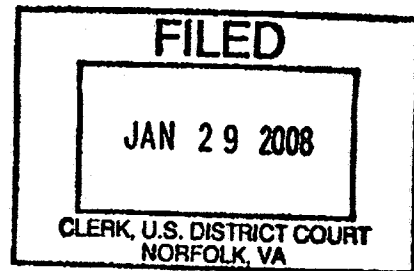


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



FRANK BRUNCKHORST CO., L.L.C.,

Plaintiff,

v.

Civil Action No. 2:07cv314

COASTAL ATLANTIC, INC.,

Defendant.

COASTAL ATLANTIC, INC.,

Counterclaim Plaintiff ,

v.

FRANK BRUNCKHORST CO., L.L.C.,

and

BOAR'S HEAD PROVISIONS CO., INC.,

Counterclaim Defendants.

ORDER AND OPINION

Pending before the court are motions to dismiss filed by the counterclaim defendants, Frank Brunckhorst, Co., L.L.C. (hereinafter "Brunckhorst") and Boar's Head Provisions Co., Inc. (hereinafter "Boar's Head"). The counterclaim defendants seek dismissal of the Amended Counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6). After examination of the briefs and record, this court determines oral argument is unnecessary because the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided

by oral argument. The court, for the reasons set out fully herein, **GRANTS** Brunckhorst's and Boar's Head's motions to dismiss.

I. Factual Background

Brunckhorst is the national distributor of Boar's Head Brand deli products, and sells those products to independent distributors across the country. The defendant and counterclaim plaintiff Coastal Atlantic, Inc. (hereinafter "Coastal") is a former distributor of Boar's Head products, which would purchase the products from Brunckhorst and resell them to supermarkets and delicatessens.¹ Although Brunckhorst and Coastal had a distributorship arrangement for more than twenty years, they never entered into a written distribution agreement, nor did they have any agreement of a definite duration. Instead, they had an at-will relationship, in which Coastal was permitted at any time to cease purchasing Boar's Head products from Brunckhorst, and Brunckhorst was likewise free to stop selling products to Coastal for any or no reason. Geri Meyers is Coastal's sole shareholder. Richard Meyers is the husband of Geri Meyers, and is Coastal's corporate secretary and treasurer. Coastal Real Estate, L.L.C., is a separate entity owned by Geri and Richard Meyers which operates a warehouse in which Coastal and other businesses owned by the Meyerses lease space.²

On or about June 29, 2007, citing problems relating to product integrity, Brunckhorst

¹In 1984, Coastal entered into an arrangement with Brunckhorst, which authorized Coastal to distribute Boars' Head products in the Tidewater and Richmond areas of Virginia.

²Although denominated on some of the pleadings as such, the court notes that the Meyerses and Coastal Real Estate have not been properly joined as counterclaim plaintiffs, either pursuant to Rule 13(h) or Rule 24 of the Federal Rules of Civil Procedure. However, as noted infra and because this order dismisses the Amended Counterclaim, the court finds the motion to join the Meyerses and Coastal Real Estate to be moot.

ceased all shipments of Boar's Head products to Coastal. After negotiations between Brunckhorst and the Meyerses in an effort to salvage the distribution relationship broke down, Coastal began distributing Thumann's brand deli meats and cheeses.

II. Procedural History

On July 10, 2007, Brunckhorst filed the instant complaint against Coastal in this court, alleging trademark infringement and violations of the Lanham Act as well as a claim for recovery of over \$400,000 worth of deli products that had allegedly been delivered to Coastal but for which Brunckhorst was never paid. Coastal filed a counterclaim and then an amended counterclaim, alleging actual and constructive fraud, tortious interference with contract and with business expectancy, business conspiracy, breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.³ On September 24, 2007, Brunckhorst filed the instant motion to dismiss the amended counterclaim. Coastal filed a response brief on October 15, 2007, and Brunckhorst filed a reply brief on October 25, 2007.

Likewise, Boar's Head filed a separate motion to dismiss on September 24, 2007, to which Coastal responded on October 15, 2007. Boar's Head filed a reply brief on October 25, 2007. The court notes that the Amended Counterclaim fails to allege any claims against Boar's

³Coastal filed the Amended Counterclaim along with the Meyerses and Coastal Real Estate, against both Brunckhorst and Boar's Head. Brunckhorst has filed a motion to drop the Meyerses and Coastal Real Estate as improperly joined, and those parties have filed a motion to be added as counterclaim plaintiffs. It appears to the court that the Meyerses and Coastal Real Estate are not proper parties to the lawsuit, because they each lack standing to assert claims against Brunckhorst and Boar's Head. However, the dismissal of the Amended Counterclaim obviates the need to formally rule on the proposed joinder of the Meyerses and Coastal Real Estate to the instant litigation, and therefore the court finds the motions concerning joinder to be moot.

Head, and that Brunckhorst and Boar's Head are legally distinct entities.⁴ Further, the briefs filed in support and in opposition to the motions to dismiss seem to conflate Boar's Head and Brunckhorst, leading to the briefs that are related to Boar's Head's motion to dismiss serving, essentially, as page-limit extensions to the briefs on Brunckhorst's motion to dismiss. The court notes that this enlargement would appear to be in violation of a strict reading of Rule 7(F) of the Local Rules of the United District Court for the Eastern District of Virginia. However, considering that neither party appears to have gained a clear advantage from incorporating briefs by reference, the court notes that it has considered all of the arguments set forth by the parties. Accordingly, the motions to dismiss are ripe for consideration.

III. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits the defendant to request dismissal if the plaintiff has filed a claim upon which relief cannot be granted. FED. R. CIV. P. 12(b)(6). In assessing a motion to dismiss for failure to state a claim upon which relief can be granted, "a count should be dismissed only where it appears beyond a reasonable doubt that recovery would be impossible under any set of facts which could be proven." America Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 854 (E.D. Va. 1999). The court must "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." Eastern Shore Markets, Inc. v. J.D. Associates Ltd., 213 F.3d 175,

⁴The Amended Counterclaim makes plain Coastal's position that Brunckhorst and Boar's Head are indistinguishable entities. However, even assuming this to be true, the allegations of the Amended Counterclaim are made against Brunckhorst, and there are no claims that relate directly to Boar's Head but not Brunckhorst. Further, the confusion as to whether Boar's Head is a proper party to the case is immaterial to the resolution of the motions to dismiss. For purposes of this order, the court will refer to Brunckhorst and Boar's Head collectively as "Brunckhorst."

180 (4th Cir. 2000) (citations omitted).

While the court must take the facts in the light most favorable to the plaintiff, the court is not bound with respect to the complaint's legal conclusions. See Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991). Dismissal pursuant to Rule 12(b)(6) is appropriate when upon considering the facts set forth in the complaint as true and construing the facts in the light most favorable to the non-moving party, there is no basis on which relief can be granted. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Dismissal should not be granted unless the moving party can demonstrate that no set of allegations will support the complaint. Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989); District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979).

IV. Analysis

A. Breach of Contract

To state a valid claim for breach of contract under Virginia law, a plaintiff must claim that the defendant owed it a legal obligation, the defendant violated that obligation, and, as a consequence, injury or damage inured to the plaintiff. See, e.g., Caudill v. Wise Rambler, Inc., 210 Va. 11, 13 (1969). Virginia courts have repeatedly held that, where a distributorship arrangement has no definite duration, it is "at will" and may be terminated by either party at any time, with or without cause. See, e.g., Stutzman v. C.A. Nash & Son, Inc., 189 Va. 438, 446 (1949) (holding that, where a contract to distribute floor cleaner contained no provision as to duration, either party was at liberty to terminate the contract at will).

Count VI of the Amended Counterclaim alleges that Brunckhorst breached the oral distribution agreement it had with Coastal by terminating Coastal's distributorship rights after

having assured Coastal that it would continue with the relationship as long as Coastal complied with certain requirements. Coastal specifically claims that, more than twenty-three years ago, Richard Meyers had a conversation with a Brunckhorst employee who told him that as long as the Meyerses “(1) promoted the Boar’s Head brand and, (2) built brand identification, they would have the exclusive right to distribute Boar’s Head products in the Tidewater, Virginia area.” Amended Counterclaim at ¶ 13. Coastal therefore argues that this statement provides an “agreed-upon” duration for the contract between it and Brunckhorst, to wit: for as long as Coastal satisfied the conditions.

In support of this contention, Coastal cites the case of Alpha Distrib. Co. v. Jack Daniel Distillery, 454 F.2d 442 (9th Cir. 1972), in which the Ninth Circuit, citing Burgermeister Brewing Corp. v. Bowman, 38 Cal. Rptr. 597 (Cal. Ct. App. 1964), indicated that “where parties expressly agree that the exclusive distributorship shall continue while the distributor exercises his best efforts, the contract is terminable only for cause.” Alpha Distrib., 454 F.2d at 448. However, the Alpha Distrib. court held that the oral contract between the parties was terminable at will where the supplier had indicated the relationship would last “as long as [the distributor] performed its undertakings.” Id. at 447. Even further, to the extent that California law transforms an at-will relationship into one that can be terminated only for cause if one party agrees to use its best efforts to promote a brand, this is contrary to the law of Virginia, which governs this case. See, e.g., Stutzman, 189 Va. at 446; Stonega Coke & Coal Co. v. Lousville & Nashville R.R. Co., 106 Va. 223, 226 (1906).

Coastal cites no decision from a court interpreting Virginia law that would support the application of the Burgermeister ruling to this case. In Addison v. Amalgamated Clothing &

Textile Workers Union of Am., 236 Va. 233 (1988), the Supreme Court of Virginia held that the promise of employment to an individual for “as long as he wanted one and as long as one existed” was sufficient only to create an at-will relationship of employment. Id. at 235. Coastal claims that, in dicta, the court left open the possibility that the at-will status might be refuted “where the contract expressly assured job security so long as performance was satisfactory.” Id. at 235-36. Yet in actuality, the court was merely indicating that, in its review of applicable case law from other jurisdictions, it found only two that supported such a theory. See Maloney v. E.I. Du Pont de Nemours & Co., 352 F.2d 936, 938 (D.C. Cir. 1965); Touissant v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 610 (1980). The Addison court, noting that it had rejected this line of reasoning, then indicated that, even were it to apply the rationale of Maloney and Touissant, the facts before it demonstrated no assurance relating to satisfactory performance. Addison, 236 Va. at 236.

Further damaging to Coastal’s case is the fact that, were the court to find that the agreement with Brunckhorst included a just-cause provision, its enforcement would be barred by the Statute of Frauds, which requires a writing if the contract cannot be performed within one year. See Windsor v. Aegis Servs., Ltd., 691 F.Supp. 956, 959 (E.D. Va. 1988), aff’d, 869 F.2d 796 (4th Cir. 1989) (holding that, under Virginia law, “enforcement of [an] alleged oral ‘just-cause’ . . . contract is barred by the Statute of Frauds because it cannot be performed within a year”). Although Coastal claims that the contract could be performed within a year, the Windsor court and other courts applying Virginia law have noted the distinction between termination and completed performance. Id. See also Silverman v. Bernot, 218 Va. 650, 655 (1977). Should the court find that the contract only permitted termination for cause, then a writing would be required

to comply with Virginia's Statute of Frauds. See, e.g., Seddon v. Rosenbaum, 85 Va. 928, 931-33 (1889). Because the contract at issue was never memorialized in a writing, Coastal would be unable to rely on it in an action for breach against Brunckhorst.

Coastal argues that three Fourth Circuit cases applying Virginia law stand for the proposition that, where a distributor contracts with a supplier for an exclusive distributorship, the agreement is no longer terminable at will. See Melchiorre v. California Cannery & Growers, 394 F.2d 413 (4th Cir. 1968); Allied Equip. Co. v. Weber Eng'ng Prods., Inc., 237 F.2d 879 (4th Cir. 1956); Jack's Cookie Co. v. Brooks, 227 F.2d 935 (4th Cir. 1955). However, these cases are all either readily distinguishable or inapposite. In Melchiorre, the parties and the court agreed that the distribution agreement between them was at will, but disputed whether there was an enforceable contract in the first place, and, if so, whether the supplier was required to give the distributor notice in advance of termination. Melchiorre, 394 F.2d at 415. Thus, Melchiorre does not address the issue at hand, and there is no allegation that Brunckhorst did not give reasonable notice to Coastal before terminating the agreement.

In both Allied and Jack's Cookie, the Fourth Circuit held that, under the circumstances before it, a fact issue existed as to whether a supplier had committed to supplying products to a distributor for a reasonable period of time in order to permit the distributor to recoup the expenses of setting up the distribution network. Allied, 237 F.2d at 882; Jack's Cookie, 227 F.2d at 937. However, in Allied, the supplier, Weber, had granted to Allied, the distributor, the exclusive right of distribution in a certain geographic region. Over the course of expanding its operations, Allied was negotiating a fifteen-year lease, but "[t]he lessor desired some assurances as to the duration of Allied's franchises." Allied, 237 F.2d at 880. Allied secured a letter from

Weber in which Weber indicated its hope that the two would “have the pleasure of many more years of pleasant, profitable association.” Id. at 881. Upon receipt of the letter, the lessor agreed to the fifteen-year lease. When, one year later, Weber terminated the relationship, the Fourth Circuit held that, on the circumstances before it, a factual issue arose as to whether Weber had committed to Allied for a reasonable period of time. Id. at 882.

Likewise, in Jack’s Cookie, a distributor began his duties under a distribution agreement on January 1, 1952, and the agreement was terminated on September 1, 1953. Jack’s Cookie, 227 F.2d at 937. The Fourth Circuit held that a jury issue existed as to whether the supplier had retained the agent in his employment for a reasonable amount of time. Id. at 938-39. In contrast, the factual allegations of the amended counterclaim indicate that Coastal and Brunckhorst had a distribution relationship for more than twenty-three years. This period of time is more than sufficient for Coastal to have recouped its investment, and indeed, the amended counterclaim makes no contention to the contrary. Accordingly, the facts of this case fall outside those contemplated in Allied and Jack’s Cookie, in that Coastal was given more than a reasonable amount of time to operate its distributorship before the at-will relationship was terminated by Brunckhorst.

Coastal finally claims that Coastal Real Estate may bring an action for breach of contract as a third-party beneficiary of the agreement between Coastal and Brunckhorst, because Coastal Real Estate, in reliance on that agreement, has begun building a new distribution facility. However, this court has held consistently that “only intended beneficiaries of a contract may enforce against the promisor a duty or right under the contract.” Maersk Line Ltd. v. CARE, 271 F.Supp.2d 818, 825 (E.D. Va. 2003) (citing Restatement (Second) of Contracts, § 302 (1981)).

Because Coastal Real Estate did not exist when Coastal and Brunckhorst entered into the distribution relationship, it clearly could not have been contemplated as a beneficiary of the contract agreed to by Coastal and Brunckhorst. As the court in Maersk Line held, the argument proffered by Coastal

would create almost limitless third-party beneficiaries in commercial situations, because any party standing to profit from the performance of another contract could claim intended beneficiary status and move to enforce that contract against the promisor. The purpose of the test as stated in the Restatement is to assure that only a party whose benefit was contemplated, and therefore intended, at the time of the contract can assert intended third-party beneficiary status.

Id. Accordingly, Coastal Real Estate lacks standing as a third-party beneficiary to enforce the terms of the contract between Coastal and Brunckhorst. Because Coastal cannot demonstrate that the contract in question was anything other than terminable at will, it is not entitled to recover on a claim for breach of contract.

B. Fraud

To properly state a claim for actual fraud under Virginia law, a plaintiff needs to demonstrate: “(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.” Winn v. Aleda Constr. Co., 227 Va. 304, 308 (1984). Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud claims be pled with heightened specificity. As the Fourth Circuit has indicated, the factors of a fraud claim that must be pled with particularity are “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).