

PREPARED BY THE COURT

JOHN BARRIGA

Plaintiff,

v.

ADVANCED SURGERY CENTER  
LLC and JAMES R. LEE, M.D.

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION

BERGEN COUNTY  
DOCKET NO. BER-L-1326-17

CIVIL ACTION

OPINION

**Argued: March 2, 2018**  
**Decided: March 14, 2018**

**Honorable Robert C. Wilson, J.S.C.**

Jonathan Nirenberg, Esq., appearing for the Plaintiff, John Barriga, (From Rabner Baumgart Ben-Asher & Nirenberg, P.C.).

Stephen J. Caccavale, Esq., appearing for the Defendants, Advanced Surgery Center LLC and James Lee, M.D. (From Rudolph & Kayal, Counselors at Law, P.A.).

**FACTUAL BACKGROUND**

**THIS MATTER** arises from a dispute concerning the recruiting of medical personnel by Plaintiff John Barriga (“Plaintiff”) on behalf of Defendant Advanced Surgery Center (“ASC” or “Defendant”). Defendant ASC is a New Jersey limited liability company, which operates an ambulatory surgery center. ASC is licensed by the New Jersey Department of Health and Senior Services and is accredited by the Accreditation Association for Ambulatory Health Care, Inc. Defendant James Lee (“Defendant”) is an obstetric and gynecologic surgeon. He is a founding member of ASC, and acts as ASC’s managing member.

The Plaintiff is not himself a physician or surgeon, but instead worked as an independent contractor for ASC to recruit physicians and surgeons with the objective to have those medical professionals obtain privileges to utilize ASC's facilities for operative procedures. If the recruited professionals satisfied the qualifications of membership in ASC's Operating Agreement, they might be invited to become members in ASC in exchange for a cash payment. Plaintiff Barriga would receive periodic payments in exchange for his efforts to recruit these physicians and surgeons.

This case raises the all too common "shotgun blast" of claims and causes of action in both the Plaintiff's complaint and the Defendants' counterclaim, ranging from fraud, quasi-contract and tort. These causes of action however, are generally barred by the economic loss doctrine and subsumed by the cause of action for breach of contract. See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). While the Court is sympathetic to an aggrieved party having suffered from a breach of contract, that economic loss should not be an excuse to plead a litany of civil causes of action. Under New Jersey Law, the economic loss doctrine serves to maintain the distinction between contract and tort. As the Appellate Division has explained "a dispute [that] clearly arises out of and relates to [a] contract and its breach should be resolved pursuant to contract law rather than tort law. See Wasserstein v. Kovatch, 261 N.J. Super. 277, 286, 618 A.2d 886 (App. Div. 1993). Further, that It is well-settled New Jersey law that "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). The economic loss doctrine operates to bar tort claims where a plaintiff through its tort allegations seeks to enhance the benefit of the bargain it contracted for with the defendant. See id. at 315-16.

Plaintiff filed the complaint in February of 2017, alleging that Defendants ASC and Lee failed to pay the agreed-upon compensation for services performed, fraudulently entered into an agreement to make the Plaintiff a twenty percent owner of ASC without intending to honor that contract, and a breach of that contract. The Plaintiff has filed a motion to dismiss the Defendants' numerous counterclaims. These counterclaims include: defamation, fraud, indemnification and contribution, tortious interference with contract, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, unjust enrichment, "promissory note," conversion, a breach of the covenant of good faith and fair dealing, and equitable estoppel. The Plaintiff also moves to strike three of the Defendants' affirmative defenses sounding in indemnification and contribution, the entire controversy doctrine, and res judicata.

For the reasons stated below, the Plaintiff's motion is hereby **GRANTED IN PART** and **DENIED IN PART**.

#### **MOTION TO DISMISS STANDARD**

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted.

R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The “test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts.” Printing Mart, 116 N.J. at 746. However, “a court must dismiss the plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.” Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

## **DECISION**

### **I. The Defendants’ Counterclaim for Fraud Must be dismissed as the Defendants have failed to plead with the Requisite Particularity.**

The Court first examines the counterclaim for fraud. Here, the counterclaim must be dismissed, as the Defendants have failed to plead with the required particularity. In any claims alleging fraud “particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other conditions of mind of a person may be alleged generally.” R. 4:5-8. Where pleadings only lack specificity, the Court typically provides the pleader with the opportunity to amend the pleadings. See Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988). However, where the pleadings lack specificity and fail to plead the elements of legal or equitable fraud, the Court may dismiss the count. See Levinson v. D’Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999).

The elements of legal fraud are “(1) material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” Banco Popular No. America v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Equitable fraud is distinguished from legal fraud by the lack of scienter as an element. See Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619 (1981).

The Defendants’ counterclaim for fraud lacks the requisite specificity under New Jersey law. Defendants’ counterclaim makes broad representations about future performance and sales with respect to the Plaintiff’s recruiting at ASC. No details regarding what was allegedly said by the Plaintiff, or to whom he made any misrepresentations was raised in the counterclaim. Likewise, the counterclaim fails to specify when these statements were made. Therefore, the Defendants’ counterclaim for fraud is dismissed without prejudice.

II. **The Defendants’ Counterclaim for Defamation Must be dismissed as the Defendants have failed to plead the elements of the Tort.**

The Court next examines the Defendants’ counterclaim for defamation. Here, the Defendants’ have failed to plead the elements of defamation, and thus, the counterclaim must be dismissed. The elements of a defamation claim are: “(1) a defamatory statement of fact (2) concerning the claimant (3) which was false, and (4) which was communicated to a person or persons other than the claimant.” Feggans v. Billington, 291 N.J. Super. 382, 390 (App. Div. 1996). The claimant must also show fault on the part of the defaming party. In cases concerning a private individual and a private subject matter, the standard is that of ordinary negligence. See Feggans, at 391. Further, those elements must be pled with a level of specificity. The Appellate Division

has explained that “In order to properly plead a claim for libel or slander the defamatory words must be identified.” Russo v. Nagel, 358 N.J. Super. 254, 269 (App. Div. 2003).

Here, the Defendants have not only failed to plead the elements of defamation, but have failed to do so with the specificity required. First, the counterclaim fails to allege any negligence on the part of the Plaintiff. Thus, the Defendants have not pled the essential elements of a defamation claim. Second, there is no specific allegation of the words or statements made by the Plaintiff which is allegedly defamatory. Consequently, the counterclaim fails to incorporate the required specificity. For these reasons, the Defendants’ counterclaim for defamation is hereby dismissed without prejudice.

III. **The Defendants’ Counterclaim for Indemnification and Contribution Must be dismissed as the Defendants have failed to plead the elements of that Cause of Action, which is Barred by the Entire Controversy Doctrine.**

The Defendants’ counterclaim for indemnification and contribution must be dismissed because they have failed to plead required elements, and it is likewise barred by the entire controversy doctrine. The elements of an indemnification and contribution claim are: “(1) entry of a judgment or verdict; (2) determination of plaintiff’s quantum of damages, and (3) the existence of nonsettling defendants.” Tefft v. Tefft, 192 N.J. Super. 561, 570 (App. Div. 1983). Further, the Court in Tefft held that “where percentages of negligence are appropriately determined by the fact-finder under N.J.S.A. 2A:15-5.2 and all defendants then settle with plaintiff, any cross-claims against each other are extinguished.” Id. Here, the Defendants have admitted that they settled the previous claims in order to mitigate the possibility of an unfavorable verdict. This is a common motivation for settlement in any case. Therefore, as in the instant case, when there is a settlement,

those potentially existing rights of the litigants against each other for indemnification and contribution are extinguished.

Additionally, this counterclaim would be similarly barred by the entire controversy doctrine. The entire controversy doctrine requires that litigants adjudicate the entirety of their dispute in a single lawsuit. The New Jersey Supreme Court has stated that the entire controversy doctrine “requires that all issues of a single dispute between the parties must be completely determined in one action.” Culver v. Ins. Co. of N. Am., 115 N.J. 451, 463 (1989). The New Jersey Court Rules have codified this requirement in R. 4:30A, which states in relevant part: “Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine...” R. 4:30A. As the New Jersey Supreme Court explained in Applestein v. United Board & Catron Corp., the entire controversy doctrine requires that “a defendant assert all matters which will defeat a claim against him and a plaintiff must seek complete relief for vindication of the wrong he charges.” Applestein v. United Bd. & Carton Corp., 35 N.J. 343, 356 (1961).

Here, the law makes it clear that a claim for indemnification or contribution must be brought in the underlying suit, and falls squarely into the entire controversy doctrine if brought later. The Appellate Division in Buck v. MacDonald held that a claim for indemnification or contribution was barred when it could have been raised in a previous, underlying action. Buck v. MacDonald, 300 N.J. Super. 158, 161 (App. Div. 1997). Here, like in Buck, any cross claims for indemnification and contribution could have been brought in the underlying litigation. Consequently, these counterclaims are barred by the entire controversy doctrine, and dismissed without prejudice.

IV. **The Defendants' Counterclaim for Tortious Interference with Contract Must be dismissed as the Defendants have failed to show any Diversion of the Plaintiff's Business.**

The Defendant's counterclaim for tortious interference with contract must also be dismissed because the Defendants have not plead the requisite elements by failing to show that the Plaintiff diverted the Defendants' business. The elements of a tortious interference with contract claim are: (1) a prospective economic or contractual relationship (2) the interference was done intentionally and with malice (3) the interference caused the loss of the prospective gain, or that if there had been no interference, there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits, and (4) damages. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989). The Defendants have failed to make any showing of what prospective economic or contractual relationship was interfered with. Further, there was no showing that any such business was actually diverted. The Defendants failed to allege actual interference by the Plaintiff. As a result, the counterclaim must be dismissed without prejudice.

V. **The Defendants' Counterclaim for Intentional Infliction of Emotional Distress must be dismissed as the Defendants have failed to show Outrageous Conduct by the Plaintiff.**

The Defendants' counterclaims for intentional infliction of emotional distress must be dismissed because the Defendants have failed to show any outrageous conduct on the part of the Plaintiff. The elements of a claim for intentional infliction of emotional distress are:

- (1) the defendant acted intentionally;
- (2) the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;"
- (3) the defendant's actions proximately caused him/her emotional distress;



and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it."

Soliman v. Kushner Cos., Inc., 433 N.J. Super. 153, 177 (App. Div. 2013).

In the instant case, the Defendants have failed to make any showing of outrageous conduct of the sort required for an intentional infliction of emotional distress claim. Here, where the Plaintiff allegedly breached a contract, it simply cannot be said that he engaged in actions "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. Thus, the Defendants' counterclaim for intentional infliction of emotional distress claim is dismissed without prejudice.

VI. **The Defendants' Counterclaim for Negligent Infliction of Emotional Distress must be dismissed as the Plaintiff is an Independent Contractor and the Underlying Cause of Action is for Breach of Contract.**

Similarly, the Defendants' counterclaim for negligent infliction of emotional distress is dismissed without prejudice because the Defendants have not pled facts necessary to support such a claim. Negligent infliction of emotional distress requires: (1) a duty of reasonable care; (2) a breach of that duty; (3) severe emotional distress; and (4) that the breach of duty was the proximate cause of the injury. Russo v. Nagel, 358 N.J. Super. 254, 269-70 (App. Div. 2003). Further, "Whether the defendant has a duty of care to the plaintiff depends on whether it was foreseeable that the plaintiff would be seriously, mentally distressed." Id.

In the instant case, the Defendants admit that the Plaintiff was an independent contractor. There has been no showing that the Plaintiff owed a duty of care to the Defendants, what that duty was, or how it was breached. The Defendants' counterclaims make general assertion that the Plaintiff should have known that his conduct was wrong without ever defining the conduct in

question. Thus, the counterclaim for negligent infliction of emotional distress is hereby dismissed without prejudice.

VII. **The Defendants' Counterclaim for Conversion Must be Dismissed because they have Failed to Specifically Plead that a Good or Chattel has been Stolen.**

The Defendants' counterclaim for conversion must be dismissed because they have failed to plead the facts necessary to support such a claim. Conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div. 2009). Significantly, the tort of conversion has historically applied to goods or chattels. See Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 455-56 (App. Div. 2009). When applied to money, courts have restricted the application of conversion claims in order to maintain distinct separations between breach of contract claims and conversion claims. Id. Specifically, courts have held that "a cause of action for conversion of money does not lie unless the money is identifiable as a specific fund set aside for the owner." and that "It is essential that the money have belonged to the injured party and that it be identifiable, but the money need not be the identical bills or coins that belong to the owner." Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 455-56 (App. Div. 2009).

In the instant case, the Defendants make only general allegations in their counterclaim that the Plaintiff has engaged in theft of proceeds from Defendant ASC while working as an independent contractor. No specific funds are identified. No source of income, other than the proceeds relating to the breach of contract claim are identified. As explained above, courts have maintained a distinction between claims for conversion and claims for breach of contract. Here, the Defendants have failed to maintain any such distinction. Therefore, the Court hereby dismisses the Defendants' counterclaim for conversion without prejudice.

VIII. **The Defendants' Counterclaims for Breach of Contract, Unjust Enrichment, "Promissory Note," Equitable Estoppel, and a Breach of the Covenant of Good Faith and Fair Dealing are not Dismissed because they have been Adequately Pled.**

The Defendants' counterclaims sounding in contract, specifically: (1) breach of contract, (2) unjust enrichment, (3) "promissory note," (4) equitable estoppel, and (5) breach of the covenant of good faith and fair dealing are not dismissed because they have been adequately supported in the pleadings. As explained above, the Court can only dismiss claims if a cause of action cannot be gleaned from even an obscure statement in the pleading. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Further, a complaint should not be dismissed under R. 4:6-2(e) where a cause of action is suggested by the facts and a theory of actionability may be articulated by an amendment of the complaint. See Printing Mart, 116 N.J. at 746. New Jersey Courts have further held that dismissal is proper if the complaint states no basis for relief and discovery would not provide one. Energy Rec. v. Dept of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

Here, the underlying dispute concerns the alleged breach of an agreement between the Plaintiff and Defendant. The parties do not dispute that there was a business relationship between the Plaintiff and Defendant, and that there was some agreement between the two. Both the Plaintiff and Defendants contend that the agreement was breached by the other. For the above claims, this Court can "glean an obscure statement in the pleading." Further, as previously explained, a motion to dismiss should not be granted if an amendment of the complaint would result in a suggested cause of action. Printing Mart, 116 N.J. at 746. The Court notes that the sufficiency of such amendments to the Defendants' counterclaims may be tested at the summary judgment phase of

the litigation. Thus, the Court hereby denies the Plaintiff's motion to dismiss the Defendant's above enumerated contract and quasi-contract counterclaims.

IX. **The Defendants' Affirmative Defenses are not Stricken because questions of Law and Fact Exist.**

The Defendants' affirmative defenses for indemnification and contribution, the entire controversy doctrine, and res judicata are not stricken because there exists questions of law and fact as to those issues. New Jersey Court Rule R. 4:6-5 provides that "the court may order stricken from any pleading any defense insufficient at law." R. 4:6-5. Thus, a court should strike a defense when it is "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Semexant v. MIL Ltd.-Boston Mach. Div., 252 N.J. Super. 318, 322 (App. Div. 1991). Here, the Defendants contend that the scope of the previous order entered by the Judge Harz, J.S.C. applies only to the issue of the Membership Subscription Agreement. Therefore, a question of law exists sufficient to defeat the motion to strike the Defendants' affirmative defenses. Accordingly, the Plaintiff's motion to strike the Defendants' affirmative defenses is denied.

For the reasons stated above, the Plaintiff's motion to dismiss the Defendants' counterclaims and strike the Defendants' affirmative defenses is **GRANTED IN PART** and **DENIED IN PART**.