

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

HIGHMARK WEST VIRGINIA, INC.,

Plaintiff,

vs.

Civil Action No.: 18-C-271
Presiding Judge: Shawn D. Nines
Resolution Judge: Christopher C. Wilkes

MEDTEST LABORATORIES, LLC, et al.,

Defendants.

MEDTEST LABORATORIES LLC,

Counterclaim and Third-Party
Plaintiff,

vs.

HIGHMARK WEST VIRGINIA INC., et al.,

Counterclaim and Third-Party
Defendants.

ENTERED
D.B. No. _____
Page _____



MAR 27 2020

CELESTE RIDGWAY
CLERK CIRCUIT COURT

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS AMENDED COUNTERCLAIM

This matter came before the Court this 27th day of March 2020, upon Plaintiff Highmark West Virginia (hereinafter "Plaintiff" or "Highmark WV")'s Motion to Dismiss Amended Counterclaim.

The parties have fully briefed the issues necessary. So, upon the full consideration of the issues, the record, the arguments of counsel and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was initiated with the Complaint filed on or about October 18, 2018, alleging causes of action for fraudulent misrepresentation & inducement (Count I); breach of contract

3/31/2020 CC 17 to List of counsel.

(Count II), unjust enrichment (Count III); civil conspiracy (Count IV); joint venture (Count V); negligence (Count VI); and “piercing the MedTest LLC veil” (Count VII), related to an alleged billing scheme wherein Plaintiff alleged Defendants MedTest Laboratories, LLC (hereinafter “MedTest”), Brice and/or Billy Taylor, Muhammad Amjad, Ph. D., Michael Chen, Ph. D., and James Taylor, carried out a billing scheme by making fraudulent claims for insurance benefits to Plaintiff¹. *See* Compl., ¶¶1, 37-80. On September 13, 2019, Plaintiff filed an Amended Complaint adding Cenegen, LLC as a Defendant, and this Amended Complaint asserts the same causes of action as the original Complaint in the matter². *See* Compl., ¶¶39-82.

2. On or about April 8, 2018, Defendants filed their Answer on Behalf of MedTest Laboratories, LLC, Billy Taylor, Brice Taylor, James Taylor, Vitas Laboratories and Michael Chen, Ph.D., Counterclaims and Third-Party Complaint, asserting causes of action for breach of contract against Highmark WV (Count I); negligence against Highmark WV (Count II); fraudulent misrepresentation and inducement against all Defendants (Count III); civil conspiracy against all Defendants (Count IV); joint venture against all Defendants (Count V); and unjust enrichment against all Defendants (Count VI). *See* Counterclaims and Th. Pty. Compl., ¶¶98- 129. On September 13, 2019, Defendants filed their First Amended Counterclaims and Third-Party Complaint (hereinafter “Counterclaim”) asserting the same claims. *See* First Am. Counterclaims and Th. Pty. Compl., ¶¶108-139.

3. On or about June 18, 2019, this civil action was referred to the Business Court Division. On July 22, 2019, the matter was referred to the Business Court Division via Administrative Order of the Supreme Court of Appeals of West Virginia. By Order Assigning Presiding and Resolution Judge

¹ The Court notes Defendants filed a motion to dismiss the entire Complaint, and this motion was denied by Judge Waters by Order Denying Defendants’ Motion to Dismiss filed March 21, 2019. *See* Ord., 3/21/19.

² The Court notes that all the aforementioned Defendants may hereinafter be referred to as “Defendants” or “Third-Party Plaintiffs”.

to Case entered on or about July 29, 2019, the matter was assigned to the undersigned as Presiding Judge.

4. On October 15, 2019, Plaintiff filed Highmark West Virginia Inc.'s Motion to Dismiss Amended Counterclaim, arguing the Amended Counterclaim must be dismissed because (1) MedTest concedes that it has failed to establish its own performance under the agreements; (2) the "duty" MedTest alleges in its breach of contract and negligence claims runs afoul of the express terms of the agreement; (3) MedTest's fraud claim fails to meet the heightened standard for such a claim and is not unique from its breach of contract claim; (4) MedTest has not sufficiently pled damages; and (5) MedTest's claims for Civil Conspiracy, Joint Venture, and Unjust Enrichment cannot survive the dismissal of its contract, negligence, and fraud claims. *See* Pl's Mem., p. 3.

5. On November 1, 2019, MedTest filed Third-Party Plaintiff's Memorandum of Law in Opposition to Third-Party Defendants' Motions to Dismiss MedTest's Amended Third-Party Complaint for Lack of Personal Jurisdiction and Improper Venue, in opposition to both the instant motion and Third-Party Defendants' Motion to Dismiss MedTest's Amended Third-Party Complaint for Failure to State a Claim. *See* Def's Resp., p. 1.

6. On January 28, 2020, the parties, by counsel³, appeared before the undersigned for a hearing on the instant motion and related filings.

7. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

8. This matter comes before the Court upon a partial motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

³ The Court notes Defendant Muhammad Amjad, Ph. D. attended the hearing in person, *pro se*.

claim which would entitle him to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

9. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

10. Plaintiff filed Highmark West Virginia Inc.’s Motion to Dismiss Amended Counterclaim, arguing the Amended Counterclaim must be dismissed because (1) MedTest concedes that it has failed to establish its own performance under the agreements; (2) the “duty” MedTest alleges in its breach of contract and negligence claims runs afoul of the express terms of the agreement; (3) MedTest’s fraud claim fails to meet the heightened standard for such a claim and is not unique from its breach of contract claim; (4) MedTest has not sufficiently pled damages; and (5) MedTest’s claims for Civil Conspiracy, Joint Venture, and Unjust Enrichment cannot survive the dismissal of its contract, negligence, and fraud claims. *See* Pl’s Mem., p. 3.

11. After having reviewed and considered the Amended Counterclaim and Third-Party Complaint filed September 13, 2019, the Motion to Dismiss, memoranda of law and exhibits of the parties, as well as the oral arguments of counsel, this Court hereby **DENIES** the instant Motion to Dismiss Amended Counterclaim, concluding as a matter of law that the First Amended Counterclaim and Third-Party Complaint states viable claims upon which relief can be granted. The issues will be taken up in turn.

Count I: Breach of Contract

12. First, Plaintiff argues that MedTest has failed to plead the elements for breach of contract. See Pl's Mem., p. 5. A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages. Syl. Pt. 1, *State ex rel. Thornhill Group, Inc. v. King*, 233 W.Va. 564, 759 S.E.2d 795 (2014); see also *Wetzel County Savings & Loan Co. v. Stern Bros., Inc.*, 156 W.Va. 693, 698, 195 S.E.2d 732, 736 (1973).

13. Here, the Court analyzes the claim as set out in the Amended Counterclaim. First, MedTest alleges in the Counterclaim that a contract exists between the parties. See Am. Ctrclm., ¶109. Second, MedTest alleges that Highmark WV breached the agreement by "refusing to compensate MedTest for laboratory testing services provided to members of the Blues' health insurance plans with coverage for 'National Networks'". *Id.* at ¶110. Third, MedTest alleges that it has suffered millions of dollars in damages as a result of Highmark WV's refusal to compensate it for laboratory testing services. *Id.* at ¶114.

14. This is sufficient to state a claim for breach of contract under West Virginia law under the state's liberal pleading standard. The Court finds and concludes that MedTest properly alleges each of the elements of its breach of contract claim⁴. For this reason, the instant motion shall be **DENIED** as to Count I.

Count II: Negligence

15. Next, Plaintiff argues that MedTest has failed to plead the elements for negligence. See Pl's Mem., p. 9. 'In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.' Syl. Pt. 1, *Parsley v. General Motors*

⁴ The Court considers MedTest's argument that the breach of contract claim should fail because MedTest did not perform under the contract. MedTest alleges it did perform under the contract, and followed the directions given to it by Highmark WV. At this stage in the litigation, dismissal of the claim based upon this dispute would be inappropriate.

Acceptance Corp., 167 W.Va. 866, 280 S.E.2d 703 (1981).” Syl. Pt. 4, *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995).

16. Specifically, Plaintiff argues that MedTest’s duty assertion in both its breach of contract and negligence claims contradicts the express terms of the contract. *See* Pl’s Mem., p. 9. Plaintiff avers the national networks provision of the parties’ agreement limits its obligations, that MedTest improperly coded claim submissions as office, not laboratory, and that MedTest incorrectly utilized its laboratories in other states to perform the testing services. *Id.* at 9-10.

17. While the Court considers upon further factual development through discovery in this matter these allegations may affect the case, at this point in the litigation, the Court finds and concludes that MedTest has met its pleading burden. At best, Plaintiff raises factual issues, inappropriate for resolution on a motion to dismiss.

18. A review of Count II of the Counterclaim reveals the cause of action is pled sufficiently and that MedTest has satisfied its relatively light burden of stating viable claims against the Counterclaim Defendant under Rule 8 of the West Virginia Rules of Civil Procedure. The plain language of the Amended Counterclaim reveals MedTest has adequately pled an allegation that Highmark WV breached an alleged duty to reimburse MedTest for submitted claims for covered services, sufficient to withstand a motion to dismiss. Accordingly, the instant motion shall be **DENIED** as to Count II.

Count III: Fraudulent Misrepresentation and Inducement

19. Next, Plaintiff argues that MedTest has failed to plead the elements for fraud, because the claim is not unique from its breach of contract claim. *See* Pl’s Mem., p. 11. Further, Plaintiff argues Count III is barred by the gist of the action doctrine, since Plaintiff also pled a cause of action for breach of contract. *Id.* at 12.

20. Under West Virginia Rule of Civil Procedure 9(b), “not only must fraud or mistake be pleaded, the circumstances creating the fraud or mistake must be set out in the pleadings with particularity.” *Hager v. Exxon Corp.*, 241 S.E.2d 920, 923 (1978); *see also* W. Va. R. Civ. P. 9(b).

21. In view of West Virginia’s pleading standards, including the heightened standard of pleading fraud claims with particularity, and after having carefully considered and assessed the allegations in the 139 separately numbered paragraphs of the Amended Counterclaim, this Court finds and concludes that Count III is pled sufficiently. In particular, in paragraph 123 of the Amended Counterclaim, MedTest details what it alleges to be the misrepresentations at the heart of the cause of action contained in Count III. *See* Am. Counterclaim, ¶123. The Court finds these allegations describe with requisite particularity the “circumstances creating the fraud,” *Hager*, 241 S.E.2d at 923.

22. Plaintiff has alleged that the misrepresentation is not separate from the breach of contract claim, as MedTest is attempting to recast its breach of contract claim into a fraud claim. *See* Pl’s Mem., p. 11. With regard to Plaintiff’s allegation that Count III fails because is barred by the gist of the action doctrine, the Court finds and concludes that MedTest has validly pled this claim in the alternative.

23. Rule 8 of the West Virginia Rules of Civil Procedure governs the general rules of pleading. Rule 8(a) provides, in pertinent part: “A pleading which sets forth a claim for relief, whether an original claim [or] counterclaim...shall contain (1) a short a plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. *Relief in the alternative or several types may be demanded.*” W. Va. R. Civ. P. 8(a) (emphasis added).

24. Further, Rule 8(e) provides, in pertinent part: “A party may set forth two or more statements of a claim...alternately or hypothetically, either in one count...or in separate counts....A

party may also state as many separate claims...as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.” W. Va. R. Civ. P. 8(e)(2).

25. Additionally, the West Virginia Supreme Court of Appeals has stated that alternative claims or defenses are allowed. Specifically, the West Virginia Supreme Court of Appeals has held that “[t]his rule gives parties considerable latitude in framing their pleadings and expressly permits claims or defenses to be pled alternatively...”. *Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999).

26. In *Highmark W. Va., Inc. v. Jamie*, the West Virginia Supreme Court of Appeals found that although a physician could not recover twice for the same injury in a dispute with a health insurance company, he was not precluded from pleading more than one theory of recovery; in fact, Rule 8 specifically authorized alternative pleading. 221 W. Va. 487, 655 S.E.2d 509 (2007).

27. In light of Rule 8 and the relevant case law, the Court finds MedTest has validly pled Count III in the alternative. To be clear, paragraph 103 of the Amended Counterclaim specifies, “In the alternative...”. See Am. Counterclaim, ¶103. At this stage in the proceeding, it would be inappropriate to dismiss Count III on this basis. Accordingly, the instant motion to dismiss is **DENIED** as to Count III.

Count IV: Civil Conspiracy

28. Next, Plaintiff claims that Count IV of the Amended Counterclaim must be dismissed because it depends on Counts I, II, and III, and because Plaintiff contends Counts I, II, and III fail, the claim for civil conspiracy contained in Count IV must also fail. See Pl’s Mem., p. 14.

29. The Court recognizes the well-settled law that a “civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who also shared a common plan for its

commission with the actual perpetrator(s)." *Dunn v. Rockwell*, 689 S.E.2d 255 (2009). Since the Court has already found that Counts I, II, and III should not be dismissed at this juncture, Plaintiff's argument for dismissal of Count IV must likewise be denied at this time. However, as the Court found above that the instant motion to dismiss shall not be granted as to Counts, I, II and III, Plaintiff's argument must fail. The Court concludes the motion to dismiss will not be granted as to Count IV on this basis.

30. Accordingly, the Court finds and concludes that the instant motion to dismiss shall be **DENIED** as to Count IV.

Count V: Joint Venture

31. Next, Plaintiff claims that Count V of the Amended Counterclaim must be dismissed because it depends on Counts I, II, and III, and because Plaintiff contends Counts I, II, and III fail, the claim for joint venture contained in Count V must also fail. *See* Pl's Mem., p. 14.

32. Since the Court has already found that Counts I, II, and III should not be dismissed at this juncture, Plaintiff's argument for dismissal of Count V must likewise be denied at this time. The Court concludes the motion to dismiss will not be granted as to Count V on this basis.

33. The Court also notes a review of the allegations contained in Count V of the First Amended Counterclaim and Third-Party Complaint reveals these allegations are more than sufficient to state a claim for joint venture under West Virginia's liberal pleading standards. For these reasons, the Court finds the instant motion to dismiss shall be **DENIED** as to Count V.

Count VI: Unjust Enrichment

34. Next, Plaintiff claims that Count VI of the Amended Counterclaim must be dismissed because it depends on Counts I, II, and III, and because Plaintiff contends Counts I, II, and III fail, the claim for unjust enrichment contained in Count VI must also fail. *See* Pl's Mem., p. 14.

35. Since the Court has already found that Counts I, II, and III should not be dismissed at this juncture, Plaintiff's argument for dismissal of Count VI must likewise be denied at this time. The Court concludes the motion to dismiss will not be granted as to Count VI on this basis.

36. Further, Plaintiff argues "MedTest has also failed to plead that Highmark WV has been unjustly enriched by testing services that were performed for individuals outside of Highmark WV's services area". See Pl's Mem., p. 14.

37. The Court also notes a review of the allegations contained in Count VI of the First Amended Counterclaim and Third-Party Complaint reveals these allegations are more than sufficient to state a claim for joint venture under West Virginia's liberal pleading standards.

38. Given the foregoing, the Court concludes that MedTest has met its burden under the liberal pleading standards of pleading all the elements of Count VI. Accordingly, the Court finds dismissal would be inappropriate at this stage in the proceedings. For this reason, the instant motion to dismiss is **DENIED** as to Count VI.

Damages

39. Finally, Plaintiff contends that MedTest has not sufficiently pled damages. See Pl's Mem., p. 12. Specifically, Plaintiff contends that the assertion of "millions of dollars in damages" in the Amended Counterclaim is too vague. *Id.* at 14; *see also* Am. Counterclaim, ¶115. Further, Plaintiff contends the damages claim is "impermissibly vague insofar as MedTest has not alleged when it or the other labs performed the services, whether and when it submitted claims to Highmark WV, and whether or when it attempted to seek reimbursement from the other Blue Cross Blue Shield plans as it was instructed to do". *Id.* at 14.

40. The Court finds *ad damnum* clauses are not mandatory in complaints/counterclaims. The Court considers that "the purpose of the...the amount sued for, as contained in the complaint, is

merely to inform the defendant of the amount of damages demanded and is not considered proof of any injury or of liability. *Jenkins v. Montgomery*, 69 W.Va. 795, 72 S.E. 1087; *Natale v. Great Atlantic & Pacific Tea Co.*, 8 A.D.2d 781, 186 N.Y.S.2d 795.” *Ferguson v. R.E. Ball & Co.*, 153 W.Va. 882, 887, 173 S.E.2d 83, 86 (1970) *cited by Jones v. Sanger*, 217 W. Va. 564, 570, 618 S.E.2d 573, 579 (2005).

41. Here, the Court finds MedTest has been placed on notice Plaintiff is seeking a substantial amount of damages, in the millions, as a result of the alleged payments for lab testing services. Further factual development will flesh out evidence related to the factors that Plaintiff pointed to, such as when “it or the other labs performed the services, whether and when it submitted claims to Highmark WV, and whether or when it attempted to seek reimbursement from the other Blue Cross Blue Shield plans as it was instructed to do”. *See* Pl’s Mem., p. 14.

42. Further, the Court has found above that the claims are sufficiently pled, and a review of the claims clearly shows that the allegations contained in the Amended Counterclaim are adequate to support a claim for damages under our law. *See J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W. Va. 77, 83, 785 S.E.2d 627, 633 (2016)(Allegations set forth in a contractor’s amended complaint against a sanitary board were adequate to support a claim for damages). Accordingly, the instant motion must be **DENIED** as to its argument regarding damages.

43. The Court finds and concludes that the First Amended Counterclaim and Third-Party Complaint is pled sufficiently and that MedTest has met its burden of stating viable claims for relief under relevant West Virginia rules and law.

CONCLUSION

Based upon the above set forth Findings of Fact and Conclusions of Law, the Court finds that MedTest's claims set forth in the First Amended Counterclaim and Third-Party Complaint **SHALL NOT** be dismissed; therefore, Plaintiff's Motion to Dismiss Amended Counterclaim **SHALL** be **DENIED**.

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff's Motion to Dismiss Amended Counterclaim is hereby **DENIED**.

The Court further **DIRECTS** the parties to proceed with discovery.

The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 27th day of March 2020.



Shawn D. Nines
Business Court Division