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GVC LTD., Plaintiff, v. VALLEY NATIONAL BANK, Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-2459-22** Civil Action **OPINION**

Argued: **August 26, 2022**
Decided: **August 29, 2022**

HONORABLE ROBERT C. WILSON, J.S.C.

Kaitlyn Grajek, Esq. appearing on behalf of Plaintiff GVC LTD. (from Freeman Mathis & Gary, LLP)

James Forte, Esq. appearing on behalf of Defendant Valley National Bank (from Saiber LLC)

PROCEDURAL HISTORY

GVC Ltd. ("GVC") is a busing company with principal place of business in Bronx, New York. Valley National Bank ("Valley") is a bank with locations throughout New Jersey and is authorized to and regularly conducts business in Bergen County, New Jersey.

On February 26, 2021, Valley filed a Complaint commencing an action in the Superior Court of New Jersey, Law Division, Passaic County, Docket. No. PAS-L-711-21 ("Passaic Action"), against GVC to recover approximately $600,000.00 from GVC's default under several unrelated agreements, i.e., four finance agreements under which Valley funded insurance premiums on GVC's behalf. While the Passaic Action was pending, in October 2021, Valley was required to make payment on behalf of GVC in connection with a completely different transaction, i.e., a commercial letter of credit that Valley issued at GVC's request in favor of Everest Insurance Company which presented a draft for payment thereunder. After Valley made payment, it sought reimbursement from GVC pursuant to a Standby Letter of Credit Reimbursement Agreement. GVC did not honor its obligations.

As Valley did not wish to complicate the Passaic Action, which the Court had recognized as a collection action, with its claim relating to the Letter of Credit, on November 1, 2021, Valley filed a motion in the Passaic Action to request the Court's guidance whether they should assert its new claim in a new action in the State of New York, the jurisdiction whose law governed the Letter of Credit, or file it in the Passaic Action.

Although the motion was returnable on December 17, 2021, the Court did not schedule oral argument on the motion until May 6, 2022. On March 10, 2022, GVC filed a motion in the Passaic Action for leave to assert the exact same Letter of Credit related claims that are the subject of its Complaint in this action as counterclaims in the Passaic Action. Valley opposed the motion. The Court scheduled oral argument for GVC's motion to amend its Answer to assert its Letter of Credit related counterclaims on May 6, 2022, the same date on which the Court scheduled oral argument on Valley's motion for leave to file its claim against GVC for breach of the Reimbursement Agreement in a separate action.

Two days before the oral arguments on these motions, on May 4, 2022, GVC withdrew its motion to amend its Answer to assert its Letter of Credit claims as counterclaims in the Passaic Action and commenced this action in Bergen County ("Bergen Action") asserting those same claims. On May 6, 2022, the Honorable Thomas F. Brogan, P.J. Cv. (Passaic) heard oral arguments on Valley's motion for leave to file its breach of the Reimbursement Agreement in a separate action. In the Court's Order filed May 6, 2022, Judge Brogan granted Valley's motion authorizing the filing of Valley's breach of the Reimbursement Agreement claim in a separate action and ordered that "the filing of plaintiff Valley National Bank of an unrelated constituent claim against GVC arising from GVC's default on an Individual Standby Letter of Credit Reimbursement Agreement dated as November 5, 2018, in a separate action shall not violate New Jersey's entire

controversy doctrine." Valley now moves to dismiss the Complaint in the Bergen Action for failure to state a claim.

FACTUAL BACKGROUND

GVC offers bussing services to preschool and elementary-aged children and specializes in transporting children with special needs. Specifically, GVC transports approximately six thousand ambulatory and non-ambulatory special needs children per day in and around Bronx, New York. Acting as part of the New York City Board of Education, GVC plays a vital role in ensuring that these children can attend school, intervention services, necessary therapies, and important extracurricular activities. In connection with its business, GVC employs bus drivers, bus monitors, dispatchers, and administrative professionals. Additionally, GVC maintains varying types of insurance coverage in connection with its business.

On or around November 5, 2018, GVC entered into an agreement with Valley in connection with a certain Letter of Credit. The Letter of Credit guaranteed GVC's workers compensation policy ("Policy") with Everest Insurance Company ("Everest"). GVC relied upon the Letter of Credit as collateral in connection with payments relating to the Policy. The Letter of Credit remained in effect until November 14, 2021. Additionally, from July 2019 to September 2019, GVC obtained insurance premium financing with Agile Premium Finance ("Agile") pursuant to four premium finance agreements ("PFAs"). However, GVC was unaware that a link existed when it obtained the foregoing financing with Agile and Letters of Credit with Valley.

In March 2020, GVC's business operations were impacted by the Covid-19 pandemic. Specifically, on March 16, 2020, both New York Mayor Bill de Blasio and New York Governor Andrew Cuomo ordered that New York City Public Schools close. Then on March 22, 2020, Governor Cuomo ordered that all non-essential business statewide close. As a result, GVC's buses were grounded and it was forced to cease most of its operations and lay off, or furlough, many of

its employees. Based on GVC's distressed financial position due to the pandemic and related government orders, GVC began to evaluate options that might relieve its financial burdens. During this time GVC apprised Agile that their business was impacted and was suffering financial hardship.

In February 2021, Valley advised GVC of its defaults under the four PFAs. In October 2021, Valley requested payment under the Reimbursement Agreement. GVC has failed to honor the demand. In response, GVC filed a Complaint against Valley alleging: Count I Violation of the Consumer Fraud Act, Count II Breach of Contract, Count III Breach of the Implied Covenant of Good Faith and Fair Dealing, Count IV Fraud and Intentional Misrepresentation, Count V Civil Conspiracy to Commit Fraud, Count VI Tortious Interference, and Count VII Violation of N.J.S.A. 12A:5-101 to -118.

For the reasons set forth below, GVC's Motion for Leave to Amend is **DENIED** and the Complaint is **DISMISSED** without prejudice**.**

MOTION TO AMEND PLEADINGS STANDARD

New Jersey Rules of Court provide that "[a] party may amend any pleading . . . by leave of court which shall be freely given in the interest of justice." R. 4:9-1. While motions for leave to amend pleadings are to be liberally granted, they are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made. Kernan v. One Washington Park Urban Renewal Associates, 154 N.J. 437, 457 (1998) (citing Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). "If a claim does not arise until after a complaint has been filed, leave to amend to add that claim should be granted as of course so long as the moving party has exercised due diligence and the amendment will not

cause the trial to be unduly delayed or complicated." State v. Standard Tank, 284 N.J. Super. 381, 396 (App. Div. 1995).

A motion to amend is properly denied where allowing the amendment would unduly protract the litigation. Pressler, Current N.J. Court Rules, comment 2.2.1 on R. 4:9-1 (2015). Although any asserted prejudice must amount to more than mere inconvenience, if "the proposed amendments requires the reopening of discovery, the prejudice to the non-moving party will be considered greater than if the proposed amendment presents only a new issue of law." Violas v. General Motors Corp., 173 F.R.D. 389, 396 (D.N.J. 1997) (citing Harrison Beverage Co. v. Dribeck Importers, Inc., 133 F.R.D. 463, 469 (D.N.J. 1990)).

While motions to amend are typically afforded liberal treatment, such motions are subject to the court's discretion, especially when the motion is to add new claims or new parties late in the litigation. Verni ex. rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 195 (App. Div. 2006). Furthermore, a denial of a motion to amend a pleading is sustainable when made on the eve of trial. In re Nov. 2, 2010 Gen. Election, 423 N.J. Super. 190, 209 (App. Div. 2011). This is especially true if the motion seeks to add new parties. Morales v. Academy of Aquatic Sc., 302 N.J. Super. 50, 56 (App. Div. 1997); see also, Globe Motor Car Co. v. First Aid, 291 N.J. Super. 428 (App. Div. 1996). Factors to be considered include "the reason for the late filing" and "whether the newly-asserted claim would unduly prejudice the opposing party, survive a motion to dismiss on the merits, cause undue delay of the trial, or constitute an effort to avoid another applicable rule of law." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484-85 (App. Div. 2012). The rationale for this freedom to deny amendments is the preservation of judicial economy and efficiency. Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

Count I Violation of the Consumer Fraud Act

Section 8(F)(1) of the Reimbursement Agreement states "[t]his Agreement, and the Bank's liability to [GVC] for action or omission under or in connection with this Agreement or any Letter of Credit, shall be governed by the law, including particularly UCC Article 5, in effect in the State to which the Letter of Credit will be subject." The Letter of Credit is governed by New York law, and thus the Reimbursement Agreement is governed by New York law as well. Because New York law applies to any action or inaction by Valley in connection with the PFAs, Reimbursement Agreement or any Letter of Credit, the New Jersey Consumer Fraud Act and New Jersey common law governing GVC's fraud claims do not apply. Courts applying New Jersey law have held that "[a]ny claim arising under the New Jersey Consumer Fraud Act must be dismissed where the case is governed by the law of another state." Knispel v. Gallery 63 Antiques, 2015 N.J. Super. Unpub. LEXIS 1485, at *21 (Law Div. Hun. 19, 2015).

Even if this Court did not rely upon the choice of law selected by the parties, New York law still applies under a choice of law analysis. Application of Section 148(2) of the Restatement (Second) Conflicts of Law makes clear that New York law applies to GVC's New Jersey Consumer Fraud Act claim. GVC is located and conducts business in New York. GVC's place of business is in New York, and it is a New York domestic business corporation. The policies provided insurance coverage for GVC in connection with its business in New York and if Valley made any misrepresentations to GVC, GVC acted upon them and received them in New York. Given that the overwhelming majority of the factors set forth in Section 148(2) of the Restatement (Second) of Conflicts of Law justify application of New York law to the fraud claims, New York law applies to those claims. Therefore, Count I of the Complaint is DISMISSED.

Even applying New Jersey law, Count I will be dismissed. The elements of a claim under the New Jersey Consumer Fraud Act are "(1) unlawful conduct by defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful

conduct and the plaintiff's ascertainable loss." N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003). Moreover, Rule 4:5-8(a) requires that any pleading alleging fraud set forth the "particulars of the wrong, with dates and items if necessary . . . insofar as practicable." "Because a claim under the CFA is essentially a fraud claim, the rule requires that such claims be pled with specificity to the extent practicable." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009).

GVC makes broad allegations regarding alleged unconscionable commercial practices. GVC does not identify the alleged wrongful acts and omissions that Valley allegedly committed, who, on behalf of Valley, committed them, when they were committed or how they were committed.

GVC has also not pled an "ascertainable loss" arising from any wrongful acts by Valley. The PFAs on which Valley did not receive repayment of sums advanced for GVC's insurance premium are the subject of the Complaint in the Passaic Action. The Reimbursement Agreement on which Valley did not receive repayment is the subject of this Action. Valley sustained losses on both transactions due to the non-payments. GVC has not sustained any loss, ascertainable or otherwise, on these transactions, and has not pled any specific loss.

Furthermore, GVC has not pled any "causal connection" between GVC's allegations of wrongful conduct and their purported ascertainable loss. According to GVC Agile did not disclose its relationship with Valley, although it is stated throughout the documents. However, the Letter of Credit was issued months before Valley purportedly withheld from GVC its relationship with Agile. Therefore, the non-disclosure cannot be a causal connection to GVC's alleged loss under the Letter of Credit. Therefore, Count I of GVC's Complaint is DISMISSED.

Counts II and III Breach of Contract and Implied Covenant of Good Faith and fair Dealing

As previously discussed, the Reimbursement Agreement is governed by New York law. Under New York law, "[t]he essential elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach.'" Canzona v. Atanasio, 989 N.Y.S.2d 44, 47 (2d Dep't 2014) (quoting Dee v. Rakower, 976 N.Y.S.2d 470 474 (2d Dep't 2013)). "in order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached." Barker v. Time Warner Cable, Inc., 923 N.Y.S.2d 118 (2d Dep't 2011).

GVC has not identified any provision of the Reimbursement Agreement that Valley breached. Therefore, GVC's contention that Valley's payment under the Letter of Credit constitutes a breach of the Reimbursement Agreement, is without merit. Valley has established, they were required to make the payment under the Letter of Credit. Thus, GVC's proposed breach of contract claim does not state a viable claim for relief.

Nor does GVC's claim for breach of the implied covenant of good faith and fair dealing state a claim upon which relief can be granted. Because the Reimbursement Agreement is governed by New York law, GVC's breach of the implied covenant of good faith and fair dealing claim is also governed by New York law. See Deloitte (Cayman) Corporate Recovery Servs., LTD. v. Sandalwood Debt Fund A, LP, 929 N.Y.S.2d 199 (Sup. Ct., N.Y. Cty. 2011).

Under New York law, "[w]hen the same alleged conduct forms the basis for a claim alleging a breach of contract and for a claim alleging a breach of the implied covenant of good faith and fair dealing, the latter claim will normally be dismissed as duplicative of the former claim." Current Med. Directions, LLC v. Salomone, 2011 N.Y. Misc. LEXIS 7060, at *6 (Sup. Ct., N.Y. Cty. April 13, 2011). Additionally, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained where the damages alleged by such a breach are

'intrinsically tied to the damages resulting from the breach of a contract.'" Id. at *6-7 (quoting Canstar v. J.A. Jones Const. Co., 622 N.Y.S.2d 730, 731 (1st Dep't 1995)).

In Counts II and III, GVC relies upon the same allege wrongful conduct on the part of Valley, namely Valley's payment of Wells Fargo, which paid Everest's sight draft that complied with the terms of the Letter of Credit. Because the same conduct underpins both claims, and both claims seek the same damages, Count III for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim of Count II, and are DISMISSED.

Count IV Fraud and Intentional Misrepresentation

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by plaintiff and damages." Eurycleai Partners, LP v. Seward & Kissel, LLP, 883 N.Y.S.2d 147, 150 (2009). As previously discussed, Rule 4:5-8 requires GVC to plead with respect to its fraud claim the "particulars of the wrong, with the dates and items if necessary," insofar as practicable.

GVC's conclusory allegations in Count IV do not meet the Rule 4:5-8 heightened pleading standard. GVC has not identified the particulars of the wrong or the dates on which they occurred. Although GVC generally alleges Valley knowingly and intentionally misrepresented that they would honor the terms of the Agreement, GVC does not allege what misrepresentations were made, by whom, to whom, when they were made, and regarding which terms. GVC also does not plead specific facts that, if proven, would show that Valley's representations were false. See Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105 (App. Div. 2009) ("Plaintiff failed to plead specific facts that, if proven, would show that defendants' representations were false.") Therefore, Count IV of the Complaint is DISMISSED.

Count V Conspiracy

New Jersey Courts have recognized that "allegations of fraud and conspiracy to commit fraud must be pled with particularity." Mavroudis v. Ge, 2020 N.J. Super. Unpub. LEXIS 2139, at *20 (Law. Div. Jun. 18, 2020). "There is no separate action for damages from the conspiracy itself, only the underlying acts; a plaintiff must show some act was committed that would be actionable even without the conspiracy." Id. at *25. Further, GVC's proposed conspiracy does not contain any specificity concerning this alleged agreement between Valley and Agile. This lacking mandates a dismissal. Kronfeld v. First Jersey Nat'l Bank, 638 F.Supp. 1454, 1468 (D.N.J. 1986).

Additionally, Valley cannot conspire with one of its divisions, here Agile. A civil conspiracy requires two or more persons action in concert to commit an unlawful act or a lawful act by unlawful means. LoBiondo v. Schwartz, 199 N.J. 62, 102 (2009). However, "a corporation which acts through authorized agents and employees . . . cannot conspire with itself." Tynan v. Gen. Motors Corp., 248 N.J. Super. 654, 668 (App. Div. 1991). "A corporation and its employees are not separate persons for the purpose of civil conspiracy, and a conspiracy cannot exist in the absence of two or more persons acting in concert." Nat'l Auto Div., LLC v. Collector's Alliance, Inc., 2017 N.J. Super. Unpub. LEXIS 234, at *13 (App. Div. Jan. 21, 2017). Agile, a division of Valley, is not a jural entity. Therefore, it cannot conspire with Valley. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-01 (1984). Therefore, GVC's conspiracy claim is DISMISSED.

Count VI Tortious Interference with Contract

The elements of a claim of tortious interference with contract are: (1) a prospective economic or contractual relationship; (2) intentional and malicious interference with the contract or relationship; and (3) resulting damages caused by the interference. See Printing Mart, 116 N.J. at 751-52. Although GVC declares that Valley has tortiously interfered with GVC's contractual relationship with Everest, GVC does not specify what actions Valley allegedly took that

constituted malicious interference. There is no factual allegation that Valley induced or otherwise caused Everest not to perform the contract. There is also no allegation that GVC has not received the benefits of the workers' compensation policy that Everest issued in favor of GVC.

GVC also has not alleged other necessary elements of a tortious interference claim. GVC has not alleged that Valley had "actual knowledge" of the contract with which it allegedly interfered, which is an essential element of a tortious interference claim. Mylan Inc. v. Smithkline Beecham Corp., 723 F.3d 413, 422 (3d Cir. 2013). Nor does GVC allege the necessary element that Valley acted with malice, i.e., Valley inflicted harm upon GVC without justification or excuse. See Printing Mart, 116 N.J. at 751. GVC cannot allege malice as Valley acted in accordance with its obligations under the Letter of Credit and the New York version of Article 5 of the UCC when Valley made the payment. Therefore, GVC's tortious interference claims are DISMISSED.

Count VII Violation of N.J.S.A. 12A:5-101 to -118 and the Motion to Amend

Count VII refers to Article 5 of the New Jersey version of the UCC and forces Valley to infer what section of Article 5 Valley allegedly violated. To the extent GVC contends that Valley's payment of the Letter of Credit was improper, it is incorrect as a matter of law.

Further, GVC's reliance upon the New Jersey version of Article 5 of the UCC is misplaced. The Letter of Credit states that it is governed by New York law. Thus, N.J.S.A. 12A:5-101 to 12A:5-118 do not apply. Therefore, Count VII of the Complaint is DISMISSED.

GVC also seeks to amend its Complaint to assert a claim under Section 5-114 of the New York UCC. This statute is entitled "Assignment of Proceeds." It addresses the assignability of a beneficiary's rights under a letter of credit. Because this statute does not set forth when an issuer can refuse to honor a draft, which is the reason GVC claims to have cited it, it does not form the basis of a claim against Valley. Therefore, GVC's cross-motion to file an amended complaint is DENIED.

CONCLUSION

For the aforementioned reasons, GVC's Motion for Leave to Amend Complaint is **DENIED** and the Complaint is hereby **DISMISSED** without prejudice**.**