

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRYOLIFE, INC.)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION FILE
)	NO: 1:09-CV-1150-CAP
MEDAFOR, INC.)	
)	
Defendant.)	

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PARTIAL RECONSIDERATION**

Defendant Medafor, Inc. (“Medafor”) respectfully submits this Memorandum of Law in Opposition to Plaintiff CryoLife, Inc.’s (“CryoLife”) Motion for Partial Reconsideration.

INTRODUCTION

On December 9, 2009, this Court entered a twenty page Order ruling on Medafor’s Partial Motion to Dismiss (the “Order”). The Order includes a lengthy discussion of both parties’ arguments, and concludes that Medafor’s Motion to Dismiss should be granted with respect to CryoLife’s fraud and negligent misrepresentation claims. (Order, at pp. 15-18). CryoLife now seeks reconsideration of this Order, expressing “surprise” that the Court dismissed its fraud and negligent misrepresentation claims, and concluding that the Court must

have gotten “lost” in the voluminous filings of the parties and misunderstood the nature of its claims. (Motion for Reconsideration at pp. 1-2). CryoLife does not argue that there has been an intervening change in controlling law since the issuance of the Order, that new evidence has been discovered or that the Order is based upon clear error. Instead, CryoLife’s Motion is nothing more than an attack on the Court’s reasoning with respect to the dismissal of its fraud and negligent misrepresentation claims, and a rehashing of arguments that have been fully briefed by both parties and carefully considered by this Court. CryoLife fails to show this Court that reconsideration of the Order is appropriate and its Motion should be denied.

ARGUMENT

A. Legal Standards For Motion For Reconsideration.

The Local Rules of this court expressly state that motions for reconsideration “shall not be filed as a matter of routine practice[,]” but only when “absolutely necessary.” LR 7.2(E), NDGa. Consistent with this rule, this Court has repeatedly held that motions for reconsideration should be reserved for limited situations. Romala Stone, Inc. v. Home Depot U.S.A., Inc., 2009 U.S. Dist. LEXIS 42300, *4 (N.D. Ga. May 18, 2009); see also Vidinliev v. Carey Int’l, Inc., 2008 U.S. Dist. LEXIS 106770, at *5 (N.D. Ga. Dec. 15, 2008)(noting that motions for

reconsideration should only be filed when “absolutely necessary.”); Diamond Crystal Brands, Inc. v. Wallace, 563 F. Supp. 2d 1349, 1352 (N.D. Ga. 2008)(recognizing that a motion for reconsideration is an “extraordinary remedy to be employed sparingly”)(internal citations omitted)). An “absolute necessity” exists only where there is: “(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact.” Romala Stone, Inc., 2009 U.S. Dist LEXIS 42300 at *4 (quoting Bryan v. Murphy, 246 F.Supp.2d 1256, 1258-59 (N.D. Ga. 2003)).

This Court has also consistently recognized that motions for reconsideration should not be used to reiterate arguments that have already been made. Bryan, 246 F.Supp.2d at 1258-59. Such motions should also not be used to “offer new legal theories that could have been raised earlier,” or to “present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind.” Romala Stone, Inc., 2009 U.S. Dist LEXIS 42300 at *4 (internal citations omitted); See also, Brogdon v. National Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000)(same); Worsham v. Provident Cos., 249 F. Supp. 2d 1325, 1338 (N.D. Ga. 2003)(denying motion to reconsider grant of summary judgment on plaintiff’s fraud and RICO claims,

holding that plaintiff had simply repeated arguments made on the summary judgment motion).

A motion for reconsideration may also not be used “as an opportunity to show the court how it could have done better.” Romala Stone, Inc., 2009 U.S. Dist LEXIS 42300 at *4; see also, Deerskin Trading Post v. UPS of America, Inc., 972 F. Supp. 665, 674 (N.D. Ga. 1997)(motion for reconsideration is not an opportunity for a party to “instruct the court on how the court ‘could have done it better’ the first time”)(citation omitted).

B. CryoLife’s Motion Merely Reiterates The Same Arguments Made In Opposition To Medafor’s Motion To Dismiss.

There can be no dispute that CryoLife has already fully briefed the issue of whether its fraudulent inducement and negligent misrepresentation claims are barred as a matter of law.¹ As noted above, the Order makes clear that this Court fully considered all of the arguments of both parties before concluding that Medafor’s Motion should be granted with respect to CryoLife’s fraud and negligent misrepresentation claims. CryoLife’s Motion does not show that there

¹ This is the *fourth* time CryoLife has made these arguments before this Court. Medafor moved to dismiss the same claims in CryoLife’s original Complaint, and CryoLife filed not only an opposition brief, but a sur-reply brief to that motion, and then attempted to correct certain deficiencies in its Complaint by filing its First Amended Complaint. Medafor then moved to dismiss portions of the First Amended Complaint, to which CryoLife filed an opposition brief.

has been an intervening change in the controlling law, that new evidence is available, or that there is a clear error in this Court's reading of either the facts or the law.

Instead, CryoLife declares that this Court must have "misunderstood" its claims. Presumably in an attempt to correct the Court's "misunderstanding," CryoLife spends the majority of its Motion summarizing those paragraphs of its lengthy Amended Complaint that it believes properly allege a claim for fraud, broken down by the elements of the claim. (Motion for Reconsideration at pp. 6-7; 11-13). In the remainder of its Motion, CryoLife merely reiterates (sometimes verbatim) arguments and citations it made in previous rounds of briefing, each of which has already been considered and rejected by this Court. (Motion for Reconsideration at pp. 8-10). CryoLife's repetition of the elements of its claims and the arguments it made on the Motion to Dismiss amount to nothing more than its attempts to show this Court how it could have done better. Merely because CryoLife does not agree with this Court's reasoning does not mean it was incorrect. See, Vidinliev, 2008 U.S. Dist. LEXIS 106770 at *7 (denying the defendant's motion for reconsideration of denial of summary judgment, noting that the Court had considered and rejected all of defendant's arguments and stating:

“[t]he Defendants may not agree with those reasons, but that does not entitle them to summary judgment in their favor.”).

C. The AFLAC Case Does Not Change The Controlling Law.

In its Motion, CryoLife relies heavily on a recent case from the Middle District of Georgia, AFLAC v. Intervoice, Inc., 2009 U.S. Dist. LEXIS 86055 (M.D. Ga. Sept. 21, 2009). Despite CryoLife’s attempt to characterize this case as “new” law, a reading of the case makes clear that it does not change the controlling law or contain any newly developed law. The AFLAC case was merely decided after Medafor’s motion was fully briefed. CryoLife does not even attempt to show this Court how AFLAC contains new developments or changes to the law. Instead, CryoLife uses its citation to AFLAC in its efforts to “repackage” the same arguments it made in the previous three briefs it has filed on this issue, in order to “test whether the Court will change its mind.” Indeed, cases cited in the portions of AFLAC that CryoLife cites date as far back as 1910, and include a case that CryoLife cited in opposition to Medafor’s motion to dismiss CryoLife’s initial complaint: Authentic Architectural Millworks v. SCM Group USA, Inc., 262 Ga. App. 826, 586 S.E.2d 726 (2003). See Plaintiff’s Response to Defendant’s Motion to Dismiss, filed June 24, 2009 [Document 15], at 9-10.

CryoLife's implication that this Court did not understand the Georgia law on fraud is also incorrect. Citing to AFLAC, CryoLife points out that a plaintiff alleging a claim for fraudulent inducement has a "third option:" to affirm the contract and sue for damages from the fraud. (Motion for Reconsideration at p. 9). Yet this Court, citing to Ekeledo v. Amporful, 281 Ga. 817, 819 (2007) expressly stated in its Order that "a plaintiff alleging fraudulent inducement to enter a contract can choose between (1) affirming the contract and **suing for damages from the fraud or breach**, and (2) promptly rescinding the contract and suing in tort for fraud." (Order at p. 17)(Emphasis Supplied).

Finally, AFLAC is distinguishable from this case. At the outset, the plaintiff in AFLAC sought to rescind the sales contract at issue, unlike CryoLife. Nonetheless, the defendant argued that, even if the plaintiff had affirmed the contract, the merger clause precluded the fraud claim. Relying upon Ekeledo, 281 Ga. at 819, the court noted that, under Georgia law, the existence of a merger clause in a contract "usually precludes fraudulent inducement claims," reasoning that where a party affirms a contract with a merger clause, "he is estopped from asserting that he relied upon the other party's misrepresentation and his action for fraud must fail." AFLAC, 2009 U.S. Dist. LEXIS 86055 at *33. However, as ignored by CryoLife, the court in AFLAC ultimately concluded that the existence

of the merger clause did not preclude the plaintiff's fraud claim, because "*the species of fraud alleged by Plaintiff is not fraudulent inducement. . . .*" Id. (Emphasis Supplied).

By contrast, CryoLife's claim based upon alleged misrepresentations in the EDA *is* a claim for fraudulent inducement. In fact, in its Motion, CryoLife expressly asserts that its claim based upon misrepresentations in the EDA is "under the well-established theory of fraudulent inducement." (Motion for Reconsideration at p. 3). CryoLife's First Amended Complaint also expressly alleges that Medafor made alleged misrepresentations in the EDA "with the specific intent to deceive CryoLife *and to induce CryoLife to enter into the EDA.*" (First Amended Complaint, ¶ 171)(Emphasis Supplied). Not only does AFLAC not represent a change in the law, but its holding is inapposite to this case. It does not provide a basis for reconsideration of the Court's Order.

CONCLUSION

For the foregoing reasons, defendant Medafor respectfully requests that this Court deny plaintiff CryoLife's Motion for Partial Reconsideration.

This 10th day of January, 2010. ²

² Counsel hereby certifies that this document has been prepared in Times New Roman font (14 point), in accordance with Local Rule 5.1C.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2010, I electronically filed **Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Reconsideration** using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

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