IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

Plaintiff

JEROME RINGO,

Vs.

SOUTHLAND GAMING OF THE U.S. VIRGIN ISLANDS, INC., ET AL.,

Defendant

CASE NO. ST-10-CV-116

ACTION FOR: DAMAGES

NOTICE
OF
ENTRY OF MEMORANDUM OPINION AND ORDER

TO: RONALD W. BELFON, Esquire
ARTURO WATLINGTON, JR., Esquire
WILLIAM J. GLORE, Esquire

JUDGES & MAGISTRATES, SUPERIOR COURT
LIBRARIAN, ~~IT~~ DIVISION, ORDER BOOK
DAVID J. HODGE, ESQ.

Please take notice that on SEPTEMBER 22, 2010 A MEMORANDUM OPINION AND Order was entered by this Court in the above-entitled matter.

Dated: SEPTEMBER 23, 2010

Venetia H. Velazquez Esq.
Clerk of the Superior Court

By: Diane Matthew-Turnbull
DIANE MATTHEW-TURNBULL
COURT CLERK II

IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JEROME RINGO, **Plaintiff,** **vs.** **SOUTHLAND GAMING OF THE U.S. VIRGIN ISLANDS, INC., ROBERT HUCKABEE, III, and SHAINE GASPARD,** **Defendants.**	)	**CASE NO. ST-10-CV-116**

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss ("the Motion") filed on April 26, 2010. Plaintiff filed an Opposition to Defendants' Motion on June 8, 2010, and Defendants' Reply to Plaintiff's Opposition was filed on June 28, 2010.

FACTS AND PROCEDURAL HISTORY

Plaintiff's March 3, 2010, Complaint asserts that in May 2003, Defendant Southland Gaming ("Southland") solicited Plaintiff for consulting services in relation to the establishment of a U.S. Virgin Islands Video Lottery Program ("the Program"). Southland and Plaintiff entered into a Consulting and Noncompetition Agreement ("the Agreement") that would extend throughout the time period in which Defendant operated under a private contract with the government of the Virgin Islands. The Agreement included an annual payment in the amount of three percent (3.0%) of the net profits of the Program, Southland earned each calendar year, calculated before any deduction for income taxes and was payable to Plaintiff on or before March 31st of each year. Plaintiff contends that, pursuant to the contract, Southland made payments to Plaintiff until March 31, 2009, but did not make payments thereafter and argues that the past payments made by Southland did not represent three percent (3.0%) of the Program's net profits.

As a result, on March 3, 2010, Plaintiff filed a Complaint containing causes of action for breach of contract against Southland, fraud against Huckabee and Gaspard, negligent misrepresentation against Huckabee and Gaspard, breach of fiduciary duty against Southland, a demand for an equitable accounting from Southland, and unjust enrichment against Southland.

STANDARD OF REVIEW

In considering a FED. R. CIV. P. 12(b)(6),[1] motion to dismiss, "a judge must accept as true all of the factual allegations contained in the complaint." *Sala v. Hawk*, Civ. No. 2008-63, 2009 WL 2147478, at *1 (D.V.I. July 20, 2009) (citing *Erickson v. Pardus*, 127 S.CT. 2197, 2200 (2007)) (per curium) (citing *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007)). The Court must "construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). "The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims." *Fin. Trust Co., Inc. v. Citibank, N.A.*, 268 F.Supp.2d 561, 570

[1] Made applicable to the Superior Court through SUPER CT. R. 7

(D.V.I. 2003) (quoting *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d 198, 215 (3d Cir. 2002)).[2]

DISCUSSION

I. Conditions Precedent

a. Rule 9(c)

Defendants assert that payment of the consulting fee in the Agreement was based on the occurrence of conditions precedent. Section 2(a) of the Agreement provided:

> [i]f Enabling Legislation is enacted during the Consulting Term then the Consulting Term shall be extended for an additional period of six months (or longer if agreed to in writing by the Company) during which time Consultant shall exercise his best efforts to have the VI contract recognized as a valid obligation of the U.S. Virgin Islands and to have the appropriate government bodies thereof begin working with the Company to operate video lottery in the U.S. Virgin Islands as contemplated in the VI Contract. If all the above occurs during the Consulting Term, then, and only in such event, shall the Company thereafter be obligated to and shall pay Consultant for his Services hereunder fees in the amount of 3% of the net profits calculated before any deduction for income taxes, of the Company, earned each calendar year during the Payment Period and payable in arrears on or before March 31 each year with respect to the immediately preceding calendar year.

As a result, Defendants argue that because Plaintiff's Complaint failed to allege the occurrence of the conditions precedent it should be dismissed pursuant to Fed. R. Civ. P.

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[2] The Court notes that Defendants' Motion did not rely on matters outside the pleadings because Plaintiff's Complaint addresses Defendants' private contract with the Government of the Virgin Islands. Consequently, this matter will not be treated as one for summary judgment. See *United States Dept. of Agriculture Rural Housing v. Phillips,* Civ. No. 1:08-cv-00032, 2010 WL 1529297, at *2 (D.V.I. April 15, 2010).

9(c). Rule 9(c) provides "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed."

On the other hand, Plaintiff argues that, despite the conditions in the Agreement, Defendant still paid Plaintiff consulting fees, which payments served as a waiver to the conditions precedent. Thus, Plaintiff asserts the Complaint correctly alleged that the conditions occurred. "Rule 9(c) does not expressly require that performance of conditions be pled, it merely sets forth the manner in which such pleadings should be made." *Kiernan v. Zurich Companies,* 150 F.3d 1120, 1124 (9th Cir. 1998) (citing 2 James Wm. Moore, *Moore's Federal Practice,* § 9.04[1] (3d ed. 1997)).

In *Kiernan, supra*, the defendant argued that the plaintiff's claim failed to state a claim upon which relief may be granted because the plaintiff failed to plead that he fulfilled a condition precedent. The plaintiff's complaint asserted that he was entitled to recover under an insurance policy for a parasailing injury, but the defendants asserted that Rule 9(c) required the defendant to explicitly plead that he had signed a waiver in order to recover under the policy. The court held that the plaintiff's pleading was sufficient under Rule 9(c) because even though the plaintiff "did not specifically allege that he signed a waiver, he did claim that the parasailing accident occurred 'while the policy was in full force and effect.'" Similarly, in this matter, Plaintiff's Complaint alleged that Plaintiff received payments from Defendants, which, according to the agreement, were only to be paid upon fulfillment of certain conditions precedent. Thus, Plaintiff claims Defendants waived these conditions when payments were made to Plaintiff. Consequently, the Court finds that Plaintiff has pleaded sufficient facts that "all conditions precedent have been performed or have occurred." See *Phillips, supra*, at 235 (quoting *Twombly, supra* at 1965) ("[A] claim requires a complaint with enough factual matter (taken as true) to suggest' the required element....This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element").

b. Consulting Term as a Condition Precedent

Defendant also argues that the Agreement provided that the payment of consulting fees to Plaintiff was dependant upon the implementation of a 1998 Contract between Defendant and the Virgin Islands Lottery Commission, and, because Defendant was unable to implement video lottery under the 1998 Contract, the condition precedent for Plaintiff to be eligible to receive the Agreement's consulting fee was not met. Plaintiff, on the other hand, again asserts that Defendant waived all of its condition precedents including the contract Consulting Term when it paid Plaintiff his consulting fee.

Waiver is defined as "the voluntary relinquishment of a known right.'" *Sunshine Shopping Ctr., Inc. v. Kmart Corp.*, 85 F.Supp.2d 537, 543 (D.V.I. 2000) (quoting Comment (b) of Section 84 of the Restatement (Second) of Contracts). A valid waiver "requires a "clear, unequivocal, and decisive act of the party showing such purpose or acts amounting to an estoppel on his part.'" *Carter v. Exxon Co.*, 177 F.3d 197, 205 (3d Cir. 1999) (quoting *West Jersey Title & Guaranty Co. v Industrial Trust Co.*, 141 A.2d 782, 787 (1958)). The Agreement provided that Plaintiff would be paid a consulting fee for his services "[i]f the Enabling Legislation is enacted during the Consulting Term then the Consulting Term shall be extended for an additional period of six months...during which time Consultant shall exercise his best efforts to have the VI Contract recognized as a valid obligation...."

However, Plaintiff was paid a consulting fee despite the prerequisites of the Agreement. Therefore, the Court finds that Plaintiff has pled sufficient facts from which it could be plausibly established that Defendant engaged in a "clear, unequivocal, and decisive act" when it paid Plaintiff consulting fees. *Id.* Consequently, Plaintiff has sufficiently pled his claim that Defendant's actions constituted a waiver. See *West Jersey Title, supra,* at 786 (Waiver "implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on").

II. Payment Period of Consulting Agreement

Defendant argues in the alternative that even if the conditions precedent had occurred within the Consulting Term, Defendant's obligation to pay Plaintiff a consulting fee expired at the end of the payment period.[3] The Agreement provides that the payment period ends either on October 21, 2013, or on the termination date of the V.I. Contract.[4] Thus, Defendant argues that because the Agreement defined the "V.I. Contract" as Southland's 1998 Contract with the government, and the 1998 Contract was terminated and superseded by a 2003 Contract, the payment period had ended, resulting in

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[3] Defendant's Exhibit A, Consulting and Noncompetition Agreement, pg. 1 provides that "[t]he Company hereby engages Consultant as a consultant for a period beginning on the date hereof and ending on the last day of 2001/2002 legislative session of the U.S. Virgin Islands Legislature (the "Consulting Term").
[4] *Id.*, at 3.

Defendant having no duty to pay Plaintiff a consulting fee. Conversely, Plaintiff argues that even if the payment period expired, Defendant still made payments to Plaintiff, and, at this stage, a motion to dismiss is unwarranted. Considering the facts at this juncture, the Court finds that Plaintiff has alleged facts that state a claim that is "plausible" on its face. *Twombly, supra.*

III. Fraud and Misrepresentation Claims

A. Pleading Fraud Claim

Defendants argue that Plaintiff's fraud and misrepresentation claims must be dismissed because Plaintiff failed to plead the claims with particularity. Rule 9(b) provides "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Therefore, Plaintiff "must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." Moreover, Rule 9(b) requires Plaintiff to plead:

> (1) a specific false representation of material fact,
> (2) knowledge of its falsity by the person who made it,
> (3) ignorance of its falsity by the person to whom it was made,
> (4) the maker's intention that it should be acted upon, and
> (5) detrimental reliance by the Plaintiff

Nicholas v. Wyndham Int'l, Inc., 301 F.Supp.2d 407, 409 (D.V.I. 2002) (citing *In re: Burlington Coat Factory Securities Litigation,* 114 F.3d 1410, 4121 (3d Cir. 1997)).

In Plaintiff's fraud claim, Plaintiff states that Defendants Huckabee and Gaspard "fraudulently" promised to make payments to Plaintiff in written correspondence and in telephone conversations. However, Plaintiff did not provide dates or any other information explaining when Defendants' misrepresentations occurred. See *Pourzal v. Marriot Int'l, Inc.*, Civ. No. 2001-140, 2006 WL 2471695, at *5 (D.V.I. Aug. 17, 2006) (The plaintiff's allegations that defendant made deliberate misrepresentations was insufficient to fulfill the heightened pleading requirements of Rule 9(b) because the allegations did not contain dates or additional information to identify when the misrepresentations occurred). In contrast, in *Charleswell v. Chase Manhattan Bank*, 308 F.Supp.2d 545, 569 (D.V.I. 2004), the court found that the plaintiff had properly pled his fraud claim because he provided dates the letters containing the alleged misrepresentations were sent. As a result, Plaintiff's fraud claim is improperly pled because it fails to provide sufficient detail to establish the dates of the misrepresentations.

Defendants also argue that Plaintiff's fraud claim lacked specificity because it failed to identify which Defendant made the fraudulent statements and argue that Plaintiff failed to provide the details of the misrepresentation. In *Focus Consulting Group, Inc. v. Merchant's Market, Inc.*, No. Civ.2003-127, 2003 WL 23004999, at *2 (D.V.I. Dec. 15, 2003), the court held that plaintiff's fraud claim was insufficiently plead because the plaintiff referred to the defendants collectively and failed to indicate to whom the alleged fraudulent statements were made. In this case, Plaintiff's fraud claim merely alleges that Defendants Huckabee and Gaspard fraudulently promised on behalf of Southland to pay Plaintiff three percent (3.0%) of the net profits without distinguishing which Defendant made which representation and when it was made. This claim must therefore be dismissed.

B. Pleading Negligent Misrepresentation

Defendants also assert that Plaintiff's negligent misrepresentation claim should be dismissed because it was not plead with the required specificity of Rule 9(b). Negligent misrepresentation claims are not subject to the heightened pleading standards of Rule 9(b). A properly pled negligent misrepresentation claim requires a plaintiff to allege:

> (1) that defendants supplied false information; (2) that the information was supplied in the course of defendants' business; (3) that plaintiffs were guided by the information in their justifiable reliance upon the information; and (5) that defendants failed to exercise reasonable care or competence in obtaining or communicating the information.

Chase, supra at 568. Thus, "the tort of negligent misrepresentation requires proof of the same elements as legal fraud with one additional requirement: a showing that [Defendants] failed to exercise reasonable care in communicating the information." *In re Tutu Water Wells Contamination Litig.*, 78 F.Supp.2d 456, 464 (D.V.I. 1999).

In *Addie v. Kjaer,* Civil No. 2004-135, 2009 WL 453352, at *3 (D.V.I. Feb. 23, 2009), the defendant's motion to dismiss was granted with regard to the plaintiff's negligent misrepresentation claim because the plaintiff failed to allege that the seller defendants made a representation of fact that was false at the time it was made, and the claim lacked allegations that sellers purposefully intended to breach the contract. The court further reasoned that the plaintiff's complaint at a minimum alleged that the seller defendants "failed to fulfill their future promise," and allowing negligent misrepresentation claims based on future intentions would enable all breach of contract causes of actions to also sue in tort. *Id.* Similarly, in this case, Plaintiff alleges that Defendants misrepresented to Plaintiff that he would be paid for his services in the future. Plaintiff's assertion does not provide sufficient factual detail from which it can be discerned that, at the time Defendants agreed to pay Plaintiff for his services, they had no intention of correctly paying Plaintiff. In fact, Defendants paid Plaintiff for sometime. Consequently, Plaintiff's negligent misrepresentation cause of action must also be dismissed.

IV. Gist of the Action Doctrine

Defendants argue in the alternative that Plaintiff's fraud and misrepresentation claims are barred by the gist of the action doctrine which bars tort claims:

> (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependant on terms of a contract.

Addie, supra at *3 (citing *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 19 (Pa.Super.Ct. 2002)). In short, the gist of the action doctrine prevents a plaintiff from pleading a duplicate claim in tort that already is a viable contract claim. *Id.*

Defendants argue that Plaintiff's fraud and misrepresentation claims are barred by the gist of the action doctrine because Plaintiff's damages stem from the Agreement, such that the action is based in contract and not in tort. The Court agrees. Plaintiff alleges that in reference to the Agreement, Huckabee and Gaspard misrepresented that they would pay Plaintiff a consulting fee. See *Williams v. Hilton Group PLC,* 93 Fed.Appx. 384, 387 (3d Cir. 2004) (The Third Circuit affirmed the district court's holding that the plaintiff's tort claims were barred because his "claims were sounded in contract, not tort" and reasoned that the alleged misrepresentations were based on matters agreed to in the parties' contract); see also *Addie, supra* at *10 (Court held that representations that become incorporated into the contract are barred by the gist of the action doctrine). Consequently, Plaintiff's fraud and misrepresentation claims are barred under the gist of the action doctrine because the misrepresentations were a part of the Agreement.

V. Economic Loss Rule

Plaintiff's fraud and misrepresentation claims also are barred under the economic loss doctrine because Plaintiff is limited to recovery of economic damages. "The economic loss doctrine 'prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract.'" *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 671 (3d Cir. 2002) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995)); See *Spivack v. Berks Ridge Corp., Inc.*, 586 A.2d 402, 405 (Pa.Super.Ct. 1990) ("The general rule is that economic losses may not be recovered in tort (negligence) absent physical injury or property damage"). Thus, because Plaintiff has alleged only economic damages stemming from a breach of contract claim and has not alleged any physical or property damage, Plaintiff's fraud and misrepresentation claims may be dismissed under the economic loss doctrine as well.

VI. Breach of Fiduciary Duty and Equitable Accounting

Finally, Defendant argues that Plaintiff's claims for breach of fiduciary duty and equitable accounting should be dismissed because they are premised upon Plaintiff's breach of contract claim. However, the Court finds that these claims are sufficiently pled. Hence, these claims will not be dismissed.

CONCLUSION

Accordingly, Defendant's Motion to Dismiss is granted in part and denied in part.

A separate Order will issue.

Dated: September 22, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest: Venetia H. Velasquez, Esq.
Clerk of the Court_____/_____/_____

by: for
Rosalie Griffith
Court Clerk Supervisor 9 / 22 / 2010

CERTIFIED A TRUE COPY
Date: 9/23/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By:
Court Clerk

IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JEROME RINGO, **Plaintiff,** **vs.** **SOUTHLAND GAMING OF THE U.S. VIRGIN ISLANDS, INC., ROBERT HUCKABEE, III, and SHAINE GASPARD,** **Defendants.**	**CASE NO. ST-10-CV-116**

ORDER

The Court having rendered a Memorandum Opinion this date, in accordance with that opinion it is

ORDERED that Defendant's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**; and it is

ORDERED that Plaintiff's Fraud and Misrepresentation claims are **DISMISSED**; and it is

ORDERED that Defendant's Motion to Dismiss is **DENIED** as to Plaintiff's remaining claims; and it is

ORDERED that copies of this Order shall be directed to counsel of record.

Dated: September 22, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest: Venetia H. Velasquez, Esq.
Clerk of the Court_____/_____/_____

by: for
Rosalie Griffith
Court Clerk Supervisor 9 /22 /2010

CERTIFIED A TRUE COPY
Date: 9/23/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Diane M. Turnbull
Court Clerk