Plaintiffs' breach of fiduciary duty claim in the Revised First Amended

Complaint, even though, issued below, is an order granting Plaintiffs' motion to amend to replace the Revised First Amended Complaint with the Second Amended Complaint. Ruling as a matter of law on Defendant's challenge, despite the replacement/amendment, can be done because the aspect of Plaintiffs' breach of fiduciary duty claim asserted at paragraph 43(c) of the Revised First Amended Complaint, which is challenged in Defendant Chase's motion for judgment on the pleadings, is reasserted as paragraph 49(c) in the Second Amended Complaint. Thus, by issuing the ruling below, the Court eliminates Defendant Chase having to refile its motion for judgment on the pleadings with respect to paragraph 49(c) of the Second Amended Complaint.

Further, in opposition to Plaintiffs' motion to amend, Defendant Chase asserted a Tennessee Civil Procedure Rule 9.02 challenge to the proposed Second Amended Complaint, enabling the Court to rule on that matter. This ruling, as well, eliminates future Rule 9.02 motions by Defendant Chase on the Second Amended Complaint.

Rulings

Beginning with Defendant Chase's motion for partial judgment on the pleadings, the motion has two parts. One seeks dismissal of Plaintiffs' claim that Defendant was negligent in his management of NV Partners. This is moot. Stated in Plaintiffs' June 5, 2017 *Opposition* is that the Plaintiffs have "withdrawn their claim for negligence," and that claim is not reasserted in the proposed Second Amended Complaint.

With respect to the remainder of Defendant's *Motion*, Defendant Chase seeks dismissal of paragraph 43(c) of the Plaintiffs' Revised First Amended Complaint which alleges that Defendant Chase "negotiated, dominated and controlled the sale of partnership property at less than a fair market value to satisfy the personal needs of himself and D. F. Chase, to the detriment of the partnership and Plaintiffs." This claim is reasserted in the proposed Second Amended Complaint at paragraph 49(c).

In support of dismissal, Defendant Chase argues that as a matter of law there can be no breach of fiduciary duty with respect to Defendant Chase's negotiation and activities concerning the sale of the partnership property because the partners voted for and executed a "Unanimous Consent" document approving the sale, and the Plaintiffs received and accepted their distribution of the profits from the sale. These circumstances, Defendant Chase asserts, constitute a bar to the breach of fiduciary duty claim and a bar to attack the sale after having consented to it under the terms of the Unanimous Consent document as well as under the doctrines of estoppel, ratification, acquiescence and waiver.

The Plaintiffs' opposition is that there is an element missing. For Defendant Chase to succeed on judgment on the pleadings as to any of his defenses of the Unanimous Consent terms, ratification, waiver, estoppel, acquiescence, the case law cited by Plaintiffs and incorporated herein by reference, makes clear that an essential element of each of these defenses is that the Plaintiffs had knowledge of material facts. Thus, in the posture of a

motion for judgment on the pleadings, the pleadings must establish that the Plaintiffs had knowledge of material facts.

In both the Revised First Amended Complaint and the proposed Second Amended Complaint, the Plaintiffs have pled that they lacked knowledge of the material facts in connection with their execution of the Unanimous Consent and in proceeding with the sale because Defendant Chase concealed and misrepresented facts, and misled the Plaintiffs. In particular, using the numbering of the paragraphs of the Revised First Amended Complaint, which are substantially similar but renumbered in the proposed Second Amended Complaint, a sampling of the averments of lack of knowledge of material facts is that the Plaintiffs allege, at paragraphs 8 and 30 of the Revised First Amended Complaint, that Defendant Chase concealed that he borrowed funds from his own business in violation of the partnership agreement. The Plaintiffs allege in paragraph 45 that the Note was not provided to the partners and that they were unaware that a \$200,000 origination fee which represented approximately half of the funds was not disclosed nor was the interest rate nor the options to renew the note in 90-day increments. The Plaintiffs aver that Defendant Chase did not file the deed of trust with the registrar's office which also was a concealment. At paragraphs 39-42 of the pleading, the Plaintiffs assert they requested an accounting but none was provided.

These averments of specific facts of concealment, misrepresentation and misleading—carried over to the proposed Second Amended Complaint—put in issue the essential element

of whether Plaintiffs' consensual actions were done with knowledge of the material facts. These averments are sufficient as a matter of law to put in issue the essential element of knowledge of material facts with respect to Defendant Chase's defenses of Unanimous Consent bar, ratification, estoppel, acquiescence and waiver. As to these defenses, the Court rules that Defendant Chase is not entitled to a partial judgment on the pleadings.

It is therefore ORDERED that Defendant Chase's motion for partial judgment on the pleadings as to the claim asserted at paragraph 43(c) of the Revised First Amended Complaint is denied. These conclusions of law apply as well to paragraph 49(c) of the proposed Second Amended Complaint.

With respect to Plaintiffs' motion to file the Second Amended Complaint, it is granted for the following reasons.

Decisions by Tennessee appellate courts are that in the initial stages of a lawsuit, trial courts are to liberally allow parties to amend. In terms of timing, this case fits those circumstances. The case has defied the Court's progression and is still in its initial phase of setting the pleadings for a number of reasons including the Plaintiffs' changing counsel, related cases being consolidated and parties being added.

Accordingly, the principle that when the case is still in its initial stage, leave to amend should be freely given, fits the posture of this case.

Citing exceptional circumstances, Defendant Chase asserts Plaintiffs' motion to amend should be denied because the proposed amendment contradicts and takes positions opposite to previous pleadings, and that the proposed Second Amended Complaint is a "reversal" in positions and a substantial change in the litigation. These maneuvering pleadings, Defendant Chase argues, constitute undue delay, bad faith and/or unfair prejudice—all circumstances recognized in the case law to deny leave to amend. The Court comes to a different conclusion.

Undue delay, bad faith and unfair prejudice all contain an element of intentional dishonesty, gamesmanship or lack of diligence. This element, however, is not yet established in the record before the Court. Taking a contradictory, inconsistent position, while circumstantially indicative, is not *ipso facto* intentional dishonesty, gamesmanship or lack of diligence. To establish this, more evidence is needed than is presently in the record. These grounds to disallow the amendment are denied.

As to Defendant Chase's position that the proposed Second Amended Complaint is insufficient under Tennessee Civil Procedure Rule 9.02 because the pleading does not plead fraud with particularity, the Court, as well, denies this challenge. Claims involving fraud require more than the general pleading requirement of a "short and plain statement of the claims." TENN. R. CIV. P. 8.01. Rather, Tennessee Rule of Civil Procedure 9.02 requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." TENN. R. CIV. P. 9.02. "Particularlty, or the quality or state

of being particular, connotes a concern with details, or minut[ia].” *PNC Multifamily Capital Institutional Fund XXVI Ltd. P’ship v. Bluff City Community Development Corp*, 387 S.W.3d 525, 547 (Tenn. Ct. App. 2012) (quotations omitted).

In Tennessee the elements of fraud are “(1) an intentional misrepresentation of a material fact, (2) knowledge of the fact’s falsity, (3) an injury caused by reasonable reliance on the representation, and (4) the requirement that the misrepresentation involve a past or existing fact.” *Hermosa Holdings, Inc., v. Mid Tennessee Bone and Joint Clinic, P.C.*, No. M2008-00597-COA-R3-CV, 2009 WL 711125, at *10 (Term. Ct. App. Mar. 16, 2009), *abrogated on other grounds by Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422 (Tenn. 2011). “A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact.” *Id.* Particularity requires that “the actors should be identified and the substance of each allegation should be pled.” *Id.* “[P]articularity in pleadings requires singularity - of or pertaining to a single or specific person, thing, group, class, occasion, etc. rather than to others or all.” *Diggs v. Lasalle Nat. Bank Ass’n*, 387 S.W.3d 559, 565 (Tenn. Ct. App. 2012). The person making the fraudulent representation should be identified and the intentional nature of the misrepresentation described.

Applying this law, the Court finds in the following paragraphs of the proposed Second Amended Complaint, the particularity of identity of the person making the fraudulent representation or concealment is provided, along with to whom, and the matters allegedly

misrepresented. Further, circumstantial events are identified as motives and plans indicative of intentional wrongdoing. Also the “how, when and where,” which Defendant Chase asserts is absent, is provided in these paragraphs. These are a sampling and not an exhaustive list.

- When/dates: paragraphs 20, 21, 22, 25, 27, 29, 30, 34, 35, 41, 44, 43, 44, 46
- How/where: paragraphs 21, 24, 25, 27, 29, 30, 35, 36, 37, 38, 42, 43, 44

Accordingly, it is ORDERED that the Plaintiffs are granted leave to file the Second Amended Complaint which shall be efiled or filed with an original signature by June 16, 2017.

Lastly, it is ORDERED that by June 16, 2017, Counsel shall contact the Docket Clerk, Mrs. Smith (615-862-5719) as to their availability to attend a Rule 16 Conference on these dates and times:

June 22, 2017 at 11:30 a.m.
June 28, 2017, at 9:00 a.m.
July 5, 2017, at 1:30 p.m.

Subsequent to June 16, the Court will follow-up with an order setting the Rule 16 Conference and stating matters for Counsel to be prepared to address.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efileing as applicable to:

W. Gary Blackburn

Bryant Kroll

Attorneys for Jonathan King, Taylor King, and David King

Gayle I. Malone

Charles I. Malone

Beau C. Creson

Paige Ayres

John C. Hayworth

Attorneys for Dean Chase, D.F. Chase, Inc., and Sandra Chase

Lyndsay Smith Hyde

Attorney for Lee Kennedy and Austin Pennington

William D. Leader, Jr.

Attorney for The Rosemary Grace Dunn 2004 Irrevocable Trust

William T. Ramsey

Attorney for James W. Carrell Estate

Robert Busby

NV Partners

NV Music Row, LLC

Pro Se Defendants