

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT  
LOCATION: Portland  
Docket No. BCD-CV 11-28

KAILE R. WARREN, JR., )  
RENT-A-HUSBAND LLC, )  
RENT-A-HUSBAND ENTERPRISES, )  
LLC, and KW ENTERPRISES, INC., )  
Plaintiffs, )  
v. )  
PRETI, FLAHERTY, BELIVEAU & )  
PACHIOS, LLC, MARCUS, CLEGG & )  
MISTRETТА, P.A., and ACE )  
HARDWARE CORP., )  
Defendants )



**ORDER ON ACE'S MOTION TO DISMISS COUNT VIII**

On October 16, 2012, the Court issued an order on several pending discovery motions. As part of that order, the Court required Plaintiffs to "supplement their responses to interrogatories 4, 5, and 6 of Ace's first set of interrogatories regarding alleged misrepresentations by Ace" by November 9, 2012. (Disco. Order 1.) The Court ordered that Plaintiffs specify "1) each allegedly false statement, 2) who made the statement and to whom the statement was made, 3) when it was made, 4) how the statement was conveyed to Plaintiff, and 5) what about the statement was false." (Disco. Order 1.) Plaintiffs supplemented their interrogatories to Defendant Ace Hardware Corp. (Ace) on November 9, 2012. Ace now moves, pursuant to M.R. Civ. P. 9(b) and 41(b)(2), for involuntary dismissal of Count VIII (intentional misrepresentation) of the Plaintiffs' Second Amended Complaint for failure to comply with the Maine Rules of Procedure and the Court's October 16, 2012, discovery order.

In the alternative, Ace requests the Court order that Plaintiffs' fraud claims are limited to those statements that are sufficiently particular in Plaintiffs supplemental interrogatory responses.

Broadly, Ace asserts that despite two amendments of Plaintiffs' complaint,<sup>1</sup> Plaintiffs' first responses to Ace's interrogatories, and a court-ordered supplementation of those responses, Ace still lacks sufficient notice of all the particulars of the allegedly false statements, most notably, what about those statements Plaintiffs consider to be false. Ace does not substantively challenge the sufficiency of the pleadings pursuant to M.R. Civ. P. 12 or the sufficiency of the evidence pursuant to M.R. Civ. P. 56. Rather, Ace "seeks to dismiss or limit the Plaintiffs' fraud claim because it is impossible for Ace to determine what fraud allegations it must defend itself against."

Plaintiffs' opposition to the motion asserts that Ace's motion is premature, as discovery is ongoing and Plaintiffs have not yet deposed several Ace executives. Plaintiffs assert that Ace is "attempting to limit discovery on the issue of fraud to what has been provided through Plaintiffs' interrogatory responses" and granting Ace's motion would unfairly foreclose Plaintiffs from developing facts through discovery.

Rule 41(b) stems from the inherent authority of the trial courts to "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Westbrook v. Wallace*, 478 A.2d 687, 689 (1984) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962)). Thus, pursuant to Me. R. Civ. P. 41(b)(1), a trial court may dismiss an action *sua sponte* for failure to prosecute a case, encompassing a broad range of circumstances from instances where no action has been taken in a case for two years or when a plaintiff's attorney fails to appear at trial. *See Westbrook*, 478 A.2d at 689-90. Similarly, Rule 41(b)(2) authorizes a trial judge, on motion by a defendant, to dismiss any claim against the defendant for failure to prosecute or "failure . . . to

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<sup>1</sup> Currently pending before the Court is Plaintiffs motion to amend their complaint for a third time, but not in any way that affects the present motion. Ace opposes the motion to amend.

comply with the[ civil] rules or any order of court.” Nevertheless, the Law Court has cautioned that “[s]uch power should be exercised only with full appreciation and consideration of the plight of the plaintiff” and the “values underlying our system of justice which favors resolution on the merits.” *Wallace*, 478 A.2d at 690; accord *State v. Bowring*, 490 A.2d 667, 669 (Me. 1985) (“A court should exercise its inherent power to dismiss only when the party bringing the action has failed to fulfill its duty to the court”).

Ace’s motion is not grounded upon lack of prosecution; rather, Ace seeks dismissal of Count VIII of Plaintiffs’ second amended complaint because Plaintiffs failed to comply with the court’s mandate that Plaintiffs supplement their responses to Defendant’s interrogatories. Ace asserts that Rule 41(b)(2) is a vehicle for defendant to dismiss a plaintiff’s claim for failing to comply with an order or rule designed to put them on notice of the particulars of the claim.

While this may be true in federal cases, *see, e.g., Angulo-Alvarez v. Aponte*, 170 F.3d 246, 251-52 (1st Cir. 1999); *Abdullah v. Acands, Inc.*, 30 F.3d 264, 269-70 (1st Cir. 1994), the Law Court has been more cautious, requiring fair notice of the risk of dismissal to a plaintiff for failure to comply with the court’s order, *see Miller v. Perry*, 468 A.2d 981, 983 (Me. 1983). The case cited by Ace, *Nevijel v. North Coast Life Insurance Co.*, 651 F. 2d 671 (9th Cir. 1981), is consistent with necessitating notice to a plaintiff that continued failure to comply with a court’s order will result in dismissal.

Further, dismissal for failure to properly plead a cause of action is more appropriately directed to a Rule 12 motion than a Rule 41 motion. *See Hearn v. San Bernardino Police Dept.*, 530 F.3d 1124 (9th Cir. 2008) (concluding the rule 41 dismissal of a plaintiff’s 68-page first amended complaint solely for the failure to satisfy the “short and plain statement standard” was an abuse of discretion); *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (concluding the trial

court abused its discretion when, it dismissed plaintiff's claim for failure to comply with a court order that required a complaint that "substantially exceeded the requirements of Rule 8").

Nevertheless, the Court has reviewed Plaintiffs' supplemental interrogatories and finds that they are not in compliance with the court's discovery order. The Court agrees with Ace that Plaintiffs have still failed to identify what about each particular statements Ace made was false at the time it was conveyed to Plaintiffs. Although "Maine is a notice pleading state, . . . only requir[ing] a short and plain statement of the claim to provide fair notice of the cause of action," *Johnston v. Me. Energy Recovery Co.*, 2010 ME 52, ¶ 16, 19 A.3d 823, fraud is a special matter that must be plead in more detail than a general matter. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall be stated with particularity*. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." M.R. Civ. P. 9(b) (emphasis added); *cf.* M.R. Civ. P. 8.

The requirement to plead fraud with particularity is to ensure "the defendant is fairly apprised of the elements of the claim." 2 Harvey, *Maine Civil Practice* § 9:2 at 384 (3d ed. 2011).

Notably, pleading fraud with particularity is not a new requirement in Maine. Any party

seeking relief on the ground of fraud, accident or mistake, must directly charge the grounds relied upon. The statement should be so full and explicit as to show the court a clear picture of the particulars of the fraud, -- the manner in which the party was misled, or imposed upon, -- the character and causes of the accident, or mistake, and how it occurred. Without such a statement . . . the court can not grant relief or even hear evidence in the matter.

*Semo v. Goudreau*, 147 Me. 17, 20-21, 83 A.2d 209, 211 (1951).

Plaintiffs assert that their fraud claim has been stated with sufficient particularity, but the Court disagrees. The Court ordered that Plaintiffs specify "1) each allegedly false statement, 2) who made the statement and to whom the statement was made, 3) when it was made, 4) how the statement was conveyed to Plaintiff, and 5) what about the statement was false." (Disco. Order 1.) The Court's review of the supplemental interrogatories filed by Plaintiffs leads the

Court to conclude, similar to *Ace*, that Plaintiffs' allegations of fraud are at best unclear and at worst incoherent and intentionally vague. Rather than providing a clear statement comporting with the Court's order, Plaintiffs submitted a rambling narrative of non-sequential events that fails to satisfy the Court's mandate—which was essentially a restatement of the requirements of Rule 9(b). In any event, the responses do not provide *Ace* with a fair appraisal of the basis of Plaintiffs' fraud claim.

The Court is left with the dilemma of how to reconcile Plaintiffs' noncompliance with its order and their insufficient pleading with the *Ace* motion that does not challenge the sufficiency of the Plaintiffs' pleading. The Court had intended to order Plaintiffs once again to provide a concise recitation of the circumstances of each allegedly false representation *Ace* made in a standardized format,<sup>3</sup> but such an order affords Plaintiffs an opportunity to which they are not entitled, given the late stage of the proceedings and their repeated noncompliance with the pleading requirements of a fraud claim.

Instead, the Court will permit *Ace* to make an appropriate motion regarding the sufficiency of the pleadings. Plaintiffs have been amply advised in this matter that the supplementation to their interrogatory responses would define the scope of their fraud claim.

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<sup>3</sup> To avoid any confusion about what is necessary to comply with M.R. Civ. P. 9(b), the Court provides the following format and an example based on *Gorman v. Maine Eye Care Associates, P.A.*, 2008 ME 36, 942 A.2d 707:

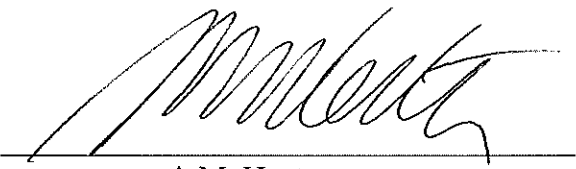
1. Alleged misrepresentation
  - Who said it and to whom
  - When it was made
  - How the statement was conveyed
  - What about the statement is false at the time it was made
- A. Dr. Gorman told MECA that she and her partner would buy the MECA practice.
  - Dr. Gorman said this to the principals of MECA
  - September of 2000
  - In person
  - Dr. Gorman and her partner did not in fact want to purchase the practice at the time she said it.

(Disco. Order 1 (“what claims Plaintiffs will be permitted to present to the jury will be defined by the pleadings, as illuminated or clarified by discovery responses”).) *See also Semo*, 147 Me. at 20-21, 83 A.2d at 211. Plaintiffs have supplemented their interrogatory response and in fairness to Ace the Court will not permit any further supplementation, alteration, or clarification, regardless of developments in discovery. The status of the fraud claim is the state of the allegations within the Second Amended Complaint and the interrogatory responses as of the date of this Order.

Ace’s motion to dismiss pursuant to M.R. Civ. P. 41 is hereby denied without prejudice to its renewal through a motion pursuant to M.R. Civ. P. 12 and/or 56.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order in the docket by reference.

Dated: March 12, 2013

  
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A.M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 3.12.13  
Copies sent via Mail  Electronically