

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In Re:)	Chapter 11
)	
INACOM CORP., et al.)	Case No. 00-2426 (PJW)
)	
Debtors.)	
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)	
TMP WORLDWIDE, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Adv. Proc. No. 00-1115
)	
INACOM CORP.,)	
)	
Defendant.)	

MEMORANDUM OPINION

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Date: August 7, 2001

WALSH, J. /s/ Peter J. Walsh

Before the Court is the motion (Doc. # 5) by debtor and defendant, InaCom, Corp. ("InaCom") to dismiss plaintiff's complaint for failure to plead fraud with particularity under Fed.R.Civ.P. 9(b) and Fed.R.Civ.P. 12(b)(6).¹ The plaintiff, TMP Worldwide, Inc. ("TMP") commenced this action against the Debtor to recover damages allegedly incurred in connection with TMP's prepetition purchase of two of the Debtor's business divisions and a related staffing contract. Plaintiff's first count seeks imposition of a constructive trust on certain stock proceeds held by the Debtor. Plaintiff's second count seeks a declaratory judgment that the same stock proceeds are not property of Debtor's bankruptcy estate. For the reasons discussed below, I will deny the motion to dismiss.

BACKGROUND

Among other things, InaCom operated contract personnel

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Fed.R.Bank.P. 7009 and Fed.R.Bank.P. 7012 make Fed.R.Civ.P. 9 and Fed.R.Civ.P. 12 applicable to adversary proceedings in bankruptcy. The failure to plead a claim with the particularity required by Rule 9(b) is a failure to state a claim upon which relief may be granted under Rule 12(b)(6). I therefore accept the facts as alleged in the complaint as true for purposes of this motion. Helstoski v. Goldstein, 552 F.2d 564, 565 (3d Cir. 1977) (to sustain dismissal under Fed.R.Civ.P. 12(b)(6) court must take all "well pleaded allegations of the complaint as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to any relief").

staffing businesses for the information technology and information systems industries. TMP is the successor by merger to System One Technical, Inc. and System One Services, Inc. (together "System One").

On June 29, 1999, System One entered into an asset purchase agreement ("Asset Purchase Agreement") with InaCom pursuant to which System One purchased a division of InaCom's staffing business (the "Division"). In exchange, System One transferred to InaCom 704,193 shares of System Services stock which converted to TMP stock after the System One - TMP merger ("TMP Stock"). Pursuant to the Asset Purchase Agreement, System One and InaCom entered into a National Managed Staffing Agreement ("Staffing Agreement") under which InaCom promised to continue to use the Division, now owned by System One, for InaCom's staffing needs. According to TMP, the parties anticipated the arrangement would generate \$50 - 70 million in revenue for the Division.

About one year later, on June 16, 2000, InaCom filed a voluntary petition for chapter 11 relief. InaCom moved for an order approving the sale of the TMP Stock. TMP objected. The parties resolved the objection by allowing the sale to go forward and preserving TMP's claim as to the proceeds. Accordingly, TMP filed its complaint and an order authorizing the sale of the TMP Stock was entered. Subsequently, TMP filed a more detailed amended complaint ("Amended Complaint") (Doc. # 4) to which InaCom

responded with the subject motion to dismiss.

TMP's complaint seeks recovery of damages it suffered from InaCom's alleged breach of warranty and breach of contract arising from the acquisition transaction. Specifically, TMP claims InaCom misrepresented that it would generate \$50 - 70 million in gross revenue for the Division. Amended Complaint at ¶¶ 10 - 11. TMP claims that but for this representation, TMP would not have entered into the Asset Purchase Agreement because the value of the Division, absent the continued business from InaCom, was much less than what TMP agreed to pay. Id. at ¶¶ 13 - 14.

Count I of the Amended Complaint requests imposition of a constructive trust under Florida law and 11 U.S.C. § 541(b)(1) for the benefit of TMP on the proceeds of the TMP Stock. TMP claims this relief is warranted to prevent InaCom's unjust enrichment resulting from InaCom's inequitable conduct in inducing TMP to enter into the Asset Purchase Agreement and causing TMP to convey its stock to InaCom.

Count II of the Amended Complaint seeks a declaratory judgment under 28 U.S.C. § 2201 and 11 U.S.C. § 541(d) that InaCom holds only legal title and not an equitable interest in the proceeds of the TMP stock and that the proceeds are consequently not property of InaCom's bankruptcy estate.

InaCom moves to dismiss for failure to plead fraud with particularity. InaCom argues that although neither cause of action

is based on express fraud, Rule 9(b) still applies because allegations of fraud lie at the core of the complaint. In response, TMP maintains it has not alleged fraud, but rather, inequitable conduct and unjust enrichment stemming from breach of contract, i.e., breach of the warranties and representations in the Asset Purchase Agreement. From this TMP concludes its complaint is subject to the liberal pleading standard of Rule 8(a) which requires only a "short and plain statement" showing TMP is entitled to relief.

DISCUSSION

Rule 9(b) requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Fed.R.Civ.P. 9(b). The Third Circuit takes a lenient approach to application of this standard. Seville Indus. Machin. v. Southmost Machin., 742 F.2d 786, 791 (3d Cir. 1984). Plaintiffs must plead with particularity the circumstances of the alleged fraud. They need not, however, plead the "date, place or time" of the fraud, so long as they use an "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Id. Plaintiffs should not be expected to plead details that defendants may have concealed. In re Freuhauf Trailer Corp., 250 B.R. 168, 198 (D. Del. 2000). The heightened pleading requirement of Rule 9(b) "generally does not apply to the state law claims of breach of fiduciary duty, negligent

misrepresentation, gross negligence, mismanagement, unjust enrichment, aiding and abetting breach of fiduciary duty, and breach of contract." Freuhauf Trailer, 250 B.R. at 197-198 (footnotes omitted); accord Seville, 742 F.2d at 792 n.7 ("Rule 9(b) requires that fraud be pleaded particularly; it does not require that every element of an offense that includes fraud also be pleaded particularly.").

Under this analysis, I find that Rule 9(b) does not apply to the Amended Complaint. As I read the pleading, TMP alleges injury arising from InaCom's breach of contract and warranties stemming from TMP's acquisition of the Division, not fraud. For example, TMP asserts:

21. Among the representations and warranties of Inacom in the Asset Purchase Agreement were those related to the accuracy of the financial statements of the "Division," specifically, and to Inacom as Seller generally.

22. Specifically, Section 3.6 of the Asset Purchase Agreement states:

Section 3.6 Financial Statements. Attached hereto as Exhibit E are the following financial statements . . . : (i) an unaudited statement of income relating to the Division for the fiscal year of the Division ended December 31, 1998 . . . ; and (ii) unaudited statement of income . . . as of and for the four months ended April 30, 1999 . . . for the Division. The Financial Statements have been prepared from the books and records of the Seller, which books and records are maintained in accordance with GAAP and reflect all adjustments required to make such Financial Statements not misleading.

23. Inacom knew or should have known the Financial Statements of the Division were false and misleading and misrepresented to System One the Division's financial condition.

* * *

25. Specifically, Inacom, among other things, overstated the value of its accounts receivable by over \$25 million.

* * *

29. Furthermore, Section 3.7 of the Asset Purchase Agreement provides as follows:

Events Subsequent to the Most Recent
Fiscal Month End.

Since the Recent Fiscal Month End there has not been any material adverse change in the business, financial condition, operations, results of operations, or future prospects of the Division. Without limiting the generality of the foregoing, since that date . . .

30. This representation was false and misleading as it was clear that Inacom was in profound financial distress at the time and that its books and records were grossly misleading as evidenced, in part, by the fact that it had to undertake a dramatic restatement of earnings.

* * *

32. Moreover, Section 3.7 of the Asset Purchase Agreement states:

(e) there has not been any other material occurrence, event, incident, action, failure to act, or transaction outside the Ordinary Course of Business including the Division.

33. Section 3.7(e) was also a material misrepresentation as there was in fact the need to restate earnings and Inacom was, as a whole, in dire financial straits and was unable to honor the Staffing Agreement or provide the future revenue stream, upon which System One relied to

enter into the transaction.

34. Section 3.19 adds an additional representation:

Section 3.19 Disclosure. The representations and warranties contained in this Article III do not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements and information contained in this Article III not misleading.

35. Inacom knew or should have known this representation was false and / or misleading when made ...

Amended Complaint at pp. 5 - 7.

I understand these allegations to plead a cause of action based on breach of warranty and breach of contract caused by InaCom's alleged misrepresentations regarding its business and financial condition. Rule 8(a) therefore applies. Under its liberal notice pleading standard, "a claimant 'does not have to set out in detail the facts upon which the claim for relief is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim'." Foulk v. Donjon Marine Co., 144 F.3d 252, 256 (3d Cir. 1998) (citation omitted). I find the Amended Complaint satisfies this standard.

Assuming, *arguendo*, that the two counts trigger Rule 9(b), I find TMP's complaint adequate. Rule 9(b) requires plaintiffs to plead with particularity the circumstances of the alleged fraud to place the defendants on notice of the precise misconduct with which they are charged. Seville, 742 F.2d at 791.

TMP sufficiently pleads the circumstances surrounding InaCom's misrepresentations relating to the sale of the Division. TMP incorporates into the Amended Complaint both the Asset Purchase Agreement and the Staffing Agreement. It identifies the specific warranties which InaCom allegedly breached and the manner in which it did so. Finally, TMP identifies at least one key InaCom employee, Jonathan Wellman, as the party responsible for the misrepresentations that are the basis of TMP's claim. Amended Complaint at ¶¶ 37- 40.

InaCom's claim that it has no means of readily ascertaining the underlying facts and that it is therefore unable to meaningfully determine whether to admit or deny the allegations is unfounded. The purpose of Rule 9(b) is to provide notice and to prevent false or unsubstantiated charges. Seville, 742 F.2d at 791. InaCom does not assert the Amended Complaint fails to provide notice or that it is based on false or unsubstantiated charges. Instead, InaCom essentially argues it is unable to ascertain the alleged facts because of its chapter 11 filing and InaCom's personnel attrition. InaCom's inability to ascertain the relevant facts, therefore, is not due to a defect in TMP's pleading. I find that the Amended Complaint provides adequate notice to InaCom of the allegations against it and the factual bases of the allegations.

With regard to InaCom's concern that the substantial

turnover of its staff post-petition prevents it from answering TMP's complaint in good faith, it seems to me this is an issue that the parties can resolve through discovery. Without suggesting how the parties should proceed, I believe appropriately phrased interrogatories will elucidate the facts about which InaCom claims lack of knowledge. It is perhaps true that the change in personnel may be a problem for both parties if neither can identify or locate the responsible participants. But it strikes me as inequitable to require TMP to plead with more specificity facts that may have been concealed by InaCom's agents or which were particularly within InaCom's knowledge (e.g., InaCom's true financial condition at the time it entered into the Asset Purchase Agreement).

CONCLUSION

For the reasons stated above, I deny InaCom's motion to dismiss the Amended Complaint. I find TMP's allegations do not plead fraud of the kind that renders the pleading subject to Rule 9(b). Moreover, I am satisfied that the allegations plead with particularity any fraud that does underlie the state law claims.

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ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, the motion (Doc. # 5) by debtor and defendant, InaCom, Corp. ("InaCom") to dismiss plaintiff's complaint for failure to plead fraud with particularity under Fed.R.Civ.P. 9(b) and Fed.R.Civ.P. 12(b)(6) is DENIED.

 /s/ Peter J. Walsh
Peter J. Walsh
United States Bankruptcy Judge

Date: August 7, 2001