UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Metropolitan Enterprise Corp., Plaintiff,	:	
v.	:	Civil No. 3:03cv1685(JBA)
United Technologies International Corp., et al., Defendants.	:	

RULING ON DEFENDANTS' MOTION IN LIMINE TO DISMISS COUNT FIVE

This commercial dispute arises out of a Sales Representation Agreement between Metropolitan Enterprise Corporation ("Metropolitan"), a Taiwanese company, and United Technologies International ("UTI"), a Connecticut company. Third Am. Compl. [Doc. # 76], ¶¶ 1-3. By Ruling dated September 21, 2005 [Doc. # 102], this Court granted UTI's motion for summary judgment on Count Three of plaintiff's Third Amended Complaint, which alleged breach of fiduciary duty, but denied the motion as to Counts One (breach of the duty of good faith and fair dealing) and Two (CUTPA violations). See Metropolitan Enter. Corp. v. United Techs. Int'l. Corp., 2005 WL 2300382 (D. Conn. Sept. 21, 2005). In the Joint Trial Memorandum, UTI renews its argument, raised in its summary judgment motion, that Count Five of the complaint, styled as a constructive fraud claim, should be dismissed because in order to prevail on that claim plaintiff must prove the existence of a fiduciary duty, which it cannot. Consideration of this basis for dismissal of Count Five was overlooked in the

Court's summary judgment ruling, which found that UTI owed no fiduciary duty to Metropolitan as a matter of law as to Count Three.

For the reasons that follow, Count Five will be dismissed.

I. Background

Familiarity with the facts, as presented in the summary judgment record, is presumed. See Metropolitan, 2005 WL 2300382 at *1-5. Briefly, Metropolitan entered into an agreement to represent Pratt & Whitney ("P&W"), a division of UTI, in its campaign to sell airplanes to China Airlines ("CAL"). Metropolitan was to be paid a commission if the sale was completed. CAL ultimately did not award the contract to P&W, and Metropolitan was not paid the commission it expected. Metropolitan now alleges that P&W deliberately sabotaged the CAL deal and never had any intention of winning the contract in the first place.

In Count Three of the Third Amended Complaint, plaintiff alleged that "the relationship between Plaintiff and Defendants was that of agent and principal" and that UTI breached its fiduciary duty to plaintiff by failing to disclose material facts and misrepresenting its "intent to do business in good faith in the commercial jet engine market...." Third Am. Compl. ¶¶ 46-48. The Sales Representation Agreement contains a clause stating that Metropolitan is to be considered an independent contractor, not

an agent of P&W. Metropolitan, 2005 WL 2300382 at *1. Nonetheless, for purposes of deciding the summary judgment motion the Court assumed, without deciding, that Metropolitan was UTI's agent under the Agreement. Id. at *9. Although Connecticut authority was lacking on this point, on the basis of the Restatement of Agency and out-of-state caselaw, the Court predicted that the Connecticut Supreme Court would hold that a fiduciary duty runs from the agent to the principal, not vice versa. While "a principal owes its agent the duties of good faith and disclosure of known financial risks, ... there is no authority for the proposition that a principal acts as a fiduciary for its own agent." Id. at *10. Therefore the claim for breach of fiduciary duty was dismissed as a matter of law.

At the Pretrial Conference and in the Joint Trial Memorandum, [Doc. # 110], n.2, defendant maintained that Count Five also should be dismissed on the basis of the Court's previous holding that defendant did not owe plaintiff a fiduciary duty. Briefing was permitted, see Supp. Sched. Order [Doc. # 114], and plaintiff has disputed defendant's contention. See Pl. Opp. [Doc. # 116]; Def. Reply [Doc. # 126].

II. Standard

Although neither party has addressed the precise procedural posture for consideration of this issue, the Court concludes that defendant's request for dismissal of Count Five should be treated

as a motion for judgment on the pleadings. Fed. R. Civ. P. 12(c) ("After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.") The "standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001) (citations omitted). "In both postures, the district court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. The court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would entitle him to relief." Id. (citations omitted).

To survive the motion, the plaintiff must set forth "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957), quoting Fed. R. Civ. P. 8(a)(2); see also Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. Discussion

A. Constructive Fraud and Fraud by Nondisclosure

Defendant argues that to prevail on a claim of constructive fraud, plaintiff must prove the existence of a fiduciary relationship between the parties. Defendant further argues that plaintiff conflates "constructive fraud" with "fraud by nondisclosure," which is an entirely separate claim.

Defendant is correct that constructive fraud and fraud by nondisclosure are distinct claims. Mitchell v. Mitchell, 31 Conn. App. 331, 334 (1993) ("The burden of proof and the elements necessary in an action for constructive fraud differ markedly from the prerequisites to liability for actual fraud."). In ordinary fraud cases, including fraud by nondisclosure, the defendant's intent to defraud may not be presumed but must be proved by the plaintiff by "clear and satisfactory" or "clear, precise and unequivocal evidence." Alaimo v. Royer, 188 Conn. 36, 39 (1982) (internal quotations and citations omitted). In cases of constructive fraud, by contrast, the plaintiff only must "establish the existence of a confidential or special relationship," and then the burden shifts to the defendant "to prove fair dealing by clear and convincing evidence." Mitchell, 31 Conn. App. 335; see also Oakhill Assocs. v. D'Amato, 228 Conn. 723 (1994) ("Proof of a fiduciary relationship imposes a twofold

burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence.") (internal quotation marks, alteration and citation omitted).

To prevail on a claim of fraud by nondisclosure, the plaintiff must prove that the defendant had a "duty to speak," i.e., to reveal information on which the plaintiff reasonably would be expected to rely. See Egan v. Hudson Nut Prods., 142 Conn. 344, 348 (1955). One circumstance under which a duty to speak arises is where the parties have "a relationship of trust and confidence" creating a "duty to make a full disclosure." Id. (holding builder of house had no duty to disclose potential zoning violations to buyer absent inquiry and absent intent to deceive). However, a "special relationship" is not the only circumstance creating a duty to speak. In Franchey v. Hannes, 152 Conn. 372, 378 (1965), for example, the Connecticut Supreme Court held that where one party to a transaction undertakes to speak, that party must fully disclose all material facts concerning the issue about which he voluntarily has revealed partial information. Under the Restatement, liability for nondisclosure may arise where a defendant knows information "necessary to prevent his partial or ambiguous statement of the facts from being misleading;" where "subsequently acquired information ... will make untrue or misleading a previous

representation;" or where "because of the relationship between" the parties, "the customs of the trade or other objective circumstances," the plaintiff "would reasonably expect a disclosure" of certain facts. Restatement (Second) of Torts § 551(2).

Thus, there are some situations in which a defendant has a duty to speak by virtue of a confidential relationship such that failure to speak could constitute both fraud by nondisclosure and constructive fraud. But because fraud by nondisclosure can arise in other circumstances as well, the two claims are not identical.

B. Parties' Relationship

The Connecticut Supreme Court has used the terms "confidential" and "fiduciary" interchangeably in considering whether the constructive fraud doctrine applies to an executor of an estate:

> Our law on the obligations of a fiduciary is well settled. A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence.

Cadle Co. v. D'Addario, 268 Conn. 441, 455 (2004) (internal

citations and quotation marks omitted, emphases supplied).[1] In no case has the Connecticut Supreme Court ever explicitly held that a "confidential relationship" is synonymous with a "fiduciary relationship," perhaps because all such cases involving constructive fraud claims have found actual fiduciary relationships. See id. (estate executor); Oakhill Assocs., 228 Conn. at 725 (business partner); Alaimo, 188 Conn. at 41 (investment counselor for disabled plaintiff).

The Connecticut Supreme Court has held that a "relationship of special trust and confidence" such as would give rise to liability for constructive fraud may arise "by operation of law or voluntarily ... such as ... between parent and child, attorney and client, guardian and ward, trustee and ... trust...." Worobey v. Sibieth, 136 Conn. 352, 359 (1949). Thus, to prove constructive fraud, a plaintiff must show the existence of an actual fiduciary relationship or other legally recognized fiduciary-type relationship. If constructive fraud encompassed any type of relationship giving rise to a duty to speak, the distinction between the separate torts of constructive fraud and fraud by nondisclosure would be blurred and the critical determination of which party bears the burden of proof could not

[1]See also Mitchell, 31 Conn. App. at 335 (holding that proof of "a confidential or special relationship" shifts the burden "to the fiduciary to prove fair dealing by clear and convincing evidence.") (emphasis supplied).

be made.

C. Count Five

In this case, the only relationship of special trust and confidence that could arise between Metropolitan and UTI is an agent-principal relationship. The Court previously held that, even if such a relationship existed between the parties, the fiduciary duty flowed only from the agent to its principal, and not vice versa, and therefore UTI owed Metropolitan no fiduciary duty. Metropolitan, 2005 WL 2300382 at *10. In the absence of any other fiduciary relationship, Metropolitan's constructive fraud claim against UTI necessarily fails.

Plaintiff argues that even if its constructive fraud claim fails, the Court "should simply strike the word 'Constructive' from the title of the Count and treat the claim as one for Fraud" by nondisclosure. Pl. Opp. [Doc. # 116] at 10. Defendant opposes this request as futile because, it argues, Count Four of the complaint, styled "Fraud in the Inducement," already alleges a claim for fraudulent nondisclosure. Def. Reply Br. [Doc. # 126] at 9.

Count Four alleges that: before the Sales Representation Agreement was signed, UTI knew its "true intentions" were to hire Metropolitan to repair the relationship with CAL and secure "a joint venture with CAL regarding maintenance and repair facilities;" UTI did not disclose these intentions to plaintiff;

a "relationship of trust and confidence" existed between the parties; the nature of the parties' discussions and meetings imposed a duty on defendant to disclose its true intentions; defendant's failure to disclose its intentions "was likely to mislead, and did in fact mislead Plaintiff into entering into the Agreement;" and defendant intended to induce plaintiff's reliance and plaintiff's entrance into the Agreement. Third Am. Compl. ¶¶ 51-54.

"Under Connecticut law, the essential elements of an action in fraud are: (1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." Finley Assoc. v. Crossroads Investment Co., No. X03CV990499388S, 2001 WL 1618573, at *14 (Conn. Super. Ct. Dec. 17, 2001) (citing Paiva v. Vanech Heights Construc. Co., 159 Conn. 512, 515 (1970), and other cases). "Furthermore, courts have consistently held that a prerequisite element of fraud by nondisclosure is a duty to speak." Id.

In Count Four, plaintiff has alleged all of the above elements for a claim of fraud by nondisclosure, notwithstanding its denomination as "fraud in the inducement."[2] Plaintiff

[2]This nomenclature usually is used in an action for contract reformation or other equitable relief, none of which plaintiff is seeking. See Restatement (Second) of Contracts (1981) §§ 163,

alleges that UTI falsely represented its goals in entering the Agreement, that UTI personnel knew the representation was false and intended to induce Metropolitan's reliance on such false statement, that Metropolitan did so rely, and that UTI had a duty arising from the parties' prior relationship to disclose its intentions. Because Count Four alleges a claim for fraudulent nondisclosure, it is unnecessary to construe Count Five to allege an identical claim.

IV. Conclusion

Accordingly, Count Five of the Third Amended Complaint is dismissed. Counts One, Two and Four remain for the bench trial to commence March 1, 2006.

IT IS SO ORDERED.

/s/

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JANET BOND ARTERTON, U.S.D.J.

Dated at New Haven, Connecticut, February 27, 2006.

164, 166 (fraud in the inducement may prevent valid acceptance of offer, or render contract voidable or subject to reformation).