



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Fairfax, Virginia 22030-4009

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JUDGES

December 4, 2019

RETIRED JUDGES

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Mr. Scott Surovell, Esquire
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RE: Rosmery Vega v. E Trucking & Services LLC, et al., Case No. CL-2019-11356

Dear Counsel:

This case involves an alleged breach of contract in the form of dumping an excessive amount of dirt onto Plaintiff's property. The issues presented on demurrer, on which I have not yet ruled,¹ are whether Plaintiff has pled causes of action for the personal liability of Mr. Ivo Jose Pereira and actual and constructive fraud so as to survive demurrer.

I. BACKGROUND

The facts from the Complaint, taken as true for the purposes of demurrer, Russo v. White, 241 Va. 23, 24 (1991), are as follows:

Plaintiff and Defendant entered into an agreement whereby Defendant would provide Plaintiff with "free dirt" in order to stabilize her property and fence. Plaintiff gave Defendant permission to come onto her property to deliver the dirt. While Plaintiff was out of town, Defendant entered Plaintiff's property and deposited more than 100 dump truck loads of dirt, covering approximately 11,000 square feet of land. Plaintiff asserts that this was far more dirt than was

¹ At the oral argument on this Demurrer, I did rule as to negligence, nuisance, violations of the VCPA, and trespass, overruling the Demurrer as to those issues.

OPINION LETTER

necessary, and that some of the dirt was dumped onto her neighbors' land as well as Fairfax County public land. As a result, Plaintiff has been cited with violations of the Fairfax County Code of Ordinances. In addition, her property has been damaged.

Plaintiff filed her Complaint on August 15, 2019. The Complaint names both E Trucking & Services LLC and Mr. Ivo Jose Pereira, the owner and principal of E Trucking & Services LLC. Defendants subsequently filed this Demurrer as to the personal liability of Mr. Pereira and Counts II, III, first count IV, second count² IV, and V. I heard argument on the Demurrer on November 8, 2019, after which I overruled the Demurrer as to Counts II, III, second IV, and V. I subsequently took the Demurrer under advisement as to the first Count IV (actual and constructive fraud) and the personal liability of Mr. Pereira. My opinion follows.

II. ANALYSIS

A. DEMURRER STANDARD

The purpose of a demurrer "is to test only whether the challenged pleading states a cause of action upon which relief can be granted if all the allegations are admitted as true." *Faulkner v. Shafer*, 264 Va. 210, 214 (2002). In reviewing a demurrer, the Court must draw all reasonable factual inferences in favor of the pleading. *Russo v. White*, 241 Va. 23, 24 (1991). The Court is permitted to consider any exhibits attached to the pleading. *Flippo v. F & L Land Co.*, 241 Va. 15, 17 (1991). Although "a demurrer admits as true all averments of material facts which are sufficiently pleaded, it does not admit the correctness of the conclusions of law stated by the pleader." *Arlington Yellow Cab Co. v. Transp., Inc.*, 207 Va. 313, 318-19 (1996).

B. PERSONAL LIABILITY OF MR. PEREIRA

Mr. Pereira cannot be held personally liable for the acts of the LLC by merely being a member of the LLC. The Virginia Limited Liability Company Act states:

Except as otherwise provided by this Code or as expressly provided in the articles of organization, no member, manager, organizer or other agent of a limited liability company, regardless of whether the limited liability company has a single member or multiple members, shall have any personal obligation for any liabilities of a limited liability company, whether such liabilities arise in contract, tort or otherwise, solely by reason of being a member, manager, organizer or agent of a limited liability company. For the purposes of this section, a person to whom the rights of a member or manager are delegated as provided in § 13.1-1022 or § 13.1-1024 shall be deemed an agent of a limited liability company.

Virginia Limited Liability Company Act § 13.1-1019. Liability to Third Parties.

² The Complaint lists two counts IV.

When an LLC member is acting solely as a member and agent of the LLC, he has no personal liability for liabilities of the limited liability company. *See Gowin v. Granite Depot, L.L.C.*, 272 Va. 246 (2006). At all relevant times Mr. Pereira was acting as a managing member and agent of E Trucking. Plaintiff does not allege that Mr. Perira offered—on his own behalf—to provide the dirt. Rather, all advertisements were clearly that of E Trucking.

Because Defendant E Trucking is a limited liability company, its members, managers, and agents can have no “personal obligation” for the liability of E Trucking solely by virtue of a position as member, manager, or agent, even when the alleged liability arises from a tort. *See Mcfarland v. Virginia Retirement Serv’s*, 477 F.Supp.2d 727 (E.D. Va., 2007).

Therefore, the Demurrer as to all claims against Mr. Pereira in his personal capacity is SUSTAINED, without leave to amend.

C. ACTUAL AND CONSTRUCTIVE FRAUD

Pursuant to Virginia’s “source of duty” rule, Plaintiff cannot maintain a cause of action for both breach of contract and fraud. While it may be possible to prove both a breach of contract and a breach of common law duty under the same facts, “the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.” *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558 (1998). This source-of-duty inquiry is necessary to prevent turning every breach of contract into an actionable claim for fraud. *See id.* at 560.

In this case, Plaintiff’s actual fraud allegation is barred by the source of duty rule because it merely claims a misrepresentation of the performance of Defendants’ contractual duty (to deliver the appropriate amount of dirt). Misrepresentations that relate to a “duty or an obligation that was specifically required” by a contract “do not give rise to a cause of action for actual fraud . . .” *Richmond Metro. Auth.*, 256 Va. at 559. Because Defendants’ duty arose solely by virtue of the parties’ contract, Plaintiff cannot maintain a cause of action for both breach of contract and fraud.

Similarly, Plaintiff’s constructive fraud allegation fails as the Supreme Court of Virginia has made clear that a promise of future action cannot support a claim for constructive fraud. *See Supervalu, Inc. v. Johnson*, 276 Va. 356, 368 (2008); *see also Richmond Metro. Auth.*, 256 Va. at 560. The rationale underlying this rule is similar to the rationale stated above: “If unfulfilled promises, innocently or negligently made, were sufficient to support a constructive fraud claim, every breach of contract would potentially give rise to a claim of constructive fraud.” *Supervalu*, 276 Va. at 368.

In this case, as in *Supervalu*, Plaintiff failed to sufficiently allege facts showing that Defendant negligently or innocently misrepresented a present or preexisting material fact at the time the promise was made. Rather, Plaintiff merely alleged that Defendant promised to—in the future—deliver free dirt to Plaintiff. There is no allegation of active misrepresentation by

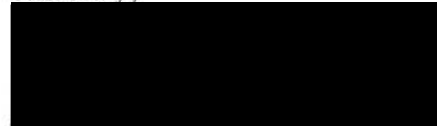
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Defendants; instead, Plaintiff simply alleges an unfulfilled promise. As such, Plaintiff failed to plead a valid cause of action for constructive fraud.

Therefore, the Demurrer as to Plaintiff's first Count IV (Actual and Constructive Fraud) is SUSTAINED, without leave to amend.

An order pursuant to my rulings above is attached.

Sincerely,

A large black rectangular redaction box covers the signature area.

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROSMERY VEGA)

Plaintiff,)

v.)

E TRUCKING & SERVICES LLC, et al.)

Defendants.)

Case No. CL-2019-11356

ORDER

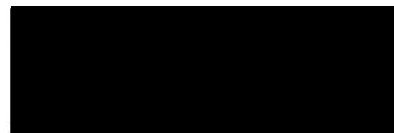
This cause came to be heard on the 8th day of November 2019 on Defendants' Demurrer. For the reasons explained in my Opinion Letter dated December 4, 2019, and in conjunction with the previous Order entered on November 8, 2019, it is hereby **ORDERED** as follows:

Defendant's Demurrer as to all claims against Mr. Ivo Jose Pereira in his personal capacity is SUSTAINED and Mr. Pereira is hereby DISMISSED from the case;

Defendant's Demurrer as to Plaintiff's first Count IV (Actual and Constructive Fraud) is SUSTAINED, without leave to amend; and

THIS CAUSE IS CONTINUED.

ENTERED this 4th day of December 2019.



The Honorable Robert J. Smith
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.