

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARK FOX GROUP, INC.,)
T/A The Fox Group,)
)
Plaintiff,)
)
v.) C.A. No. 20081
)
E.I. duPONT de NEMOURS &)
COMPANY,)
)
Defendant.)

MEMORANDUM OPINION

Submitted: April 14, 2003

Decided: July 2, 2003

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LAMB, Vice Chancellor.

I.

The plaintiff in this action facilitated a transaction between the defendant and a third party corporation. As part of that transaction, the defendant received a warrant to purchase shares of stock in the third party. The plaintiff alleges that the defendant promised to transfer 25 % of that warrant to the plaintiff upon completion of the transaction. The transaction was fully consummated, but the defendant never transferred any part of the warrant to the plaintiff.

The plaintiff first brought this complaint in federal court as a securities fraud action. That action was dismissed and the plaintiff subsequently filed suit in this court. The sole basis for the plaintiff maintaining its action in this court, rather than the Superior Court, is a claim of negligent or innocent misrepresentation. This court exercises exclusive jurisdiction where such a cause of action is properly alleged. In this case, however, a careful review of the substance of the allegations shows that the complaint does not properly state a claim for negligent or innocent misrepresentation. Instead, the matters alleged under this count sound in promissory estoppel, a claim that does not arise under this court's exclusive **jurisdiction**. Accordingly, this court will not exercise jurisdiction over the complaint because there is an adequate legal remedy available to the plaintiff in the Superior Court.

II.

A. The Parties

Plaintiff Mark Fox Group, Inc. (trading as and hereinafter “The Fox Group”) is a Delaware corporation with its principal place of business in Wilmington, Delaware.’ The Fox Group, among other things, is engaged in the development of business strategies, including financial modeling, business venturing and business acquisition services, for clients. Mark A. Fox is a Delaware resident and the founder and managing director of The Fox Group.

Defendant E.I. du Pont de Nemours and Company (“DuPont”) is a Delaware corporation with its principal place of business in Wilmington, Delaware. DuPont is a global science and technology company serving markets in the food and nutrition and healthcare arenas, among others.

B. Background

Sometime in 1998, DuPont wanted to develop a presence in the consumer healthcare business at both the consumer level and the healthcare professional level. To accomplish this, DuPont created a division within the company known as the Life Sciences Division. During all relevant times, Kurt Landgraf was in

¹ For purposes of this opinion, the following facts are taken from The Fox Group’s First Amended Complaint.

charge of the Life Sciences Division. His official title was Executive Vice President and Chief Operating Officer of DuPont.

In August 1998, DuPont, through its Life Sciences Division, hired The Fox Group to aid DuPont in creating a consumer health strategy in the field of nutritional supplements, known as nutraceuticals. The scope of services to be provided to DuPont by The Fox Group included business strategy development and implementation and development of business acquisitions for DuPont. DuPont agreed that it would compensate The Fox Group for the business strategy development and implementation services by payment of a monthly fee and reimbursement of its expenses. DuPont agreed that The Fox Group would be compensated for its development and closing of business acquisitions, investments, and partnerships on a case-by-case agreement with respect to each acquisition.

C. The WebMD Opportunity

In the fall of 1998, the possibility of entering into a business relationship between DuPont and WebMD, Inc. was brought to the attention of DuPont and The Fox Group. WebMD, at that time, was attractive to DuPont in that it offered a comprehensive suite of internet-based services for physicians. Moreover, WebMD's consumer website offered a broad range of premium branded content and services designed to allow internet users to take charge of

their health and to access healthcare professionals, resources and support communities. Finally, WebMD offered DuPont a possible direct internet communication tool with physicians.

As a result of this opportunity, DuPont expressly approved and authorized The Fox Group to begin initial efforts to develop a business alliance between DuPont and WebMD. On or about October 2, 1998, WebMD and “Fox/DuPont, a partnership” executed a written “Confidentiality and Noncircumvention Agreement.” Mark Fox, with the express approval and authorization of DuPont, executed the Confidentiality and Noncircumvention Agreement on behalf of “Fox/DuPont, a partnership.”

The next meeting between Mark Fox and WebMD occurred on October 3, 1998. Mark Fox attended the meeting at the request of DuPont’s Elizabeth Browning.* The principal reason for the meeting was for The Fox Group to perform “due diligence” efforts concerning WebMD. Nobody from DuPont attended the meeting.

Following Mark Fox’s October 3 due diligence meeting with WebMD, DuPont authorized The Fox Group to continue developing the relationship

² At all relevant times, Browning was the head of Nutrition Sciences, which was a subgroup of DuPont’s Life Sciences Division. In her capacity as head of Nutrition Sciences, Browning reported to Landgraf.

between DuPont and WebMD. This ultimately led to an agreement where DuPont purchased 180,000 shares of WebMD stock in return for internet promotion of DuPont on the WebMD website (the “Phase One Transaction”). Around the time of the Phase One Transaction, Browning told Mark Fox that (i) she was waiting for budget approval and (ii) the type of compensation The Fox Group would receive for the WebMD deal was unclear. Moreover, at this time DuPont and The Fox Group had not yet formalized the contractual arrangement under which The Fox Group would be paid for its other, separate work in connection with, for example, the implementation of DuPont’s business plan and The Fox Group’s consulting services.

In late 1998, Browning made a presentation to DuPont corporate management where she proposed that The Fox Group do corporate venturing work for **DuPont**.³ As part of this presentation, Browning proposed a scenario under which The Fox Group would bring a deal to DuPont and, in exchange for doing so, The Fox Group would receive a “piece of the deal. ”

In late 1998, Mark Fox and Browning discussed the type and amount of compensation The Fox Group would receive if, in fact, the ongoing discussions

³ Corporate venturing work in this context means the development of new business opportunities for an existing company through venturing with emerging product and service companies.

and negotiations between DuPont and WebMD resulted in another transaction (the “Phase Two Transaction”). During those discussions, Mark Fox requested that The Fox Group receive 25 % of the shares of stock that would be eventually granted to DuPont, through the issuance of a stock warrant, by WebMD.

Browning replied that The Fox Group deserved the requested 25 %, and promised Mark Fox that The Fox Group would receive 25 % of any warrant ultimately issued by WebMD as a part of the Phase Two Transaction (the “Warrant”). In December 1998 Paul Roessel (then DuPont’s Vice President of Corporate Planning), in a discussion with Mark Fox, confirmed DuPont’s promise that The Fox Group would receive the Warrant. At the time, neither Roessel nor Mark Fox knew the number of shares that might ultimately be governed by a WebMD warrant issued in connection with the Phase Two Transaction.

On or about January 1, 1999, after weeks of discussion and months of performance by The Fox Group of substantial consulting services, DuPont and The Fox Group entered into a written agreement (with an effective date of November 10, 1998) to compensate The Fox Group for certain past and future consulting services for DuPont (the “Consulting Agreement”). The Consulting Agreement described three principal types of work The Fox Group would perform for DuPont: (i) internal strategy development consulting, internal business development consulting and internal implementation **consulting** (with

compensation covered by the Consulting Agreement); (ii) establishing a **WebArena**, e-commerce, and information database (with compensation expressly to be covered by a future engagement proposal); and (iii) product/service acquisition (which could take the form of partnerships, equity investments and/or acquisitions) (such as the **DuPont/WebMD** transaction then under discussion) (with compensation expressly to be covered by a future engagement proposal).

In February 1999, Browning reiterated to Mark Fox that The Fox Group would receive 25 % of any stock warrant issued by WebMD in connection with the Phase Two Transaction between DuPont and WebMD. In March 1999, at a meeting between DuPont personnel, WebMD personnel and personnel affiliated with The Fox Group, Browning stated that The Fox Group would be "leading the charge" insofar as the **DuPont/WebMD** relationship was concerned. On or about March 8, 1999, Browning sent a letter on DuPont letterhead by facsimile to WebMD stating the terms of the Phase Two Transaction and also providing that "In addition to these terms are the one million warrants that will go directly to the Fox Group. " At an early March 1999 meeting (whose attendees included some of The Fox Group consultants working on the **DuPont/WebMD** transaction), Browning stated that Fox was to receive 25 % of the WebMD warrants granted to DuPont and described the Phase Two Transaction as "in the process of happening. "

Many members of the DuPont/Fox Group team working on the Phase Two Transaction gathered for another meeting in late March 1999. Browning, accompanied by Mark Fox, left the meeting to meet with Landgraf. When they returned, Browning told Mark Fox and others present that Landgraf had officially approved and authorized both (i) the Phase Two Transaction and (ii) that The Fox Group would receive a warrant to purchase one million shares of WebMD stock as its compensation on the DuPont/WebMD transactions. This represented 25 % of the warrant to purchase 4 million shares of WebMD stock that would be issued to DuPont upon completion of the Phase Two Transaction.

On or about March 30, 1999, DuPont and WebMD closed the Phase Two Transaction by executing a document entitled "Collaboration Agreement. " Contemporaneously with the closing of the Collaboration Agreement, WebMD issued to DuPont a warrant to purchase up to 4 million shares of WebMD Series D common stock, at a purchase price of \$20 per share, exercisable for 5 years from the date of issuance.

At a post-closing dinner meeting whose attendees included several members of the DuPont/Fox Group team who had worked on the WebMD transaction, Browning confirmed that The Fox Group would receive its share of the Warrant as promised. Browning on other occasions, in both meetings and telephone conversations, told various members of the DuPont/Fox Group team

working on the WebMD deal that The Fox Group would be receiving the Warrant.

D. Request By The Fox Group For The Warrant

In a letter dated January 23, 2000, a lawyer for The Fox Group wrote, in pertinent part, as follows to DuPont in-house counsel Nigel Pond:

As you undoubtedly know, Fox was granted a warrant to purchase 1,000,000 shares of WebMD stock at \$20 per share of the 4,000,000 warrants that DuPont received in WebMD, Inc. The warrants were granted to Fox by Elizabeth Browning, Global Business Director, Nutritional Science, for Mr. Fox's role in architecting, negotiating, and managing the WebMD transaction. Ms. Browning memorialized the Fox warrants in her letter to Jeffery Arnold, who was at the time Chairman of the Board and Chief Executive Officer of WebMD, Inc.

Pond responded on February 7, 2000 that "DuPont's position is that Fox was not granted any warrants to purchase stock in WebMD, Inc. and therefore is not entitled to any warrants"

III.

On March 28, 2000, a plaintiff called "The Mark A. Fox Group, Inc." filed a lawsuit against DuPont in the United States District Court for the Southern District of New York alleging securities fraud and a number of pendant state law claims. After DuPont moved to dismiss the suit, the District Court gave the plaintiff an opportunity to amend its complaint, which the plaintiff did in June 2000 where the name of the plaintiff changed to "Mark Fox Group, Inc. "

DuPont moved to dismiss the amended complaint, principally on the ground that the plaintiff's securities fraud claim was essentially a state law contract dispute masqueraded as a securities fraud. On February 15, 2001, the District Court agreed, holding that "this case is a case involving compensation and is basically a contract case having nothing to do with the nature or value of the securities at issue."⁴ Accordingly, the District Court granted DuPont's motion and dismissed the amended complaint.

The Fox Group then waited for nearly two years before filing its original complaint in this court. In that complaint, The Fox Group asserted only two counts: (i) conversion and (ii) promissory estoppel. After DuPont moved to dismiss this complaint (but before briefing had begun), The Fox Group filed its First Amended Complaint (the "Complaint") on February 14, 2003. This complaint added an equitable estoppel claim and an innocent or negligent misrepresentation claim. DuPont has now moved to dismiss the Complaint because: (i) this court lacks subject matter jurisdiction to hear the matter pursuant to Court of Chancery Rule 12(b)(1); and (ii) pursuant to Court of Chancery Rule 12(b)(6), the Complaint fails to state a claim upon which relief can be granted.

⁴ **Mark Fox Group, Inc. v. E. I. duPont de Nemours & Co.**, C. A. 00 CV 2360 (LAP), J. Preska, at 51 (S.D.N.Y. Feb. 15, 2001) (TRANSCRIPT).

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A. The Complaint Must Be Dismissed Because This Court Lacks Subject Matter Jurisdiction

1. The Court Of Chancery Retains Exclusive Jurisdiction Over Claims Of Negligent Or Innocent Misrepresentation

As The Fox Group readily admits, it “asserts [subject matter] jurisdiction [of the Court of Chancery] solely on the basis of its claim for negligent or innocent misrepresentation. ”⁵ Merely labeling a count in a complaint as “Innocent or Negligent Misrepresentation,” without more, however, fails to properly invoke this court’s jurisdiction.

The Court of Chancery is a court of limited jurisdiction. It is the plaintiff’s burden to demonstrate that equitable subject matter jurisdiction exists? “In this connection, the court must review the allegations of the complaint as a whole to determine the true nature of the claim. ”⁷ Moreover, as Chancellor Allen once stated, “Chancery jurisdiction is not conferred by the incantation of

⁵ Pl. Mem. at 4 (emphasis in original).

⁶ See *Wilmington Fraternal Order of Police Lodge No. 1 v. Bostrom*, 1999 WL 39546, at *4 (Del. Ch. Jan. 22, 1999) (“The burden of establishing the Court’s subject matter jurisdiction rests with the plaintiff”) (citing *Scattered Corp. v. Chicago Stock Exchange*, 671 A.2d 874, 877 (Del. Ch. 1994); *Yancey v. Nat’l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993), *aff’d*, 633 A.2d 372 (Del. 1993) (TABLE)).

⁷ *Christiana Town Center, LLC v. New Castle County*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) (citing *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 590 (Del. 1970); *Western Air Lines, Inc. v. Allegheny Airlines, Inc.*, 313 A.2d 145, 149 (Del. Ch. 1973)).

magic words. Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will excuse the court . . . from a realistic assessment of the nature of the wrong alleged ”⁸

“Equity jurisdiction can arise in two ways: (1) from the invocation of an equitable right, or (2) from the request for an equitable remedy when there is no adequate remedy at law. ”⁹ The claim of negligent or innocent misrepresentation falls within the first category.

Traditional elements of common law fraud include: (1) a false representation of material fact; (2) made by a person with knowledge that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the person to whom the representation was made to act or to refrain from acting; (4) which caused that person, in justifiable reliance on the representation, to act or refrain from acting; (5) causing damage to that person as a result of such **reliance**.¹⁰ However, “[e]quity courts developed their own requirements for relief from fraud. ”¹¹ “[A] court of equity will grant relief, even

⁸ *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987) (citation omitted).

⁹ *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *2 (Del. Ch. Feb. 3, 2000), *appeal denied*, 748 A.2d 406 (Del. 2000) (TABLE).

¹⁰ *Stephenson v. Copano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1982) (citation omitted).

¹¹ *Id.*

though the statement made to the person defrauded was not known to be false by the person making the statement, ” but rather, was simply negligent or innocent.* Therefore, “[t]o state a **prima facie** case for equitable fraud, plaintiff must . . . satisfy all the elements of common-law fraud with the exception that plaintiff need not demonstrate that the misstatement was made knowingly or recklessly. ”¹³

In addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action. In **Pepsi-Cola Bottling Co. of Salisbury v. Handy**¹⁴ the court stated that equitable fraud must be pursued exclusively in the Court of Chancery? In reaching that decision, then-Vice

¹² **Eastern States Petroleum Co., Inc. v. Universal Prod. Co.**, 3 A.2d 768, 775 (Del. Ch. 1939); see also **Zirn v. VLI Corp.**, 681 A.2d 1050, 1061 (Del. 1996) (“equity provides a remedy for negligent or innocent misrepresentations”).

¹³ **Zirn**, 681 A.2d at 1061. Relying principally on **U.S. West, Inc. v. Time Warner, Inc.**, 1994 WL 728831 (Del. Ch. Dec. 20, 1994), DuPont argues that a “special relationship” is an additional requirement of equitable fraud that must be satisfied before this court’s exclusive subject matter jurisdiction over such a claim can be properly invoked. The court need not decide this issue because, as discussed *infra*, The Fox Group has failed to even plead a misrepresentation of material fact, which is undoubtedly an element of equitable fraud.

¹⁴ 2000 WL 364199 (Del. Ch. Mar. 15, 2000).

¹⁵ **Id.**, at *6. The count at issue was entitled “equitable fraud,” but it is well known that such a term refers interchangeably to claims based on negligent or innocent misrepresentation. See, e.g., **In re Dataproducts Corp. S’holders Litig.**, 1991 WL 165301, at *7 (Del. Ch. Aug. 22, 1991) (“equitable fraud can be founded upon a negligent or an innocent misrepresentation”); **Cliff House Condo. Council v. Capaldi**, 1991 WL 165302, at *3 (Del. Ch. Aug. 26, 1991) (the “element of scienter is not required in an equitable fraud claim; equitable relief is available for negligent or innocent misrepresentations”); **Biasotto D. O. v. Spreen, D.O.**, 1997 WL 527956, at *8 n.8 (Del. Super. July 30, 1997) (the “common law provides a remedy only for intentional

Chancellor (now Justice) Jacobs expressly approved of *Snyder v. 'Butcher & Co.*,¹⁶ wherein the court “held that ‘in no event may the equitable [fraud] theory be pursued in the legal forum. ’”¹⁷ “The *Snyder* court found that because a claim for equitable fraud has elements different from a claim for common law fraud, an equitable fraud claim may proceed only in this Court.”¹⁸ “* Then-Vice Chancellor Jacobs also rejected the defendants’ argument “that because the only relief sought by plaintiffs was money damages, those counts could be adequately adjudicated at law.”¹⁹ Such an argument could not succeed because “equitable jurisdiction will also lie where monetary damages are wholly adequate *if the claim or theory of prosecution itself is not legal but equitable in nature.*”²⁰

2. The Fox Group Has Failed To Adequately Plead A Claim For Innocent Or Negligent Misrepresentation

The Complaint uses the words “negligent or innocent misrepresentation,” but it fails to plead such a claim. Rather, under that heading, the Complaint

misrepresentations. That is its great distinction from equitable fraud, which allows the Court of Chancery to provide a remedy for negligent or innocent misrepresentations”).

¹⁶ 1992 WL 240344 (Del. Ch. Sept. 15, 1992)

¹⁷ *Handy*, 2000 WL 3641999, at *6 (quoting *Snyder*, 1992 WL 240344, at *10 n.14).

¹⁸ *Id.* (citing *Snyder, 1992* WL 240344, at *3).

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

merely reiterates The Fox Group's estoppel claims. The entirety of The Fox Group's claim for **negligent** or innocent misrepresentation is as follows:

98. DuPont made a false representation to Plaintiff that The Fox Group would receive 25 % of the warrant to be issued to DuPont by WebMD upon the closing of the Phase Two Transaction.

99. DuPont made said false misrepresentation to Plaintiff to induce The Fox Group to successfully bring the Phase two Transaction to closing.

100. The Fox Group justifiably relied on DuPont's promise that it would receive 25 % of the warrant to be issued to DuPont by WebMD upon the closing of the Phase Two Transaction.

101. Plaintiff suffered damage as a result of its justifiable reliance in that DuPont failed to give The Fox Group 25 % of the warrant issued to DuPont by WebMD upon the closing of the Phase Two Transaction.

These allegations fail to plead an essential element of a claim for innocent or negligent misrepresentation: that DuPont made any misrepresentation of material **fact**.²¹ For example, in *Handy*, the misrepresentation at issue was plainly one of material fact: the defendants failed to disclose that the property they were selling contained wetlands (which adversely affected the property's value).²² In this case, The Fox Group does not claim that DuPont misrepresented

²¹ See, e.g., *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *3 (Del. Ch. Dec. 19, 2002) ("false representation of **fact**" is an element of both common law fraud and negligent or innocent misrepresentation).

²² *Handy*, 2000 WL 3641999, at *2.

any facts; instead, The Fox Group claims that DuPont falsely promised to do something-that it would convey WebMD warrants to The Fox Group in consideration for The Fox Group's consulting services on the deal.

The court pressed The Fox Group's counsel on this issue at oral argument in an attempt to elicit exactly what the alleged misrepresentation of fact is in this case. Counsel for The Fox Group stated. that "[i]t's the present fact that the agreement had been reached that's the misrepresentation upon which we rely. "23 This is not the type of fact that a court should consider for purposes of misrepresentation claims. "A breach of contract claim cannot be turned into a fraud claim simply by alleging that the other party never intended to perform. "24 Similarly, estoppel claims cannot be turned into negligent or innocent misrepresentation claims simply because one side did not perform its part of the bargain.

Because The Fox Group does not allege that DuPont misrepresented any facts, a claim for negligent or innocent misrepresentation does not lie and The Fox Group cannot use that legal doctrine as a basis for the court's jurisdiction.

²³ Tr. at 22.

²⁴ *Diamond Elec., Inc. v. Delaware Solid Waste Auth.*, 1999 WL 160161, at *7 (Del. Ch. Mar. 15, 1999) (citing *Iotex Communications, Inc. v. Defries*, 1998 WL 914265 (Del. Ch. Dec. 21, 1998)).


If the law were otherwise, virtually every breach of contract or promissory estoppel case could be converted into a fraud or negligent or innocent misrepresentation claim. This cannot be the law. It is clear that the true substance of The Fox Group's claim-that DuPont allegedly promised warrants for services and then supposedly reneged on the deal-is a breach of contract or estoppel claim. Such a claim should be resolved in the law courts.

B. The Court Need Not Consider Whether The Complaint Fails To State A Claim

As discussed above, The Fox Group invokes this court's subject matter jurisdiction solely on the basis of its claim for negligent or innocent misrepresentation. The Fox Group, however, failed to properly allege such a claim. Thus, this court lacks subject matter jurisdiction to hear any of The Fox Group's claims in the Complaint. Therefore, the court need not address whether those claims fail as matter of law pursuant to Court of Chancery Rule 12(b)(6).

V.

For the foregoing reasons, DuPont's motion to dismiss the Complaint for want of subject matter jurisdiction is GRANTED and the motion to dismiss for failure to state a claim upon which relief could be granted is DENIED without prejudice to its later revival. At the plaintiff's election, the court will either transfer the case to the Superior Court, pursuant to 10 Del. C. § 1902, or enter an order of dismissal without prejudice. The plaintiff's counsel are directed to submit an order on notice within 5 days.


Vice Chancellor