

JONES & ASSOCIATES, P.C.	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
BLANK ROME, LLP, <i>et al.</i>	*	BALTIMORE CITY
Defendants.	*	Part 20
	*	Case No.: 24-C-07-004164

MEMORANDUM AND OPINION

I. Background

This action was filed on June 12, 2007, and thereafter discovery commenced and preliminary motions were filed and adjudicated through summer and fall of 2007. On December 31, 2007, plaintiff filed a First Amended Complaint (“FAC”). At counsel’s request, the case was accepted into the Business and Technology Case Management Program on February 5, 2008. Defendants Blank Rome, LLP and William R. Martin filed a motion to dismiss Counts IV through VI of the FAC on February 26, 2008. Defendant Patrick O. Cavanaugh (“Cavanaugh”) filed a motion to dismiss for lack of personal jurisdiction on the same date. The two motions were fully briefed and arguments were heard by the Court on April 2, 2008. The Court is filing this Memorandum and Opinion today to set forth briefly its reasons for granting both motions.

II. Defendant Blank Rome, LLP, and Defendant William R. Martin’s Motion to Dismiss Counts IV, V and VI of the First Amended Complaint

The fundamental question posed by this case is who, if anyone, is responsible for paying counsel fees and expenses to plaintiff Jones & Associates, P.C., (“Jones”) for legal services provided to Nathan A. Chapman, Jr., in his defense of a federal criminal prosecution

during the summer of 2004. Plaintiff asserts that it was retained by defendants Blank Rome, LLP, (“Blank Rome”) and William R. Martin (“Martin”) to assist in Chapman’s defense on or about May 24, 2004.

Having failed to obtain a written retainer agreement from Chapman and/or defendants, Jones alleges that it was fraudulently induced to perform legal services on behalf of Chapman by oral representations made by Martin, a partner in the Blank Rome law firm, upon which Jones relied to its detriment, incurring unpaid fees and expenses as of June 11, 2007, in the amount of Three Hundred Thousand, Four Hundred and Seventy-eight Dollars and seventy-five cents (\$300,478.75). Jones points to three specific allegations in its FAC which it contends are sufficient to plead a cause of action for fraud under Maryland law. First, it points to a June 23, 2006, letter attached to the FAC, which was written by Alan M. Friedman on behalf of defendant Blank Rome denying the existence of any agreement to pay Jones’ fees and expenses. Second, plaintiff points to the allegation in its FAC that as of May 2004 defendant Martin and the other lawyers representing Chapman at Blank Rome were not adequately prepared to defend Chapman in the trial scheduled to begin in June of 2004, prompting Chapman to insist that Jones be added to his defense team. Finally, plaintiff points to the allegation in the FAC that the Chapman Insurance Policy of Five Million Dollars (\$5,000,000) was virtually depleted in May of 2004 and that defendants knew that it would be insufficient to cover Jones’ fees and expenses in the criminal case. In order to bolster its argument that Count IV is pled with sufficient specificity to withstand a motion to dismiss, plaintiff points the Court to language contained in the Court of Appeals decision in *Tufts v. Poore*, 219 Md. 1, 10 (1959), which indicates that an inference of fraud can be derived from a pre-existing intent not to perform a promise, coupled

with subsequent conduct of the promisor and other circumstances surrounding the transaction.

Defendants Blank Rome and Martin insist that the failure to perform under an agreement is not fraud and that pleading an unfulfilled promise to pay is insufficient to support a count for fraud under Maryland law. Defendants contend that, even if Martin possessed an original intention not to perform under an agreement with plaintiff, that allegation, standing alone, without more particularized allegations to support it, is insufficient as a matter of Maryland pleading practice.

In ruling on a motion to dismiss under Maryland Rule 2-322(b), the Court assumes for the purposes of the motion that all facts alleged in the complaint are true and considers not only all well-pleaded facts but also those facts that fairly may be inferred from those expressly alleged. *Bennett Heating and Air Conditioning, Inc. v. NationsBank of Maryland*, 342 Md. 169 (1996). Naturally, therefore, in ruling on a motion to dismiss a complaint, the Court focuses on the sufficiency of the pleading.

In a cause of action for fraud, the plaintiff must set forth the facts constituting fraud with certainty and particularity. It is well settled that “[a] general allegation of fraud, however strong in expression, is not sufficient unless there is an allegation of the facts and circumstances relied on as constituting the alleged fraud.” *Sims v. Ryland Group, Inc.*, 37 Md.App. 470, 473 (1977) (citing *Boyle v. Maryland State Fair, Inc.*, 150 Md. 333, 341 (1926)). Merely because a plaintiff uses the word “fraudulent” does not mean that the facts are sufficiently pled. *Brack v. Evans*, 230 Md. 548, 553 (1963) (citations omitted). Charges of fraud without allegations of facts and circumstances which constitute the fraud, does not sustain a sufficient pleading of the fraud. *Id.* “There are no strict guidelines for the Court to determine how well

facts and circumstances must be pled. As long as the allegations of fraud are supported by specific facts and circumstances, the Court must deny a motion to dismiss for failure to state a claim for the relief granted.” *Agbebaku v. Sigma Aldrich, Inc.*, 2003 W.L. 24258219, at *8 (Md. Cir. Ct. June 24, 2003).

The Court agrees with defendants that the failure to perform a contract does not convert a breach of contract action into one for fraud. *Kwang Dong Pharmaceutical Co. v. Han*, 205 F.Supp.2d 489, 495 (D.Md. 2002). The Court must examine closely the particularized allegations contained in the FAC which plaintiff contends are sufficient to support the fraud count.

With respect to the Blank Rome letter of June 23, 2006, denying the existence of an agreement with Jones to compensate it for legal fees and expenses, plaintiff would have the Court draw an inference of a fraudulent pre-existing intent not to perform a promise to pay from the failure to perform. As noted previously, that alone is insufficient to support a claim for fraud but, “under certain conditions, a failure or refusal to perform is strong evidence of an intent not to perform the promise at the time it was made, as where only a short period of time elapses between the making of the promise and the failure or refusal to perform it, and there is no change in the circumstances.” *Tufts*, 219 Md. at 10. *Compare with Cannon v. Cannon*, 156 Md.App. 387, 422 (2004) (citing *Tufts*). According to plaintiff’s FAC, just over two years passed between the May 24, 2004, fraudulent inducement and the June 23, 2006, refusal to perform. As to other circumstances, the FAC alleges that beginning September 2004 plaintiff submitted to defendants invoices for services rendered to Chapman bi-monthly for a period of nineteen months. These invoices went unpaid. Additionally, plaintiff alleges that on December 13, 2004, defendants

Martin and Blank Rome (through Patrick O. Cavanaugh, administrative partner) again acknowledged the agreement to be responsible for Jones' legal fees and expenses. It is unclear to the Court how these additional allegations bolster plaintiff's contention of a pre-existing intent not to perform. Defendants' failure to pay the invoices is consistent with its position that it had no agreement with plaintiff. The allegations concerning the meeting in December 2004 may be supportive of Jones' claim for breach of contract but fail to raise an inference about Martin's or Blank Rome's intentions in May of 2004. Consequently, the Court finds that at best, the allegations suggest an inconsistency in defendants' position with respect to its responsibility to pay Jones but no specificity with respect to defendants' intention to fraudulently induce.

Plaintiff's allegations concerning Martin's unpreparedness for the June 2004 criminal trial state that Nathan Chapman was aware of Jones' extensive knowledge of his business affairs, of Jones' expertise in these matters and that Chapman repeatedly requested of Martin and Blank Rome that they engage Jones as an additional member of the defense team. When taken as true, these allegations may provide an inference of motive for defendants to induce Jones to join in Chapman's defense but, on their face, they raise no inference as to why the law firm, rather than the client, would bear the costs of the additional representation.

As to that point, the FAC alleges that defendants were aware that Chapman's insurance coverage was being depleted and that he would not be in a position thereafter to pay additional legal fees. Again, taking that statement as true on its face, it fails to provide any inference as to why a law firm the size of Blank Rome would be so desperate for Jones' legal assistance as to incur the expense itself, an arrangement that even plaintiff concedes is highly unusual in his experience.

The facts alleged in plaintiff's FAC leave the Court scratching its proverbial head as to how plaintiff reasonably believed that it had such a unique arrangement with defendants for the payment of its fees and expenses. Justifiable reliance being an indispensable element of a fraud claim, *Parker v. Columbia Bank*, 91 Md.App. 346, 361 (1992), *cert. denied*, 327 Md. 524 (1992), this Court is not satisfied that plaintiff has made out a claim for fraud with sufficient particularity to withstand defendants' motion to dismiss. Consequently, Count IV will be dismissed, with leave to amend within fifteen (15) days.

The FAC's Count V attempts to assert a claim for conspiracy to breach contract. Under Maryland law, civil conspiracy is not an independent cause of action. *Van Royen v. Lacey*, 262 Md. 94, 97-98 (1971). The elements of an action for civil conspiracy are: (1) a confederation of two or more persons by agreement or understanding; (2) some unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and (3) actual legal damage resulting to the plaintiff. *Id.*

While there appears to be some authority in Maryland for alleging a breach of contract as the "unlawful act" in a civil conspiracy action, there is a dearth of authority on this point. *See Columbia R.E. Title Ins. Co. v. Caruso*, 39 Md.App. 282, 289 (1978).

Defendants William Martin and Patrick Cavanaugh were, at the times alleged in the FAC, partners in the Blank Rome law firm. Accordingly, it is legally impossible for the members of the firm to enter into a civil conspiracy with the law firm. *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *see also BEP, Inc. v. Atkinson*, 174 F.Supp.2d 400, 409 (D.Md. 2001) (citing *Kairys v. Douglas Stereo, Inc.*, 83 Md.App. 667, 683 (1990), *overruled on other grounds*, *Montgomery Ward v. Wilson*,

339 Md. 701 (1995). When acting within the scope of their employment as partners in the Blank Rome firm, neither Martin nor Cavanaugh could be liable for conspiracy. Plaintiff has alleged that at all times material to its FAC, defendant Martin acted within the scope of his employment. As to defendant Cavanaugh, it has alleged that he acted at times within the scope of his employment and at other times outside the scope of his employment, presumably when engaged in the acts alleged to have formed the basis for plaintiff's civil conspiracy count. Thus, the Court is faced with a situation where plaintiff contends that defendant Martin, acting within the scope of his employment as a partner of Blank Rome, entered into an unlawful conspiracy with defendant Cavanaugh, acting outside the scope of his employment as a partner of Blank Rome. According to the allegations in the FAC, however, there is no delineation between actions taken inside or outside the scope of employment with respect to establishing the agreement between defendant Blank Rome and plaintiff Jones or thereafter denying same. Somehow, plaintiff contends that the law firm itself bears *respondeat superior* liability for the actions of defendants Martin and Cavanaugh, including apparently those actions taken outside the scope of employment.

Although it may be possible to assert an appropriate cause of action for civil conspiracy to breach a contract under certain circumstances, the facts alleged in plaintiff's FAC do not adequately make out such a claim. Accordingly, Count V will be dismissed with leave to amend within fifteen (15) days.

In Count VI, the plaintiff has attempted to assert a claim for conspiracy to commit fraud. This claim, however, is predicated entirely upon the fraudulent acts alleged in Count IV, which the Court has determined above to be insufficiently pled. Consequently, Count VI cannot

stand on its own. This count will be dismissed with leave to amend within fifteen (15) days as well.

III. Defendant Cavanaugh's Motion to Dismiss for Lack of Personal Jurisdiction

Defendant Cavanaugh believes plaintiff failed to establish personal jurisdiction over him under Maryland's long-arm statute. Plaintiff alleges the following facts to support personal jurisdiction over Cavanaugh: A meeting occurred on May 24, 2004, between defendant Martin, on behalf of defendant Blank Rome, and Jones. It is alleged that the parties agreed to engage Jones as counsel in the trial of Nathan Chapman, and that Martin agreed that Blank Rome would be responsible for Jones' fees. The complaint then alleges, "upon information and belief," that at some unknown point in time, either before or after the agreement was entered into with Blank Rome, Martin communicated to Cavanaugh the terms and conditions of this agreement. Cavanaugh was also allegedly at a meeting held with Jones and Martin on December 13, 2004, at which time both he and Martin purportedly acknowledged the alleged agreement for Blank Rome to pay Jones for its services. Plaintiff states in the FAC that upon submitting its invoices in September 2004 for services rendered during the Chapman trial, Martin forwarded the invoices to Cavanaugh who was then the Administrative Partner of Blank Rome's Washington, D.C., office. Additionally, plaintiff alleges that Cavanaugh had later oral and written communications with plaintiff, both acknowledging and then later denying the existence of an agreement between the two firms.

In his motion to dismiss and his accompanying affidavit, Cavanaugh asserts the following in support of lack of personal jurisdiction: 1) he is not, nor has he ever been, domiciled in

Maryland;¹ 2) he is domiciled in Florida and maintains his residence in Virginia; 3) as a practicing attorney, he maintains his principal place of business in Washington, D.C.; 4) he is not a member of the Maryland Bar nor has he ever been specially admitted to practice law in Maryland; and, 5) he does not conduct or solicit business in Maryland. Additionally, he argues that plaintiff has failed to allege any facts in its FAC indicating that he performed any act or transacted or solicited any business in the State to cause injury to the plaintiff.

Plaintiff has failed to establish that personal jurisdiction exists over Cavanaugh pursuant to Md. Code Ann., Cts. & Jud. Proc. § 6-102. As Cavanaugh's affidavit attests, he is not domiciled in Maryland, nor does he maintain his principal place of business in Maryland. He was also not served with process in Maryland.

Plaintiff also asserts specific jurisdiction exists under Maryland's long-arm statute. Although Cavanaugh concedes that plaintiff may gain personal jurisdiction over a non-resident defendant through Maryland's long-arm, he argues that personal jurisdiction *over him* does not comport with his individual due process rights under the Fourteenth Amendment. *See Mackey v. Compass Marketing*, 391 Md. 117, 129-30 (2006). He argues that no facts have been alleged showing he transacted business or performed work in Maryland, nor were facts alleged showing that he caused a tortious act that caused plaintiff injury. Cavanaugh maintains that plaintiff has shown nothing more than that he, at some unknown point in time, knew about the alleged contract for legal services.

Plaintiff believes personal jurisdiction over Cavanaugh may be had through the conspiracy theory of personal jurisdiction. Plaintiff alleges that Cavanaugh was involved in a

¹ Plaintiff asserts that Cavanaugh is a citizen of Maryland.

conspiracy to commit both breach of contract and fraud by entering into an agreement with the other named defendants not to pay plaintiff its fees for legal services rendered. The conspiracy theory of jurisdiction is expressed as follows:

[W]hen two or more individuals conspire to do something that they could reasonably expect to lead to consequences in a particular forum, if one co-conspirator commits overt acts in furtherance of the conspiracy, and those acts are the type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.

Cawley v. Bloch, 544 F.Supp. 133, 135 (1982).

The Court of Appeals, citing to *Cawley v. Bloch*, held that Maryland law recognizes the conspiracy theory of jurisdiction. *Mackey*, 391 Md. at 130. In coming to this conclusion, the Court stated that since Maryland's long-arm statute authorizes the exercise of personal jurisdiction to the full extent allowable under the Due Process Clause, "the evaluation becomes one of determining whether the defendant's actions satisfy the minimum contacts required by due process so that 'maintenance of the suit does not offend traditional notions of fair play and justice.'" *Mackey*, 391 Md. at 130 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

Therefore, the conspiracy theory of jurisdiction comports with Maryland's long-arm statute because "[t]he attribution principle enables a court to exercise jurisdiction over nonresidents involved in a conspiracy when a co-conspirator performs jurisdictionally sufficient acts in furtherance of the conspiracy." *Mackey*, 391 Md. at 131. Put another way, "a co-conspirator can be subjected to the personal jurisdiction of a particular forum only if the co-

