STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: February 14, 2014]

THE RHODE ISLAND INDUSTRIAL-RECREATIONAL BUILDING AUTHORITY,	:	
Plaintiff,	:	
v.	:	**C.A. No. PB 13-2069**
CAPCO ENDURANCE, LLC, CAPCO STEEL, LLC, MICHAEL J. CAPARCO, SR.; PATRICIA G. CAPARCO, MICHAEL J. HULLINGER, JOHN MCDONOUGH, FEELEY & DRISCOLL, P.C.; and JOHN/JANE DOES 1-6,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. The Rhode Island Industrial-Recreational Building Authority (RIIRBA) has filed a complaint (Complaint) seeking damages as a result of alleged fraud and negligence committed by Capco Endurance, LLC (Capco Endurance), Capco Steel, LLC (Capco Steel), Michael J. Caparco, Sr. (Caparco, Sr.), Patricia G. Caparco (Patricia Caparco), Michael J. Hullinger (Hullinger), John McDonough (McDonough), Feeley & Driscoll, P.C. (F&D), and John/Jane Does 1-6 (Does 1-6).[1] In its Complaint, RIIRBA claims it was induced to enter into an insurance commitment that obligated RIIRBA to make up to $5,000,000 of loan repayments to Webster Bank, N.A. (Webster) if the Capco Defendants were not able to make the payments. Defendants have moved to dismiss the claims asserted by RIIRBA.[2]

[1] Capco Endurance and Capco Steel will be referred to collectively as the "Capco Defendants."

[2] One motion was submitted by the Capco Defendants, Caparco, Sr., and Patricia Caparco; another by Hullinger and McDonough; and the last submitted by F&D. As the F&D motion

I

Facts and Travel

Capco Steel is a Rhode Island limited liability company that was founded in 1990 by Caparco, Sr. and Patricia Caparco. Capco Endurance is also a Rhode Island limited liability company and is the holding company of Capco Steel. Throughout its history, the Capco Defendants have been engaged in the business of steel fabrication and erection. Caparco, Sr., Patricia Caparco, Hullinger, and McDonough were at all times relevant hereto either officers and/or managers of the Capco Defendants.

In early 2010, Webster solicited the Capco Defendants to transfer its then existing Bank of America revolving line of credit financing. Included in the proposal from Webster was a $20,000,000 Revolving Line of Credit and $6,000,000 of bond financing from the Rhode Island Industrial Facilities Corporation (RIIFC).[3] The transaction was structured so that Webster purchased the bonds and RIIRBA insured the principal and interest payments to be made to Webster up to $5,000,000. In connection with the RIIRBA guarantee,[4] RIIRBA was supplied with various documents from the Capco Defendants, including the Capco Defendants' financial statements for 2006 through 2008; the Capco Defendants' interim financial statements through November 30, 2009; the Capco Defendants' financial projections for December 2009, as well as

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incorporates the other two motions by reference, and the Hullinger and McDonough motion incorporates the Capco Defendants et al. motion by reference, the Court will treat the analysis of the three motions without distinction, but will later address the specific counts asserted by RIIRBA. For this reason, the parties may be grouped together and referred to as "Defendants."

[3] The RIIFC is a subsidiary of the former Rhode Island Economic Development Corporation, now renamed the Rhode Island Commerce Corporation.

[4] While the parties refer to the obligation by RIIRBA as a "guarantee," the obligations of RIIRBA to make payments to Webster flow from the Mortgage Insurance Agreement as insurer, rather than as a guarantor.

2010 through 2012; and financial results spreadsheets from 2000 through 2009, with projections through 2012.

As part of the closing of the transaction, Caparco, Sr. (as Chief Executive Officer of the Capco Defendants) was required to submit a written certification that "there has been no material adverse change in [the Capco Defendants'] financial condition since December 31, 2009." Caparco, Sr. executed such a certificate on June 15, 2010. After the submission of the certificate, the RIIRBA-backed bond transaction between RIIFC and Webster was closed and completed, which included a Mortgage Insurance Agreement executed among RIIFC, Webster, and RIIRBA. In the Mortgage Insurance Agreement, the arrangement is described as follows: "the Issuer [RIIFC] and Holder [Webster] have requested that Authority [RIIRBA] insure the payments required to be made by Issuer to Holder under the Mortgage and the Security Agreement and the Lease." The Mortgage Insurance Agreement was signed by the three parties to the agreement, and was also "Approved and Acknowledged" by Caparco, Sr. as Chief Executive Officer of the Capco Defendants.

As part of the closing on the bond transaction, the Capco Defendants, Webster, and RIIRBA executed various agreements that gave RIIRBA collateral in the assets and receivables of the Capco Defendants as security for its obligations under the insuring agreement. Additionally, an Intercreditor Agreement was entered into between RIIRBA and Webster that set forth the priorities between them in the collateral. In August 2011, the Capco Defendants requested that RIIRBA consent to an increase in the Revolving Line of Credit issued by Webster. RIIRBA did not object to the increase, and on September, 20, 2011, RIIRBA amended the Intercreditor Agreement with Webster. The amended terms regarded the priorities in the Capco Defendants' assets (including receivables) as between RIIRBA and Webster. The amendment

essentially reduced RIIRBA's secured position in certain collateral by approximately $9,000,000. (Compl. ¶ 46.)

In March 2012, RIIRBA's payment obligations under the bond transaction and Mortgage Insurance Agreement were triggered due to the Capco Defendants' default. RIIRBA commenced making payments and continues to make payments to Webster. Neither RIIFC nor Webster has brought any claims against Defendants related to the bond transaction. Defendants bring their motions to dismiss RIIRBA's Complaint pursuant to Super. R. Civ. P. 12(b)(6) and 12(c).

II

Standard of Review

Rule 12(c) motions for entry of judgment on the pleadings are tantamount to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. See Collins v. Fairways Condominiums Ass'n, 592 A.2d 147 (R.I. 1991).[5] "The sole function of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)) (internal quotations omitted). In determining whether to grant a Rule 12(b)(6) motion to dismiss, this Court '"assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs.'" Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quoting Martin v. Howard, 784 A.2d 291, 297-98 (R.I. 2001)).

[5] Rule 12(c) motions are typically granted only when "a trial would be of no use in determining the merits of the plaintiff's claims." See Przygoda v. Clifford J. Deck, CPA, Inc., No. PB 09-1336, 2010 WL 1956239 (R.I. Super. Ct. May 12, 2010) (citing Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992)).

Typically, a pleading must give fair and adequate notice of the plaintiff's claim, but does not need to contain a "high degree of factual specificity." Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 824 (R.I. 2005). However, with respect to complaints sounding in fraud, Super. R. Civ. P. 9(b) requires that allegations of fraud must be stated with particularity. Whether a complaint is sufficiently particular "depends upon the nature of the case and should always be determined in the light of the [rule's purpose]." Robert B. Kent et al., Rhode Island Civil and Appellate Procedure §9:2. Specifically, the complaint must provide enough detail to "give fair notice to the adverse party and to enable him to prepare his responsive pleading." Id.

"[A] motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) should be granted only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim." Siena, M.D. et al. v. Microsoft Corporation, 796 A.2d 461, 463 (R.I. 2002) (citing Bruno v. Criterion Holdings, Inc., 736 A.2d 99, 99 (R.I. 1999)). The Rhode Island Supreme Court continues to follow this traditional notice pleading standard, while not adopting (or rejecting) the newer federal standard on a motion to dismiss as set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Recently, our Supreme Court announced that "it is clear that the new Federal standard cannot be blended with the traditional Rhode Island standard." William Chhun et al. v. Mortgage Electronic Registration Systems, Inc., et al., No. 2012-298-A., slip op. at 4 n.5 (R.I., filed Feb. 3, 2014). Nonetheless, the Court declined to address the "Twombly and Iqbal conundrum" as it was not determinative of the outcome. Id. at 5. Thus, this Court will apply the traditional Rhode Island standard.

III

Analysis

A

Counts Subject to Super. R. Civ. P. 9(b)

Defendants argue that Counts II,[6] III,[7] and IV[8] should be dismissed because Plaintiff has failed to state a claim of fraud with the particularity necessary pursuant to Super. R. Civ. P. 9(b). Defendants assert that factual allegations contained in the Complaint lack specificity with regard to particularized statements by Defendants, and lack specificity with respect to reasonable reliance by Plaintiffs. Conversely, Plaintiff maintains that the Complaint fully complies with the particularity requirement of Super. R. Civ. P. 9(b).[9]

One reason for the particularity requirement in a fraud complaint is to provide enough detail in order that the adverse party is able to prepare a responsive pleading. See Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001). In essence, Rule 9(b) has been interpreted as requiring "specification of the time, place, and content of an alleged false

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[6] Count II alleges Fraudulent Inducement against the Capco Defendants, Caparco Sr., Patricia Caparco, Hullinger, McDonough and Does 1-6.

[7] Count III alleges Deceit or Fraudulent Representation against the Capco Defendants, Caparco, Sr., Patricia Caparco, Hullinger, McDonough, and Does 1-6.

[8] Count IV alleges Negligent Misrepresentation against the Capco Defendants, Caparco, Sr., Patricia Caparco, Hullinger, McDonough, and Does 1-6. While negligent misrepresentation is not specifically included within the language of Super. R. Civ. P. 9(b), the First Circuit has found that negligent misrepresentation falls within the ambit of Rule 9(b). See N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 15 (1st Cir. 2009) ("[O]ne might think that negligent misrepresentation and fiduciary duty were not on their face subject to Rule 9(b), but the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud.").

[9] Rule 9(b) provides that "[i]n all averments of fraud and mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Due to the substantial similarity between Super. R. Civ. P. 9(b) and Fed. R. Civ. P. 9(b), the Court may look to interpretations of the Federal Rules for guidance. See Greensleeves, Inc. v. Smiley, 942 A.2d 284, 289-90 (R.I. 2007); Crowe Countryside Realty Assocs., Co., LLC v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006).

representation." McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980); Lares Group, II v. Tobin, 47 F. Supp. 2d 223, 232 n.4 (D.R.I. 1999); see also Rhode Island Res. Recovery Corp. v. Brien, No. PB 10-5194, 2011 WL 1936012 (R.I. Super. Ct. May 13, 2011) (noting lack of Rhode Island Supreme Court opinions regarding degree of particularity required, while referencing the First Circuit's requirements for particularity). Additionally, the First Circuit has stated that fraud claims are to "specify the who, what, where, and when of the allegedly false or fraudulent representation." Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004).

Here, Plaintiff has failed to properly set forth detailed allegations in the Complaint so that Defendants each are able to prepare a responsive pleading. Instead, Plaintiff's Complaint is replete with wholly insufficient statements to satisfy Super. R. Civ. P. 9(b). For example, Compl. ¶ 15 states: "Capco, by and through its officers and managers, including but not limited to Michael Caparco, Patricia Caparco, Michael Hullinger and John McDonough furnished [RI]IRBA, RIIFC, and Webster with documents purporting to accurately represent Capco's financial condition . . . ." This allegation fails to specifically set forth the details of who, what, where, and when regarding the "furnishing" of these documents. See Suna v. Bailey Corp., 107 F.3d 64, 68 (1st Cir. 1997) ("[A] complaint making such allegations must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'") (citing Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127-28 (2d Cir. 1994)).

Likewise, the allegations contained in Compl. ¶¶ 15, 17, 18, 23, and 24 inappropriately lump the Defendants together without differentiating the allegations made against them, so as to define each individual's alleged participation in the fraud. Such statements are phrased as

"Capco, by and through its officers and managers, including but not limited to [Caparco, Sr., Patricia Caparco, Hullinger, and McDonough] furnished . . . documents";[10] "Capco, by and through its officers and managers, including but not limited to, [Caparco, Sr.], represented to [RIIRBA] and others that the reported 2009 figures were accurate";[11] and "[a]t all material times, Capco and its officers and managers, including, but not limited to, [Caparco, Sr., Patricia Caparco, Hullinger, and McDonough] provided . . . information . . . to induce [RIIRBA, RIIFC, and Webster] to issue bonds, loan guarantees, and to enter into the financing transaction."[12] These blanket allegations against all Defendants are not sufficient to inform each defendant of his, hers, or its participation to craft an appropriate responsive pleading. See Western Reserve Life Assurance Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 343 (D.R.I. 2012) ("Where multiple defendants are involved, each person's role in the alleged fraud must be particularized in order to satisfy Rule 9(b)."); Gossen v. JP Morgan Chase Bank, 819 F. Supp. 2d 1162, 1170-71 (W.D. Wash. 2011) ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.").

Additionally, the Complaint wholly fails to identify the alleged fraudulent information with particularity. Rather, Plaintiff states "financial and other information [was provided] to [RIIRBA], RIIFC, and Webster to induce them[.]" Compl. ¶ 24. Within the Complaint, Plaintiff identified various documents such as financial statements, financial projections, and spreadsheets which were provided to RIIRBA, RIIFC, and Webster. However, there are never any allegations specifically made about which of these documents is the basis of the fraudulent information. In

[10] Compl. ¶ 15.
[11] Compl. ¶ 17.
[12] Compl. ¶ 23.

Haft v. Eastland Fin. Corp., 755 F. Supp. 1123, 1129 (D.R.I. 1991), the plaintiff incorporated in his class action complaint numerous reports and charts provided by the defendant that the plaintiff asserted misrepresented the defendant's financial position. The District Court found that the incorporation of these charts was not sufficient to identify with particularity the basis of the alleged fraud. The Court stated:

> "Plaintiff has zealously provided the defendant with page after page of statements and charts; how is the defendant to determine what parts of these statements are alleged to be misrepresentations? The plaintiff has not provided the defendant with any focus. When plaintiff contends that "the [defendant] has not throughout the class period taken all adjustments which were necessary for a fair presentation of the consolidated financial statements," how should the defendant begin to answer this charge? Which figures, in the numerous charts reproduced in the complaint, does plaintiff contend are misrepresentations? While plaintiff certainly has no obligation to present the evidence that will prove his case at this point in the litigation, he must give the defendant some hints with regard to the fraud which is alleged. Defendant needs more than mere speculations to respond." Haft, 755 F. Supp. at 1129.

Rather, Plaintiff alleges that "[Defendants] knew that said information was inaccurate and/or false and knew [RIIRBA], RIIFC, and Webster would rely on that financial and other information in determining whether to issue bonds, loan guarantees, and to enter into the financing transactions." Compl. ¶ 24. This broad allegation, however, does nothing to adequately identify which financial and other information was inaccurate or false that Plaintiff relied upon to enter into the transaction. See Przygoda v. Clifford J. Deck, CPA, Inc., No. PB 09-1336, 2010 WL 1956239 (R.I. Super. Ct. May 12, 2010) ("[W]hen a fraud count is conclusory and lacking in specifics, it is too vague to meet the Rule 9(b) standard."); see also Haft, 755 F. Supp. at 1128-29. Given the lack of particularity in the Complaint, the Court finds

that the Complaint fails to meet the specificity requirement in Super. R. Civ. P. 9(b), and Counts II, III, and IV are accordingly dismissed.[13]

B

Breach of Agreement

Plaintiff alleges in its Complaint that "Capco's defaults as set forth above have damaged [RIIRBA]." Compl. Count I ¶ 2. Defendants respond that Plaintiff set forth no allegations that an agreement between RIIRBA and Defendants was breached. The Capco Defendants recognize that they approved and acknowledged the Mortgage Insurance Agreement and consented to the Intercreditor Agreement. However, Defendants allege that these agreements were between RIIRBA, Webster, and RIIFC. Defendants assert that as they owed no obligations under these agreements, Defendants could not have breached any agreement to which they were not a party.

Plaintiff counters that Defendants' arguments are "unavailing" for only referencing two of many agreements that were entered into throughout the course of finalizing the transaction. Additionally, Plaintiff asserts that Defendants owed, at the very least, a duty of good faith and fair dealing by approving and acknowledging the Mortgage Insurance Agreement.[14]

While Plaintiff may be correct that many additional agreements were entered into between the Capco Defendants and RIIRBA, the Complaint merely states "Capco's defaults as set forth above have damaged [RIIRBA]." (Compl. Count I ¶ 2.) Even though a claim for Breach of Agreements does not require Rule 9(b) particularity, the claim as alleged fails to state a claim upon which relief can be granted. The only default alleged by Plaintiff is that "Capco[]

[13] Because this Court finds that this case is "not to be disposed of summarily on arcane or technical grounds," it grants the 12(b)(6) motions and does not make findings with respect to the 12(c) motion for judgment on the pleadings. See Haley, 611 A.2d at 848.

[14] The Court considers this document and others as they were incorporated by reference in the Complaint. See Giragosian v. Ryan, 547 F.3d 59, 65 (1st Cir. 2008).

default[ed] on its payment obligations under the bond transaction." (Compl. ¶ 40.) This default is alleged to have triggered RIIRBA's obligation to take over the payments. However, Plaintiff does not state which agreement from the "bond transaction" the Capco Defendants breached. See Brien, 2011 WL 1936012 (finding that to properly state a claim under Super. R. Civ. P. 8(a), "a plaintiff cannot rely solely on 'subjective characterizations or conclusory descriptions,' and the Court need not accept unsupported conclusions or interpretations of law"). Without an alleged agreement between RIIRBA and the Capco Defendants from which legal duties flowed, a claim for Breach of Agreements cannot be maintained. See Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996) (finding that when there was not an agreement between two parties a "contract never came into existence and no duty of good faith and fair dealing arose"). Accordingly, Count I of the Complaint is dismissed.

C

Punitive Damages

Count V purports to assert a claim for punitive damages against the Capco Defendants, Caparco, Sr., Patricia Caparco, Hullinger, McDonough, and Does 1-6 for actions that were "so willful, reckless, or wicked as to border on criminality." Plaintiff admits that Count V was intended to make a demand for punitive damages. Accordingly, because all prior Counts alleged against the Capco Defendants, Caparco, Sr., Patricia Caparco, Hullinger, McDonough, and Does 1-6 have been dismissed, Count V must also be dismissed.

D

Negligence Against F&D

F&D moves to dismiss the single count against F&D alleging negligence by F&D in the preparation of financial information that F&D provided to the Capco Defendants, which was

later provided to RIIRBA. F&D argues that if RIIRBA is unable to establish viable claims against the other Defendants for supplying RIIRBA with the financial information, then RIIRBA cannot maintain an action against F&D as the Capco Defendants' accountant for providing that information to the Capco Defendants.

To establish a claim for negligence, "a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008). Here, Plaintiff has alleged that F&D owed RIIRBA a duty to exercise reasonable care in the preparation of financial information and that by breaching that duty, F&D was the proximate cause of damages sustained by RIIRBA. Nothing in the Complaint makes RIIRBA's claim against F&D contingent on maintaining the claims against the other Defendants.

In fact, this Court has found that an accountant may owe a duty to third parties not in privity with the accountant when that third party is "actually foreseen and limited classes of persons[.]" Anjoorian v. Arnold Kilberg & Co., No. PC 97-1013, 2006 WL 3436051 at *7 (R.I. Super. Ct. Nov. 27, 2006) (quoting Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968)). Here, Plaintiff alleges that F&D "knew, or should have known, that . . . [RIIRBA] would rely on the information and reports prepared by [F&D] on behalf of Capco." (Compl. Count VI ¶ 4.) Accepting this allegation as true, the Court must deny F&D's motion to dismiss Count VI. See Rusch Factors, Inc., 284 F. Supp. at 93 (denying motion to dismiss when plaintiff alleges that "defendant knew that his certification was to be used for, and had as its very aim and purpose, the reliance of the potential financiers[.]").

IV

Conclusion

Based on the foregoing analysis, the Court finds that Plaintiff has failed to allege, with the required particularity, facts to satisfy Super. R. Civ. P. 9(b). Additionally, Plaintiff has not stated a claim upon which relief can be granted with respect to breach of an agreement. Accordingly, Defendants' motions to dismiss Counts I, II, III, IV, and V are granted without prejudice.[15] F&D's motion to dismiss Count VI is denied. Counsel for the Defendants may present an order consistent herewith.

[15] The Court acknowledges that Caparco, Sr., Patricia Caparco, Hullinger, and McDonough (Individual Defendants) and the Capco Defendants have set forth other grounds—including that Individual Defendants owed no duty to Plaintiff, Count IV is barred by the economic loss doctrine, and that an officer of a corporation cannot be personally liable for torts of corporate employees—for dismissal of the various counts. The Court declines at this time to address the merits of these arguments for two reasons. First, it is unnecessary as the Court found other, independent grounds to dismiss all the counts against Individual Defendants. Second, the Court expects that in any subsequent complaint that may or may not be filed, the allegations will be made with particularity, so as to properly identify who supposedly made which representations and in what capacity. This would simplify the task of the Court in analyzing the alternative grounds for dismissal. Accordingly, at this time the Court declines to address those other grounds.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	The Rhode Island Industrial-Recreational Building Authority vs. Capco Endurance, LLC, et al.
CASE NO:	C.A. No. PB 13-2069
COURT:	Providence County Superior Court
DATE DECISION FILED:	February 14, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	***SEE ATTACHED LIST**
For Defendant:	***SEE ATTACHED LIST**