

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRYOLIFE, INC.,

Plaintiff,

v.

MEDAFOR, INC.,

Defendant.

CIVIL ACTION

NO. 1:09-CV-1150-CAP

O R D E R

This matter is before the court on the defendant's motion to dismiss [Doc. No. 12] and the defendant's partial motion to dismiss [Doc. No. 26]. As an initial matter, since the plaintiff filed an amended complaint after the defendant's motion to dismiss [Doc. No. 12], the defendant's motion to dismiss [Doc. No. 12] is DISMISSED as moot.

I. Procedural and Factual Background

This suit was initiated on April 29, 2009, and an amended complaint [Doc. No. 19] was filed on July 30, 2009. The plaintiff, CryoLife, markets and distributes services and products to an international network of distributors. The defendant, Medafor, is a biomedical company that manufactures and sells a hemostatic product ("MPH product") used by healthcare professionals to halt bleeding from cuts, wounds, and surgical incisions. This suit concerns Medafor's sale to CryoLife of the exclusive right to market the MPH product. On April 16, 2008, CryoLife and Medafor

entered into an Exclusive Distribution Agreement ("EDA"), effective May 1, 2008, pursuant to which CryoLife became the exclusive distributor of the MPH product within a defined territory for use in certain fields of medicine.

CryoLife alleges nine causes of action in its amended complaint [Doc. No. 19]. Count I is a breach of contract claim in which CryoLife alleges that Medafor has breached the EDA without justification or excuse. Count II is a fraud claim in which CryoLife alleges that Medafor made false statements with the specific intent to deceive CryoLife and to induce CryoLife to enter into the EDA. CryoLife also alleges that Medafor made knowingly false statements after the EDA was executed with the specific intent to deceive CryoLife, to induce CryoLife not to take action to repudiate the contract, and to induce CryoLife customers to order the MPH product from Medafor directly or from Medafor's other distributors. Count III is a negligent misrepresentation claim in which CryoLife alleges that Medafor made false statements with the specific intent to induce CryoLife to enter into the EDA, and that CryoLife justifiably relied on those representations and entered into the EDA. CryoLife also alleges that Medafor made negligent misrepresentations to CryoLife after the EDA to induce CryoLife not to repudiate the contract. Additionally, CryoLife alleges that Medafor made false statements with the intent of inducing

CryoLife's customers to continue ordering the MPH product from Medafor directly or from Medafor's other distributors.

Count IV is a civil RICO claim in which CryoLife alleges that Medafor intentionally devised and participated in a scheme to obtain an interest in and control of money from CryoLife and/or CryoLife's customers using the interstate mails and interstate wires. Count V is a money had and received claim in which CryoLife alleges that CryoLife is entitled to the money that Medafor received due to the above-referenced acts and omissions. In Count VI, CryoLife requests an equitable accounting of all proceeds that Medafor collected from CryoLife's customers. In Count VII, CryoLife requests a preliminary and a permanent injunction to stop Medafor from breaching the contract and to enforce the contract. In Count VIII, CryoLife requests punitive damages, and in Count IX, CryoLife requests attorneys' fees.

II. Analysis

The defendant, pursuant to Federal Rule of Civil Procedure 12 (b)(6), moves to dismiss portions of the plaintiff's complaint: Count IV in its entirety, and those portions of Counts II and III based upon: (1) alleged contractual misrepresentations, (2) alleged misrepresentations in the EDA, and (3) alleged misrepresentations to third parties.

A Rule 12(b)(6) motion requires an assessment of whether the plaintiff has set forth claims upon which this court may grant relief. In considering a defendant's motion to dismiss, the court accepts the plaintiff's allegations as true, Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), and construes the complaint in the plaintiff's favor, Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations:

[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). Ultimately, the complaint is required to contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 1974. But, "[d]ismissal is warranted if the complaint lacks an allegation as to a necessary element of the claim raised." Id. Also, this court applies the traditional pleading requirement of Federal Rule of Civil Procedure 8(a) to the instant motion to dismiss, requiring only "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 335 U.S. 41, 47 (1957). "Although authorized by the

Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion on this ground should be granted." St. Joseph's Hospital, Inc. v. Hospital Corporation of America, 795 F.2d 948, 953 (11th Cir. 1986). In light of these standards, the court reviews the relevant portions of the plaintiff's complaint to determine whether dismissal is warranted.

A. Count IV - Georgia RICO claim

Georgia's RICO statute makes it unlawful for any person, "through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money." O.C.G.A. § 16-14-4(a). Medafor promotes three arguments in support of its motion to dismiss the plaintiff's RICO claim: (1) that the plaintiff has not alleged a cognizable pattern of racketeering activity; (2) that the representations on which the plaintiff did not rely do not constitute predicate acts; and (3) that this is a business dispute that RICO was not meant to address. These arguments will be summarized in turn:

i. Pattern of racketeering activity and reliance

First, the defendant contends that the plaintiff has not alleged a "pattern of racketeering activity" as required under the

RICO statute. Emrich v. Winsor, 401 S.E.2d 76, 76 (Ga. Ct. App. 1991). The defendant contends that Georgia courts have held that a "pattern of racketeering activity" cannot arise out of a single transaction. Overton v. State, 671 S.E.2d 507, 517 (Ga. Ct. App. 2008); Jones v. Infocure, No. 1:01-CV-2845-TWT, 2005 U.S. Dist. LEXIS 46745, at *60-63 (N.D. Ga. Sept. 2, 2005). Here, the alleged predicate acts are nothing more than aspects of a single transaction - the EDA. The defendant contends that the RICO statute has been amended to clarify that the "acts" alleged must be "in furtherance of one or more incidents, schemes or transactions." O.C.G.A. § 16-14-2(b). The defendant contends that the plaintiff's attempts to avoid dismissal of its RICO claim, by amending its complaint to add alleged post-contractual predicate acts, should fail because these new allegations do not cure the deficiencies in the original complaint. These additional allegations, even if they could be actionable "misrepresentations," do not cure the fact that the RICO claim arises out of a single transaction - the EDA.

In response, the plaintiff first contends that the plain text of the RICO statute requires only two or more "acts" of racketeering activity in furtherance of as few as "one" incident or transaction. The plaintiff also contends that the defendant ignores the effect of amendments to the Georgia RICO statute,

which altered the relevant test for determining what constitutes a "pattern of racketeering activity." As of July 1, 2001, a Georgia RICO claim can be supported by allegations of two or more predicate acts that are made in furtherance of a single incident, scheme, or transaction. KURTZ CRIMINAL OFFENSES AND DEFENSES IN GEORGIA: RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO), at pp. 1336-37 (2008 ed.) (discussing O.C.G.A. § 16-14-3(8)); MOLNAR GEORGIA CRIMINAL LAW - CRIMES AND PUNISHMENTS, § 50-2 at pp. 1120-21 (2008-2009 ed.) (discussing O.C.G.A. § 16-14-3(8)). The plaintiff also contends that the two post-amendment opinions on which the defendant relies (Overton and Infocure) are in fact governed by the pre-amendment RICO statute, since the alleged predicate acts occurred prior to the amendment's effective date. See Overton, 671 S.E.2d at 513-16 (predicate acts between 1994 and 1998); Infocure, 2005 U.S. Dist. LEXIS 46745, at **2-11 (predicate acts between 1997 and 1999). The plaintiff argues that there is no authority in which a Georgia court has affirmatively declared that, notwithstanding the amendment, courts should continue to impose the pre-amendment requirement of two or more "incidents" or "transactions" instead of two or more "acts" in furtherance of as few as "one" incident or transaction. Therefore, according to the plaintiff, since the amended complaint alleges at least two "acts" of racketeering

activity in furtherance of at least "one" incident or transaction, the court should deny the defendant's motion to dismiss.

The plaintiff also contends that it has properly alleged a Georgia RICO claim, even under the pre-amendment language governing what constitutes a "pattern of racketeering activity." Although the defendant has argued that the parties' negotiations leading to the EDA constitute a "single transaction" for purposes of Georgia RICO (which the plaintiff contests), the plaintiff has nonetheless alleged at least two transactions: (1) several predicate acts leading up to the EDA, and (2) several other predicate acts occurring after the EDA was executed, which were designed to prevent the plaintiff from enforcing its rights under the EDA, to maximize the defendant's profits from the plaintiff's customers, and to prolong the period of time within which the defendant could reap the financial benefits of maintaining its own distributors in the plaintiff's exclusive territory. The plaintiff also contends that under Brown v. Freedman, 474 S.E.2d 73, 78 (Ga. Ct. App. 1996), the relation of the "acts" that took place during contract negotiations would serve "as the link required for them to be considered a pattern of racketeering activity." Thus, the plaintiff argues that even if the court does not accept its reading of the amended statute, the court can still

find a "pattern of racketeering activity," and so the court should deny the defendant's motion to dismiss.

Second, the defendant contends that Georgia law requires that where a RICO claim is based upon mail or wire fraud, the plaintiff must show reliance on the alleged misrepresentations. Huddleston v. R.J. Reynolds Tobacco Co., 66 F. Supp. 2d 1370, 1376 (N.D. Ga. 1999); Gentry v. Volkswagen of America, Inc., 521 S.E.2d 13, 19 (Ga. Ct. App. 1999). Also, Georgia law is clear that when there is a merger clause in the agreement at issue, a pre-contractual representation cannot form the basis for a RICO claim based upon mail or wire fraud. See Markowitz v. Wieland, 532 S.E.2d 705, 708 (Ga. Ct. App. 2000); Worsham v. Provident Companies, Inc., 249 F. Supp. 2d 1325, 1333 (N.D. Ga. 2002) (merger clause precluded the plaintiff's RICO and fraud claims based upon pre-contractual representations). The plaintiff sufficiently pled four misrepresentations here, and all four were made before the execution of the EDA. Thus, the defendant argues that the plaintiff cannot show reliance. The defendant contends that since the fraud claim fails, the RICO claim necessarily fails as well. Prince Heaton Enterprises, Inc. v. Buffalo's Franchise Concepts, Inc., 117 F. Supp. 2d 1357, 1363 (N.D. Ga. 2000) (dismissing the RICO claims after the fraud and negligent misrepresentation claims were dismissed). Therefore, it is the defendant's position that

the predicate acts alleged in the amended complaint cannot form the basis for the plaintiff's RICO claim.

The plaintiff concedes that a Georgia RICO violation requires two or more predicate acts of racketeering activity, such as mail or wire fraud. However, unlike common law fraud, reliance is not an element of the predicate acts of mail fraud or wire fraud, so there is no need to show reliance in order to make out claims for these predicate acts. See Simpson Consulting, Inc. v. Barclays Bank PLC, 490 S.E.2d 184, 190 (Ga. Ct. App. 1997). The plaintiff contends that none of the alleged acts require reliance in order to rise to the level of cognizable acts of mail or wire fraud, and each act can serve as a predicate act to establish a RICO violation.

The plaintiff also contends that it has standing to assert a RICO claim because it has alleged an injury that is traceable to the defendant's alleged RICO violation. To have standing, the plaintiff contends that it must show only that its injury flowed from one of the predicate acts. See, e.g., Infocure, 2005 U.S. Dist. LEXIS 46745, at *67. Here, for example, the plaintiff relied to its detriment on the defendant's fraudulent misrepresentations in the EDA, which the defendant mailed to the plaintiff. Thus, because governing law does not require a showing of reliance in order for mail or wire fraud to constitute a

predicate act, and because the plaintiff has alleged a causal link between the defendant's RICO violations and the plaintiff's injuries, the defendant's argument is without merit.

In its reply brief, the defendant contends that the plaintiff is confusing the issues of standing and reliance. In Curtis Investment Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG, 2009 U.S. App. LEXIS 17469, *9-15 (11th Cir. Aug. 5, 2009), the Eleventh Circuit affirmed the dismissal of the plaintiff's Georgia RICO claim under Rule 12(b)(6) on the ground that a merger clause in the agreement at issue precluded the plaintiff from relying on alleged pre-contractual misrepresentations. Thus, the defendant argues that the RICO claim in this case should be dismissed because the plaintiff is unable to show that it acted in reliance upon the defendant's alleged misrepresentations.

As the defendant contends, under Georgia's civil RICO provision, the plaintiff can only recover for injuries incurred as a result of predicate acts directed towards itself, as opposed to predicate acts directed towards third parties. American General Life and Accident Insurance Co. v. Ward, 509 F. Supp. 2d 1324, 1332 (N.D. Ga. 2007) (citing Nicholson v. Windham, 571 S.E.2d 466, 468 (Ga. Ct. App. 2002)). The plaintiff must show reliance on the alleged misrepresentations that constitute the predicate acts of mail or wire fraud. Huddleston, 66 F. Supp. 2d at 1376; Gentry,

521 S.E.2d at 19. Where there is a merger clause in the agreement at issue, a pre-contractual misrepresentation cannot form the basis for a RICO claim. See Markowitz, 532 S.E.2d at 709; Worsham, 249 F. Supp. 2d at 1333.

The EDA at issue here does have a merger clause. In its amended complaint, the plaintiff alleges four misrepresentations made between April 7, 2008, and April 15, 2008, all before the execution of the EDA [Doc. No. 19, ¶¶ 198(a)-(d)]. As a matter of law, these alleged acts of mail or wire fraud cannot form the basis for the alleged "pattern of racketeering activity" in this case. The plaintiff also alleges that the defendant made "numerous" unspecified misrepresentations after contract formation through the use of the mail and wires [Doc. No. 19, ¶¶ 198(f) and (g)]. However, these unspecified misrepresentations are insufficiently pled under Federal Rule of Civil Procedure 9(b), which requires civil RICO plaintiffs alleging fraud to plead: "(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the plaintiffs; and (4) what the defendants gained by the alleged fraud." Ambrosia Coal & Construction Company v. Morales, 482 F.3d 1309, 1316 (11th Cir. 2007).

To properly analyze a substantive motion to dismiss, the court must be able to adequately analyze the plaintiff's complaint and determine what facts supports its claims. The plaintiff's complaint is clearly deficient, and the defendant may well be entitled to dismissal. However, the court will not dismiss this action against the defendant at this time. Instead, the court will give the plaintiff an opportunity to recast its complaint. Accordingly, the plaintiff is directed to file a recast complaint within 20 days, with further directions to the parties included in Part III of this order.

ii. Business dispute that RICO not meant to address

The defendant also contends that the Georgia RICO statute is intended to address racketeering activity, not to provide a cause of action for plaintiffs in every "garden variety" business dispute. Instead, the Georgia legislature specially stated that the statute was meant to address the "severe problem" in Georgia posed by the "increasing sophistication of various criminal elements" and that it was meant to apply to an "interrelated pattern of criminal activity." O.C.G.A. § 16-14-2(a) and (b).

The plaintiff contends that, absent some intrinsic failing in the RICO claim itself, the attempt to block invocation of RICO civil remedies by recasting a suit as too mundane to warrant RICO relief has been widely rejected. See, e.g., Arabian American Oil Co. v. Scarfone, 939 F.2d 1472, 1478 (11th Cir. 1991) (observing that "many RICO cases involve contract disputes," and holding that a cause of action for breach of contract arising out of the same conduct did not prohibit RICO claims); Interagency, Inc. v. Danco Financial Corp., 417 S.E.2d 46, 49 (Ga. Ct. App. 1992) (noting that "the Georgia RICO statute is significantly broader than its federal counterpart" and rejecting the defendant's argument that the plaintiff's Georgia RICO claims should be dismissed because the case was merely a simple, garden variety civil dispute).

As the plaintiff contends, absent some intrinsic failing in the RICO claim itself, courts have refused to block the invocation of RICO civil remedies in "garden variety" business disputes. See, e.g., Boyle v. United States, 129 S.Ct. 2237, 2247 (2009) ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe") (citing Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct. 2131, 2145 (2008)). Accordingly, the court does not have a basis to dismiss the plaintiff's RICO claim on these grounds.

iii. Conclusion

For the reasons above, the defendant's 12(b)(6) motion to dismiss the civil RICO claim is GRANTED in part and DENIED in part. To the extent the plaintiff's RICO claim depends on acts directed towards, or harm incurred by, individuals other than itself, the defendant's motion to dismiss is GRANTED. To the extent the plaintiff's claim depends on pre-contractual acts, the defendant's motion to dismiss is GRANTED. The defendant's motion is DENIED with respect to the other parts of the RICO claim. The plaintiff is ORDERED to recast its complaint to sufficiently plead the alleged post-contractual predicate acts within 20 days.

B. Counts II and III - Based on Pre-Contractual Misrepresentations and Contractual Misrepresentations

The defendant contends that the plaintiff may not base a fraud claim on pre-contractual misrepresentations because the general rule under Georgia law is that a party is required to elect between a breach of contract action and a fraud action when the contract contains a merger clause, which the EDA does in this case. Rampura, LLC v. Main and 75 Center, LLC, No. 1:06-CV-515-CAP, 2008 U.S. Dist. LEXIS 66999, at *21 (N.D. Ga. Feb. 13, 2008). The defendant also contends that the plaintiff cannot base a fraud claim on misrepresentations made in the contract itself because these misrepresentations merely formalized the representations during negotiations leading up to the contract, meaning that the plaintiff is relegated to a breach of contract claim since the plaintiff has affirmed the contract. Weed Wizard Acquisition Corp. v. A.A.B.B., Inc., 201 F. Supp. 2d 1252, 1256 (N.D. Ga. 2002).

The plaintiff contends that all of the representations asserted in the fraud and negligent misrepresentation counts were actually set forth in the EDA or made at a later date, so the defendant's arguments regarding pre-contractual representations are irrelevant [Doc. No. 19, ¶¶ 30-43, 169, 173, 182, 186]. Regarding the representations in the EDA, the plaintiff contends that under Georgia law, a party alleging fraudulent inducement has the option to "affirm the contract and sue for damages from the

fraud or breach." Ekeledo v. Amporful, 642 S.E.2d 20, 22 (Ga. 2007). Also, the plaintiff contends that a merger clause in an affirmed contract only precludes claims for fraud in the inducement that are based on pre-contractual representations. Worsham, 249 F. Supp. 2d at 1332. The plaintiff distinguishes Weed Wizard by arguing that the plaintiff in that case did not make an effort to refute the defendant's contention that the fraud claims asserted against it were based solely on pre-contractual representations. Thus, the plaintiff contends that it can still bring a fraud claim on the basis of the representations contained in the EDA.

As the defendant contends, under Georgia law, 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. Ekeledo, 642 S.E.2d at 22. If the plaintiff elects to affirm the contract, the plaintiff is bound by the contract's provisions, including the contract's merger clause. Weed Wizard, 201 F. Supp. 2d at 1256. If the agreement at issue includes a merger clause, the plaintiff is estopped from arguing that it relied on representations other than those contained in the contract. Ainsworth v. Perreault, 563 S.E.2d 135, 137 (Ga. Ct. App. 2002). Therefore, the plaintiff cannot rely upon any

pre-contractual representations as a basis for its claims of fraud and negligent misrepresentation. The plaintiff also cannot rely upon any contractual or post-contractual representations as a basis for its claims of fraud and negligent misrepresentation as the court is not aware of any authority, and the plaintiff has not presented any authority, to show that Georgia recognizes a tort of fraud in the continuance of a contract. As such, the defendant's motion to dismiss the fraud and negligent misrepresentation claims (Counts II and III of the plaintiff's amended complaint) is GRANTED. Because the court is granting the defendant's motion to dismiss on this basis, the other bases for dismissal advanced in the defendant's motion are moot and will not be addressed by the court.

C. Shotgun Pleading

Although not raised by the defendant, after carefully reviewing the plaintiff's complaint, the court concludes that it is a quintessential shotgun pleading. See Wagner v. First Horizon Pharmaceutical Corp., 464 F.3d 1273, 1279 (11th Cir. 2006) ("Shotgun pleadings are those that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense. Shotgun pleadings wreck havoc on the judicial system."); Beckwith v. BellSouth Telecommunications, Inc., 146 Fed. Appx. 368, 372 (11th Cir. 2005) (labeling as a shotgun

pleading a complaint that made it virtually impossible to ascertain what factual allegations corresponded with each claim and which claims were directed at which defendants). The plaintiff's complaint contains 225 paragraphs and 9 counts, each of which incorporates by reference all of the paragraphs and counts preceding it. The plaintiff has an obligation to clearly articulate the basis of its claims before this case goes any further. Accordingly, the court ORDERS the plaintiff to recast its complaint to cure these problems within 20 days.

III. Conclusion

For the reasons set forth above, the court hereby GRANTS in part and DENIES in part the defendant's partial motion to dismiss [Doc. No. 26].

The court DENIES the defendant's motion to dismiss the RICO claim (Count IV of the plaintiff's amended complaint). The plaintiff is ORDERED to file a recast complaint within 20 days that complies with Federal Rule of Civil Procedure 9(b), which requires civil RICO plaintiffs alleging fraud to plead: "(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the plaintiffs; and (4) what the defendants gained by the alleged fraud." Ambrosia Coal & Construction Company, 482 F.3d at 1316.

The plaintiff is also ORDERED to cure the shortcomings which render the amended complaint a shotgun pleading in this recast complaint. Service of the recast complaint is not required.

The defendant is ORDERED to file a responsive pleading to the recast complaint within 14 days of the date the recast complaint is filed. Because the court has ordered the plaintiff to recast its complaint, the court DENIES the defendant's motion to dismiss the RICO claim at this juncture; however, the defendant may renew its motion after the plaintiff files a satisfactory complaint.

The court GRANTS the defendant's motion to dismiss the fraud and negligent misrepresentation claims (Counts II and III of the plaintiff's amended complaint).

SO ORDERED, this 9th day of December, 2009.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge