

CORDOBA INITIATIVE
CORPORATION,

Plaintiff,

v.

ROBERT LESLIE DEAK, et al.,

Defendants.

Plaintiff Cordoba Initiative Corporation ("Cordoba") filed this lawsuit against Robert Leslie Deak and his wife, Moshira Soliman, alleging that Cordoba was the victim of fraud when Deak misrepresented the value of a condominium unit in the District of Columbia, sold it to Cordoba, and did not transfer the title. Deak and Soliman have moved to dismiss the complaint for failure to state a claim, or in the alternative for summary judgment. Because Cordoba pled with sufficient particularity its claims of fraud, breach of fiduciary duty, negligent misrepresentation and constructive fraud, and unjust enrichment, but failed to allege a cognizable claim in the count alleging "misrepresentation," Cordoba's motion to dismiss will be granted in part and denied in part.

Cordoba is a non-profit organization based in Malaysia and dedicated to improving relations among people of all cultures and

faiths. Compl. ¶¶ 1, 5. Over the course of five years, Cordoba's principal and president Imam Feisal Abdul Rauf developed a close friendship with Deak and Soliman, who are residents of the District of Columbia. Id. ¶¶ 2, 6. Deak and Soliman attempted to raise funds for Cordoba, acted as advisors to Cordoba and Rauf, and hosted Rauf in their home for over three months in 2010. Id. ¶¶ 7-10. The complaint avers that based on the friendship and support Deak showed Rauf and Cordoba, Deak earned their trust and confidence. Id. ¶ 12.

In 2010, Deak suggested to Rauf that Cordoba purchase a condominium unit located on K Street in Washington, D.C. Compl. ¶ 14-15. During Deak's discussions with Rauf, Deak represented that he had specialized knowledge of the real estate market for the unit, and that Deak's real estate broker had advised him that the unit was worth \$1,350,000 and would sell for that price. However, according to the complaint, Deak knew at the time that his representations about the unit's value were false. Id. ¶¶ 16-18. Deak did not disclose to Rauf that Deak and Soliman had purchased that unit less than five months earlier for \$567,500. Id. ¶ 15.

In October 2010, Deak e-mailed Rauf asking for a total payment of \$1,500,000, with \$1,350,000 attributed to the "property" and \$150,000 for anything Cordoba wanted done to the apartment ("furnishings, special equipment . . . , extra

appliances, etc.") and for Cordoba's general use. Deak stated that the sale of the condominium unit was not a transaction "that we can, nor would we want to, run through attorneys." Compl.

¶ 20. Five days later, Cordoba transferred \$1,500,000¹ by wire to Deak's bank account. According to the complaint, Deak and Soliman failed to prepare a sales contract, failed to give Cordoba a Property Disclosure Statement, and never delivered to Cordoba or Rauf the title to the unit. Id. ¶¶ 21-25.

In February 2011, Cordoba learned that Deak and Soliman had purchased the condominium unit for \$567,500 in May 2010. Compl.

¶ 27. Cordoba then asked an independent real estate broker what the asking price of the unit would be. The broker advised that, based on the condominium market in the Georgetown neighborhood of Washington, D.C., the initial asking price for the unit would be \$799,000. Id. ¶ 28. In March 2011, Cordoba demanded that Deak return to Cordoba the \$1,500,000. Deak refused to return any of the money. Id. ¶¶ 29-30.

In August 2011, Cordoba filed this complaint against Deak and Soliman. The complaint alleges five counts against Deak and one against Soliman. The allegations against Deak are common law fraud (Count I), breach of fiduciary duty (Count II),

¹ The structure of the transaction was complex. Rauf would be loaning Deak \$1,350,000 with interest set at the "statutory minimum." Compl. ¶ 20. Rauf would then have three years to convert the transaction from a loan to a purchase. Id.

misrepresentation (Count III)², constructive fraud and negligent misrepresentation (Count IV), and unjust enrichment (Count V). The sole allegation against Soliman is for unjust enrichment (Count V).³

Deak and Soliman have moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss Cordoba's complaint for failure to state a claim upon which relief can be granted,⁴ and in the alternative to enter summary judgment against Cordoba. They argue that the complaint's allegations are based on a contract between Cordoba and an entity not named in the complaint - - Deak's company Cause Management, LLC - - that the defendants were not parties to and therefore are not responsible for, and that

²The complaint's cause of action titled "misrepresentation" is substantively duplicative of Count IV's claim of negligent misrepresentation and constructive fraud. Cordoba has not explained the legal basis for that count nor has it cited authority showing that the District of Columbia recognizes an independent cause of action for "misrepresentation." Therefore, Count III will be dismissed.

³Each count in the complaint appears to be alleged under District of Columbia common law. Both parties applied District of Columbia law in their motion papers without engaging in any choice of law analysis. Thus, District of Columbia law will be applied. See, e.g., Perry v. Scholar, 696 F. Supp. 2d 91, 94 n.1 (D.D.C. 2010); Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley, 999 F. Supp. 34, 39 (D.D.C. 1998) ("The parties have not raised any choice of law issues and, in their arguments in support of and in opposition to [the] motion for summary judgment, all parties have relied solely on District of Columbia law. Accordingly, the Court will resolve the motion under District of Columbia law.").

⁴The defendants do not address the claim for unjust enrichment in Count V against Deak, however.

all of the obligations flowing from that contract were extinguished by a valid accord and satisfaction that was signed on December 31, 2010. Defs.' Mem. in Supp. of. Mot. to Dismiss or in the Alternative for Summ. J. ("Defs.' Mem.") at 2-3.⁵ The

⁵To support their argument that judgment should be entered in favor of the defendants because the plaintiff's claims were extinguished by a settlement agreement, the defendants cite material - - namely, agreements between Cause Management and Cordoba - - that was not referred to in the complaint or relied on by the complaint. "In deciding a motion brought under Rule 12(b)(6), a court does not consider matters outside the pleadings, but a court may consider on a motion to dismiss 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies' even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.'" Carson v. Sim, 778 F. Supp. 2d 85, 91-92 (D.D.C. 2011) (quoting Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) and Hinton v. Corr. Corp. of Am., 624 F. Supp. 2d 45, 46 (D.D.C. 2009) (internal quotation omitted)). Therefore, to rule on that argument, the defendants' motion would have to be converted into one for summary judgment. However, if a motion to dismiss is converted to a motion for summary judgment before discovery, "the court must make sure both parties have had the opportunity to offer evidence in support of their factual allegations." Hansen v. Billington, 644 F. Supp. 2d 97, 104 (D.D.C. 2009). "Summary judgment is generally appropriate only after the non-moving party has been afforded an adequate opportunity to conduct discovery." LanQuest Corp. V. McManus & Darden LLP, 796 F. Supp. 2d 98, 100 (D.D.C. 2011). In its opposition, Cordoba explains that it would seek through discovery evidence directly relevant to the merits of the defendants' assertion that these claims were extinguished by a settlement agreement - - namely, that "Deak may have taken [a] digital signature [of Rauf's] that Deak already had 'on file,' affixed it to the disputed [contract] Amendment [settlement] without . . . authorization, and back-dated the document to December 31, 2010." Pl.'s Opp'n 14, n.3. In addition, Cordoba provides enough information to raise legitimate questions about the validity of the signature by offering email correspondence between the parties from January 2011 demonstrating that the contract amendment had not yet been signed on the date Deak claims. Pl.'s Opp'n at 13. Therefore, the

defendants also argue that Cordoba fails to allege facts that would pierce Cause Management's corporate veil, and that, in general, the complaint fails to allege plausibly that Deak owed Cordoba a duty. Cordoba opposes.

DISCUSSION

"A complaint can be dismissed under Federal Rule of Civil Procedure 12(b)(6) when a plaintiff fails to state a claim upon which relief can be granted.'" Maib v. FDIC, 771 F. Supp. 2d 14, 17 (D.D.C. 2011) (quoting Peavey v. Holder, 657 F. Supp. 2d 180, 185 (D.D.C. 2009) (citing Fed. R. Civ. P. 12(b)(6))). "A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint." Smith-Thompson v. Dist. of Columbia, 657 F. Supp. 2d 123, 129 (D.D.C. 2009).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, acceptable as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007)). The court must construe the complaint in the light most favorable to the plaintiff and "must assume the truth of all well-pleaded allegations." Warren v. Dist. of Columbia, 353 F.3d 36, 39 (D.C.

portion of the defendants' motion seeking summary judgment will be denied, and the motion will be treated solely as one to dismiss.

Cir. 2004). “[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations[.]” Twombly, 550 U.S. at 555.

I. FRAUD

The defendants argue that Count I’s claim of fraud against Deak should be dismissed because the complaint failed to allege that Deak owed Cordoba a duty to accurately disclose the value of the condominium unit. Defs.’ Mem. at 4-5. But under District of Columbia law, a plaintiff claiming fraud must prove “(1) the defendant made a false representation; (2) in reference to material fact; (3) with knowledge of its falsity; (4) with the intent to deceive the plaintiff; (5) the plaintiff acted in reasonable reliance on that representation; (6) which consequently resulted in provable damages.” Essroc Cement Corp. v. CTI/D.C., Inc., 740 F. Supp. 2d 131, 145 (D.D.C. 2010) (citing C & E Servs., Inc. v. Ashland, 498 F. Supp. 2d 242, 255 (D.D.C. 2007) (internal citation omitted)). “A claim for fraud may be founded on a false representation or a willful omission.” McWilliams Ballard, Inc. v. Broadway Mgmt. Co., 636 F. Supp. 2d 1, 5 (D.D.C. 2009) (citing Bell v. Rotwein, 535 F. Supp. 2d 137, 144 (D.D.C. 2008) (citing Schiff v. AARP, 697 A.2d 1193, 1198 (D.C. 1997))).

The Federal Rules of Civil Procedure include special pleading standards for fraud. See Fed. R. Civ. P. 9(b).

However, when alleging fraud, Rule 9 "permits a plaintiff to plead generally 'malice, intent, knowledge and other conditions of a person's mind.'" McWilliams Ballard, 636 F. Supp. 2d at 6 n.6 (quoting Fed. R. Civ. P. 9(b)). One who pleads fraud must "state the time, place and content of the false [representations], the fact misrepresented and what was retained or given up as a consequence of the fraud.'" United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1256 (D.C. Cir. 2004) (quoting Kowal v. MCI Communications Corp., 16 F.3d 1271, 1278 (D.C. Cir. 1994)). Complaints alleging fraud must also identify the individuals involved in the fraud. Martin-Baker Aircraft Co., 389 F.3d at 1256.

Here, the complaint plausibly alleges all of the elements of a claim for common law fraud with the particularity required by Rule 9. The complaint recites the false representation, who made it, and when it was made, namely, that Deak falsely represented the value of the condominium unit as \$1,350,000 just before October 13, 2010. Compl. ¶¶ 13-17. The complaint alleges facts reflecting Deak's intent to deceive when he did not reveal that he had purchased the unit five months earlier for \$567,500. Id. ¶ 15. The complaint pleads generally that Deak knew his representation to be false and material "under conditions which demonstrate that he intended that these misrepresentations be treated as an immediate factor inducing action by Cordoba." Id.

¶¶ 16-17, 32, 35. Rauf alleges that based on the special relationship that he had developed with Deak over the course of several years, Rauf reasonably relied upon Deak's claim to have specialized knowledge of the real estate market in the area and the value of the unit. Compl. ¶¶ 18, 33. The complaint also pleads that Cordoba justifiably relied on Deak's misrepresentations and material omissions to its detriment, suffering proximate damages for having purchased an over-priced condominium unit and never receiving title. Id. ¶ 37.⁶ Since fraud is sufficiently pled, the defendants' motion to dismiss Count I will be denied.

II. BREACH OF FIDUCIARY DUTY

To make a legally cognizable claim of breach of fiduciary duty under District of Columbia law, a plaintiff "must allege facts sufficient to show (1) the existence of a fiduciary relationship; (2) a breach of the duties associated with the fiduciary relationship; and (3) injuries that were proximately caused by the breach of the fiduciary duties." Armenian Genocide Museum & Memorial, Inc. v. Cafesjian Family Found., Inc., 607 F.

⁶The defendants argue that Cordoba has failed to allege facts necessary to pierce Cause Management's corporate veil, but that argument is misguided. The complaint does not state that it seeks to impose liability against the defendants for the actions of Cause Management; it seeks to impose liability against them for their own activities. See McWilliams Ballard v. Level 2 Dev., 697 F. Supp. 2d 101, 107 n.8 (D.D.C. 2010) ("Under District of Columbia law, the individual defendants are liable for torts in which they participate.").

Supp. 2d 185, 190-191 (D.D.C. 2009) (citing Paul v. Judicial Watch, Inc., 543 F. Supp. 2d 1, 5-6 (D.D.C. 2008)). "District of Columbia law has deliberately left the definition of 'fiduciary relationship' flexible, so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied." Teltschik v. Williams & Jensen, PLLC, 683 F. Supp. 2d 33, 46 (D.D.C. 2010); see also Council on American-Islamic Relations Action Network, Inc. v. Gaubatz, 793 F. Supp. 2d 311, 341-42 (D.D.C. 2011) (finding that plaintiff's factual allegations were sufficient to survive a motion to dismiss even assuming no contractual relationship existed when the relationship "extended beyond the normal bounds of a contractual relationship to form a special relationship founded upon trust and confidence") (internal citation omitted)).

Whether a fiduciary relationship exists is a fact-intensive question, and the fact-finder must consider "the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties." Firestone v. Firestone, 76 F.3d 1205, 1211 (D.C. Cir. 1996) (quoting Church of Scientology Int'l v. Eli Lilly & Co., 848 F. Supp. 1018, 1028 (D.D.C. 1994)).

Fiduciary relationships arise when parties develop a certain amount of trust between themselves.

Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the

integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another[.]

Church of Scientology Int'l, 848 F. Supp. at 1028 (quoting Schmidt v. Bishop, 779 F. Supp. 321, 325 (S.D.N.Y. 1991)) (quotation marks omitted). Due to the fact-intensive nature of the inquiry, "it is often inappropriate to decide whether a fiduciary relationship existed even in the context of a motion for summary judgment." Gaubatz, 793 F. Supp. 2d at 341 (citing Firestone, 76 F.3d at 1211).

The complaint sufficiently alleges facts showing a fiduciary relationship. Deak allegedly held himself out as a close friend of Rauf and an advisor to Cordoba for more than five years, attempted to raise funds on behalf of Cordoba, donated funds to an affiliate of Cordoba, acted as an advisor to Cordoba's principals for several years, invited Rauf to stay in his home for several months, and took affirmative steps to obtain Rauf's special trust and confidence. Compl. ¶¶ 6-12. According to the complaint, Deak misrepresented the unit's value when he sold it to Cordoba, id. ¶¶ 16-17, thereby allegedly breaching his fiduciary duty to Cordoba. Id. ¶ 41. The complaint alleges that Cordoba proximately suffered damages as a result of the breach and requests a monetary judgment in the amount of its actual

damages as well as a constructive trust placed on the unit. Id.
¶ 42.

Deak's claim that the relationship at issue is actually between Cordoba and Deak's company rather than Deak as an individual may be relevant as a factual defense, but has no bearing on whether the complaint alleges a plausible cause of action for a claim of breach of fiduciary duty. Since Cordoba's complaint alleges a fiduciary relationship between Deak and Cordoba, and Cordoba sufficiently pleads the factual and legal elements of that claim, the defendants' motion to dismiss Count II will be denied.

III. NEGLIGENT MISREPRESENTATION AND CONSTRUCTIVE FRAUD

The elements of a claim for negligent misrepresentation under District of Columbia law are that a defendant (1) made a false statement or omission of fact involving a material issue; (2) the statement or omission was in violation of a duty to exercise reasonable care; (3) the plaintiff reasonably relied to his detriment on the false information; and (4) the defendant's conduct was the proximate cause of plaintiff's injury. C & E Servs., 498 F. Supp. 2d at 256 (citing Burlington Ins. Co. v. Okie Dokie, Inc., 398 F. Supp. 2d 147, 153-154 (D.D.C. 2005)). Whether a plaintiff's reliance was reasonable is a question of fact that is judged based on the relationship between the

parties. C & E Servs., 498 F. Supp. 2d at 260 (citing Cassidy v. Owen, 533 A.2d 253, 256 (D.C. 1987)).

Constructive fraud includes all the same elements as actual fraud except the intent to deceive. De May v. Moore & Bruce, L.L.P., 584 F. Supp. 2d 170, 185 (D.D.C. 2008) (citing Rick v. United States, 161 F.2d 897, 899 (D.C. 1947) (stating that "neither actual dishonesty nor intent to deceive is the essential element [of constructive fraud]; and negligence so gross as to deceive might be such fraud")). In addition, constructive fraud requires a plaintiff to demonstrate the existence of a confidential relationship between the plaintiff and defendant, "by which the defendant is able to exercise extraordinary influence over plaintiff." McWilliams Ballard, Inc., 636 F. Supp. 2d at 6 n.7 (quoting Witherspoon v. Philip Morris, 964 F. Supp. 455, 461 (D.D.C. 1997)) (internal quotation marks omitted).

The complaint bases the claims of fraud, negligent misrepresentation, and constructive fraud on the same set of facts. Negligent misrepresentation and constructive fraud do not involve an intent to deceive, but a plaintiff must plead facts sufficient to show a confidential relationship between the plaintiff and the defendant and the defendant's duty of reasonable care owed to the plaintiff that would be breached by the defendant's material false statement or omission. The complaint alleges a fiduciary relationship between Cordoba and

Deak based on Cordoba's special trust and confidence in Deak which grew from Deak's advising and supporting Cordoba over several years. Compl. ¶¶ 2, 7-10, 12. Cordoba alleges in Count III, as it does in Count I, that Deak made a false statement about the value of the unit and omitted information about the price Deak paid for it less than five months prior. Id. ¶¶ 15-18. Cordoba claims that it justifiably relied on Deak's information when it paid \$1,500,000 to Deak, and it proximately suffered damages as a result of both over-payment and Deak's failure to transfer title of the property. Id. ¶ 37. While the reasonableness of Cordoba's reliance is a question of fact, Cordoba alleges a fiduciary relationship and special trust between it and Deak sufficient to allege a plausible cause of action. Therefore, the defendants' motion to dismiss Count IV will be denied.

IV. UNJUST ENRICHMENT AGAINST SOLIMAN

The defendants argue that Count V of the complaint does not allege a plausible cause of action for unjust enrichment against Soliman because Soliman was not a party to the contract between Cause Management and Cordoba, and Cordoba "has put forth no basis for sustaining the cause[] of action against" Soliman. Defs.' Mem. at 9. Under District of Columbia law, a "plaintiff states a claim for unjust enrichment when: (1) the plaintiff confers a benefit upon the defendant; (2) the defendant retains the

benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." Sabre Int'l Sec. v. Torres Advanced Enter. Solutions, 820 F. Supp. 2d 62, 76 (D.D.C. 2011) (citing News World Communications v. Thompsen, 878 A.2d 1218, 1222 (D.C. 2005)); see also Jordan Keys & Jessamy v. St. Paul Fire & Marine Ins., 870 A.2d 58, 63 (D.C. 2005) (stating that "[u]njust enrichment occurs when a person retains a benefit (usually money) which in justice and equity belongs to another").

The complaint alleges that Cordoba conferred a benefit of \$1,500,000 upon Deak and Soliman and that they both still retain that benefit. Compl. ¶¶ 60-61. According to the complaint, in October 2010, Cordoba wired \$1.5 million to Deak for the purchase and use of the unit, believing - - based on Deak's communications - - that it would receive a sales contract in return. Id. ¶¶ 19-21. Cordoba never received a sales contract or title to the property. Id. ¶¶ 22, 25. Cordoba states that Deak and Soliman used the money, in part, to purchase another condominium unit nearby. Id. ¶ 26. Cordoba has sufficiently alleged the elements of unjust enrichment as to both Deak and Soliman, and their motion to dismiss Count V as to Soliman will be denied.

CONCLUSION AND ORDER

Cordoba pled sufficient facts to state plausible claims of fraud, breach of fiduciary duty, negligent misrepresentation and constructive fraud, and unjust enrichment. Count III alleges a

cause of action that is duplicative and does not have a basis in District of Columbia law. Accordingly, it is hereby

ORDERED that the defendants' motion [12] to dismiss, or in the alternative for summary judgment, be, and hereby is, GRANTED in part and DENIED in part. Count III of the complaint will be dismissed, but the motion is otherwise denied.

SIGNED this 26th day of October, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge