IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED MOUNTAIN HOLDINGS, LTD.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 00-190-JJF
	:	
STOUT PARTNERSHIP and MARK S. ALSENTZER,	:	
	:	
	:	
Defendants.	:	

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MEMORANDUM OPINION

March 30, 2001
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is a Motion to Dismiss the Complaint (D.I. 5) pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure filed by Defendants Stout Partnership ("Stout") and Mark S. Alsentzer (collectively, the "Defendants"). For the reasons stated below, Defendants' Motion to Dismiss the Complaint (D.I. 5) will be granted in part and denied in part.

BACKGROUND

On March 17, 2000, Plaintiff Red Mountain Holdings, Ltd. ("Red Mountain") commenced this action for breach of contract, and alternatively, for fraud and/or specific performance. Red Mountain is a British Virgin Islands corporation with its principal office in New York, New York. (D.I. 1, ¶ 3). Stout is a New Jersey partnership with offices in Thorofare, New Jersey. (D.I. 1, ¶ 4). Mark S. Alsentzer is a general partner of Stout. (D.I. 1, ¶ 5).

According to the Complaint, on March 2, 1999, Mace Security International, Inc. ("Mace") agreed to acquire the common stock of American Wash Services, Inc. pursuant to a written merger agreement (the "Mace Merger Agreement"). (D.I. 1, ¶ 7). Red Mountain, at the time of the subject merger, was a principal stockholder in American Wash Services, Inc. Id. As a result of

the Mace Merger Agreement, certain individuals and entities would acquire substantial holdings of the common stock of Mace. (D.I. 1, ¶ 8). Red Mountain, as such an entity, received substantial common stock of Mace. On or about the time of the Mace Merger Agreement, Stout was a principal shareholder of U.S. Plastic Lumber Corporation ("USPL"), and Mark S. Alsentzer, a general partner of Stout, was also President and CEO of USPL. (D.I. 1, ¶ 9).

In April of 1999, Red Mountain was approached by Stout, through a principal shareholder of USPL, with a proposition that Red Mountain should consider swapping thirty percent of its restricted Mace Shares for an equal number of USPL shares. (D.I. 1, ¶ 10).

On April 14, 1999, Red Mountain received by fax the Stock Purchase Agreement ("SPA") from counsel to Stout, R.M. Kramer Associates, Attorneys at Law ("Kramer"), with instructions to execute the SPA. (D.I. 1, ¶ 11). David Ehrlich, as a director of Red Mountain with specific authority to execute such documents, executed the SPA and faxed it back to Kramer. Id. On April 16, 1999, Red Mountain received by fax from Kramer the SPA executed by Mark S. Alsentzer on behalf of Stout. Id.

On April 14, 1999, the stock price of Mace's restricted shares was $13-1/2 per share, and the price of USPL's stock was

$10 per share. (D.I. 1, ¶ 12). The SPA provides that a closing on the stock swap may occur five days after the closing on the Mace Merger Agreement. (D.I. 1, ¶ 13). The Mace Merger Agreement transaction closed on or about July 5, 1999. (D.I. 1, ¶ 14). On or about July 10, 1999, the first day the swap could have taken place, both Mace and USPL were trading at approximately $9.50 per share, although the restricted Mace shares subject to the SPA would have commanded a substantially lower sales price because of the restrictions on their sale. (D.I. 1, ¶ 15).

As a result of certain business events involving USPL, most notably, the completion of a substantial private placement of USPL's securities, Red Mountain, through its sole Director, David Ehrlich, was asked by a representative of USPL to delay closing the stock swap of the restricted Mace Shares for the USPL Shares until late September 1999, ostensibly to allow for the completion of the private placement. (D.I. 1, ¶ 16).

In early August 1999, a representative of USPL suggested that the parties forego closing the swap transaction, and instead, explore alternative financial arrangements. (D.I. 1, ¶ 17). Notwithstanding this request, Red Mountain desired to complete the original transaction contemplated by the SPA, and in late August, David Ehrlich, on behalf of Red Mountain, contacted

Stout through Mark S. Alsentzer to arrange for the closing of the swap transaction. (D.I. 1, ¶ 18).

By mid-September 1999, it became obvious to David Ehrlich that despite Red Mountain's desire to complete the stock swap, Stout and Alsentzer were unwilling to complete the transaction, even though both Red Mountain and Stout, through their respective representatives, recognized and agreed that the pre-conditions set forth in the SPA to a closing on the stock swap had been satisfied and that the closing was timely. (D.I. 1, ¶ 19). Also by this time, the stock price of Mace and USPL had reversed and USPL shares were trading at approximately $13 per share and Mace stock was trading as low as $6 per share, a reason given by Defendants for their unwillingness to complete the closing. (D.I. 1, ¶ 20).

In spite of repeated contacts between Red Mountain and the Defendants throughout September and October by their representatives, and repeated requests by Red Mountain to complete the closing under the SPA, the Defendants, while never once expressing the belief that the SPA was invalid, continued to refuse to complete the closing, and moreover, suggested alternative deals in lieu of the SPA. (D.I. 1, ¶ 21).

Finally, on November 10, 1999, Red Mountain received by fax a letter from Defendants dated November 2, 1999, which, for the

first time, expressed Defendants' opinion that the SPA was invalid and that Defendants had no intention of completing the closing under the SPA. (D.I. 1, ¶ 22).

Not coincidentally, on information and belief, Plaintiff alleges that Defendants entered into at least two similar stock swap agreements, involving exchanges of restricted Mace shares for USPL shares, during the same time frame as the transaction with Red Mountain. According to Plaintiff, Defendants have refused to close each of these transactions as well. (D.I. 1, ¶ 23).

Count I of the Complaint avers a breach of contract claim and it seeks damages for the difference in the trading price between the USPL and Mace shares on the date the transaction should have closed. (D.I. 1, ¶¶ 24-27). Alternatively, Count II seeks specific performance by Stout of the stock exchange required by the SPA. (D.I. 1, ¶¶ 28-32). Also, in the alternative, Count III asserts that Defendants engaged in a scheme to defraud Red Mountain. (D.I. 1, ¶¶ 33-39).

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss is to test the sufficiency of a

complaint, not to resolve disputed facts or decide the merits of the case. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). When considering a motion to dismiss, a court must accept as true all allegations in the complaint and must draw all reasonable factual inferences in the light most favorable to the plaintiff. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). The Court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." Kost, 1 F.3d at 183. Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957).

DISCUSSION

I. Breach of Contract Claim

Defendants assert that the Complaint should be dismissed, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, on the basis that Red Mountain cannot show damages for Defendants' alleged breach of contract in excess of $75,000 as mandated by 28 U.S.C. **§** 1332.

The rule governing dismissal for want of jurisdiction in cases brought in federal court is that "the sum claimed by the plaintiff controls if the claim is apparently made in good

faith." Wade v. Rogala, 270 F.2d 280, 284 (3d Cir. 1959) (quoting St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-90 (1938)). "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." Id. Thus, "[t]he necessary choice, except in the flagrant case, where the jurisdictional issue cannot be decided without the ruling constituting at the same time a ruling on the merits, is to permit the cause to proceed to trial." Wade, 270 F.2d at 285.

Upon reviewing the Complaint in a light most favorable to Plaintiff, the Court cannot conclude to a legal certainty that Plaintiff's claim is less than the requisite jurisdictional amount. Therefore, Defendants' motion to dismiss under Rule 12(b)(1) will be denied.

II. Specific Performance Claim

Defendants also move to dismiss Plaintiff's alternative claim for specific performance. Plaintiff, however, subsequently filed an Amended Complaint (D.I. 20) that removed the alternative claim for specific performance. Plaintiff's factual allegations in the Amended Complaint remain the same. Therefore, Defendants' motion to dismiss this claim will be denied as moot.

III. Fraud Claim

Red Mountain alleges an alternative cause of action for common law fraud. Defendants move to dismiss Plaintiff's fraud claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The elements of common law fraud are well established. The party asserting fraud must prove: (1) a false representation of material fact; (2) the knowledge or belief that the representation was false, or made with reckless indifference to the truth; (3) an intent to induce another party to act or refrain from acting; (4) the parties' action or inaction taken in justifiable reliance on the representation; and (5) damage to the other party as a result of the representation. Browne v. Robb, 583 A.2d 949, 955 (Del. 1990).

According to Plaintiff, the fraud count does not aver a failure to disclose claim, but rather, a fraudulent scheme theory of the "knowing misrepresentation" variety, which alleges that Defendants made knowingly false and misleading representations in order to induce Red Mountain into entering an agreement they knew from the outset they would not honor if the terms did not remain favorable to them. (D.I. 7, at 19). Plaintiff, however, concedes that the fraud count does not identify any particular false or misleading statements made by Defendants. (D.I. 7, at

18). Defendants contend that a party cannot transform a contract claim into a fraud claim merely by alleging that the other party never intended to perform.

In support of its contention, Defendant relies on IOTEX Communications, Inc. v. Defries, Civ. A. No. 15817, 1998 WL 914265 (Del. Ch. 1998). In IOTEX, the court concluded that a breach of contract claim "cannot be 'bootstrapped' into a fraud claim merely by adding the words 'fraudulently induced' or alleging that the contracting parties never intended to perform." IOTEX, 1998 WL at *5 (citing Dann v. Chrysler Corp., 174 A.2d 696, 700 (Del. Ch. 1961) ("Using the word 'fraud' or its equivalent in any form is just not a substitute for the statement of sufficient facts to make the basis of the charge reasonably apparent.")). The Court in IOTEX applied New York law, but first discussed the Delaware Court of Chancery's decision in Dann because "New York law is decisively to same effect" as Delaware law on this point. IOTEX, 1998 WL at *6.

Upon reviewing the Complaint in a light most favorable to Plaintiff, the Court concludes that Plaintiff fails to allege sufficient facts to support its common law fraud claim. Plaintiff's allegations of fraud relate to Defendants' conception, proposal and execution of the stock swap agreement. In fact, Plaintiff concedes that the fraud count does not

identify any particular false or misleading statements made by Defendants. Moreover, the Court concludes that Plaintiff's allegations of fraud do not rise to the level of particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Thus, the Court concludes that Defendants' motion to dismiss Plaintiff's fraud count will be granted, and Plaintiff will be left to recover, if at all, on its breach of contract claim.

CONCLUSION

For the reasons discussed, Defendants' Motion to Dismiss the Complaint (D.I. 5) will be granted in part and denied in part. The Court will grant Defendants' motion to dismiss Plaintiff's common law fraud claim and will deny Defendants' motion to dismiss the breach of contract claim for lack of jurisdiction.

An appropriate Order will be entered.