UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Inter-Act Electronics, Inc.,	)	Case No. 02-11557C-7G
	)	
Debtor.	)	
	)	
	)	
Charles M. Ivey, III, Trustee for the Bankruptcy Estate of Inter-Act Electronics, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 03-2035
	)	
Albertson's, Inc.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on January 13, 2004, for hearing upon the Defendant's motion to dismiss portions of the Plaintiff's complaint. Edwin R. Gatton and Charles M. Ivey, III appeared on behalf of the Plaintiff and Jeffrey E. Oleynik and Clinton R. Pinyan appeared on behalf of the Defendant.

FACTUAL BACKGROUND

The following background facts are reflected in the Plaintiff's complaint. At various times between 1994 and 1997, the Debtor entered into agreements with three different grocery store chains: Lucky Stores, Inc. ("Lucky"); ACME Markets, Inc. ("ACME"); and Jewel Food Stores, Inc. ("Jewel"). Under these agreements, the Debtor installed computer terminals in grocery stores that provided

customized coupons to shoppers, based upon identification of the customers through their shopping loyalty cards. The Debtor was paid by manufacturers and distributors of groceries for distribution of the coupons, and the Debtor in turn agreed to pay the grocery stores (such as Lucky, ACME and Jewel) a portion of each coupon redeemed by customers.

In 1997, the Debtor signed an agreement with Lucky (the "Original Agreement"). Lucky was headquartered in California and operated grocery stores throughout California, with some stores in Nevada. Lucky was a subsidiary of American Stores Company, which was headquartered in Utah. In June of 1999 Lucky became affiliated with Albertson's.

In the Original Agreement, the Debtor and Lucky agreed that the Debtor would install its system in Lucky grocery stores beginning with certain pilot locations and then in a broader range of stores. The Plaintiff alleges that the Original Agreement was breached when the Defendant unilaterally and without justification and in breach of Debtor's agreement with Lucky Stores, shut down the existing loyalty card systems in the Lucky Stores and demanded that the Debtor develop a new system that did not require the use of a loyalty card and further demanded that the Debtor enter into an amendment to the Original Agreement. At the same time, the Defendant charged that the Debtor had breached the Original Agreement in a number of ways, including failure to pay amounts

owed to Albertson's for coupons distributed through the Debtor's system.

The parties thereafter agreed to resolve their disputes under the Original Agreement and to move forward with a new plan which was set forth in the First Amendment to Retailer Agreement (the "Amended Agreement"). The Amended Agreement provided that, within one month, the Debtor would use its best efforts to install a new cardless terminal in each former Lucky store and, within two months, the Debtor would use its best efforts to install the new terminals in the other Albertson's stores in the region. The Amended Agreement also provided that Albertson's would use its best efforts to provide the Debtor access to the stores in order to install its terminals. The Amended Agreement provided for certain other modifications for operation under the cardless system and also included a mutual release and settlement of Albertson's claims for payments owed under the Original Agreement under which the Debtor agreed to make two payments of $308,000.00 each, with one of these payments to be made upon signing the Amended Agreement and the other payment two months later.

Installation of the modifications did not occur as contemplated by the parties in that there were delays in installing the modified terminals which the Plaintiff alleges were a result of Albertson's breaches of its best efforts clauses and its implied covenant of good faith and fair dealing. The Lucky-Debtor

relationship came to an end when the Defendant sent a termination notice for the Amended Agreement in September of 2000.

The Plaintiff alleges that although the Debtor performed its obligations under the Amended Agreement, the Defendant breached the agreement with actions which included Defendant's failure to reply to Debtor's communications in a timely manner, creating obstacles with respect to issues that had been previously resolved, making unreasonable and unjustified suggestions involving substantial, unnecessary additional cost and, after further delay, refusing to cover the additional costs. Plaintiff further alleges that in addition to creating obstacles and unjustified delays, the Defendant denied Debtor's installation team access to certain stores when installation was ready to proceed. According to the Plaintiff, Defendant's purported termination of the Amended Agreement in September of 2000 was unwarranted and constituted a breach of the Amended Agreement.

MATTER BEFORE THE COURT

The Plaintiff's complaint contains a claim for breach of contract, a claim for fraud, a claim for conversion, a claim for failure to act in good faith, a claim for unfair and deceptive trade practices and a claim for bailment. In the motion to dismiss which is now before the court, the defendant has moved pursuant to Rule 9(b) and Rule 12(b)(6) to dismiss the claim for fraud, the claim for failure to act in good faith, the claim for unfair and

deceptive trade practices and to dismiss all claims that arose prior to February 10, 2000. After the Defendant's motion to dismiss was filed, the Plaintiff filed a notice of voluntary dismissal without prejudice as to the claim for failure to act in good faith and the claim for unfair and deceptive trade practices. Hence, the matters left for determination are the Defendant's motion to dismiss the claim for fraud and to dismiss all claims that arose prior to February 10, 2000.

DISCUSSION

In moving to dismiss Plaintiff's fraud claim, the Defendant relies upon Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, which are made applicable in this proceeding by Rules 7009 and 7012 of the Federal Rules of Bankruptcy Procedure. The fraud claim which the Defendant seeks to have dismissed is stated in plaintiff's complaint as follows:

> 34. When Albertson's entered into the amendment to the Lucky Stores Contract, Albertson's made a false representation that it would comply with the contractual terms. Albertson's compliance was material to Inter-Act and Inter-Act reasonably relied upon the representations of Albertson's.
>
> 35. Albertson's further defrauded Inter-Act by insisting on obtaining in such amendment a mutual release of all prior alleged defaults and damages when Albertson's knew it would not perform pursuant to the Amended Agreement. Albertson's fraudulently induced Inter-Act to enter into this release so as to absolve itself of its prior breaches and had no intent to abide by the Agreement as amended as is evidenced by Albertson's acts (and failure to

act) following execution of the amendment.

36. Inter-Act reasonably relied upon the misrepresentations of Albertson's to its detriment.

37. As a result of the fraud of Albertson's, Inter-Act has been damaged in an amount to be determined but believed to be in excess of $200,000,000.00.

I. Motion to Dismiss pursuant to Rule(9)(b)

In contending that the fraud claim should be dismissed pursuant to Rule 9(b), Plaintiff argues that the claim is not stated with the particularity required under Rule 9(b). The requirement under Rule 9(b) is that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." To satisfy this requirement, pleadings which assert fraud must plead the time, place, and contents of the alleged fraudulent misrepresentation, as well as the identity of the person making the misrepresentation and what was obtained thereby. See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999); Rhone-Poulen Agro S.A. v. Monsanto Co., 73 F. Supp. 2d 537, 539 (M.D.N.C. 1999); Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 195 (M.D.N.C. 1997). In the fraud claim in the present case the Plaintiff alleges only that the Defendant "made a false representation that it would comply with the contractual terms" when it entered into the Amended Agreement and that the Defendant defrauded the Debtor by insisting that a release be contained in the Amended Agreement when the Defendant "knew it

would not perform pursuant to the Amended Agreement." The only misrepresentation thus alleged is that Defendant falsely represented that it would comply with the terms of the agreement. This amounts to nothing more than an assertion that the Defendant made a contract that it did not intend to keep. Such an allegation does not satisfy the requirements of Rule 9(b). See Strum v. Exxon Co., 15 F.3d 327, 331 (4th Cir. 1994)("Because Strum has done nothing more than assert that Exxon never intended to honor its obligations under the March agreement, the district court's dismissal of the first cause of action was entirely appropriate."). In order to satisfy the requirements of Rule 9(b), a plaintiff asserting a fraud claim based upon the defendant's alleged intent not to honor a contract must allege specific facts which demonstrate that at the time the agreement was made, the defendant intended not to perform the agreement. See Kwang Dong Pharm. Co. v. Han, 205 F. Supp. 2d 489, 495 (D. Md. 2002)("Han has failed to allege any specific facts, only his general assertions that KD never intended to honor the Agreements it signed with Han. Accordingly, Counts I & II of Han's Counterclaim will be dismissed for failure to state a claim."); Hsu v. OZ Optics Ltd., 211 F.R.D. 615, 620 (N.D. Cal. 2002)("Although intent can be averred generally under Rule 9(b), a plaintiff must point to facts which show that defendant harbored an intention not to be bound by terms of contract at formation. Plaintiffs' complaint simply states that

'defendant OZ had no intention to be bound by the terms as agreed in the aforesaid agreements.' . . . Plaintiffs have failed to plead fraud with specificity as required by Rule 9(b). . .."); Nat'l Westminster Bank v. Ross, 130 B.R. 656, 664 (S.D.N.Y. 1991)("The law is well settled, however, that a party may not establish fraudulent intent solely from the non-performance of the future event. . . . The defrauded party must allege specific facts showing that the promisor intended not to honor his obligations at the time the promise was made."), aff'd, 962 F.2d 1 (2d Cir. 1992).

II. Motion to Dismiss the Fraud Claim Pursuant to Rule 12(b)(6)

The Defendant contends that the Plaintiff's complaint also is subject to dismissal pursuant to Rule 12(b)(6). Pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, Rule 12(b)-(h) of the Federal Rules of Civil Procedure applies in adversary proceedings in the Bankruptcy Court. Under Rule 12(b)(6) a defendant may move to dismiss for failure to state a claim upon which relief can be granted. The party moving for dismissal has the burden of proving that no claim has been stated and in order to prevail must show "'beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief.'" See 2 MOORE'S FEDERAL PRACTICE § 12.34[1][a](3d ed. 2003), citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). During the threshold review under Rule 12(b)(6), "the issue is not whether a plaintiff will

ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. In ruling on a Rule 12(b)(6) motion, the court must accept the plaintiff's factual allegations as true and give the plaintiff the benefit of all reasonable inferences to be drawn from such factual allegations. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997). A court ruling on a motion pursuant to Rule 12(b)(6) "should construe a plaintiff's allegations liberally, because the rules require only general or 'notice' pleading, rather than detailed fact pleading." See 2 MOORE'S FEDERAL PRACTICE § 12.34[1][b] (3d ed. 2003). Consistent with the obligation to construe plaintiffs' allegations liberally, courts should not dismiss for failure to state a claim "merely because the complaint requests inappropriate relief, or because it miscategorizes legal theories." Id. However, liberal construction has its limits and conclusory allegations or purely legal conclusions will not suffice to repel a motion to dismiss. Id. Applying the foregoing standards in the present case, the court concludes that the Plaintiff's complaint fails to state a claim for relief based upon fraud.

The parties disagree as to the source of the law which should be utilized in determining whether Plaintiff's complaint states a claim for fraud. The Plaintiff argues that the injury to the Debtor from the alleged fraud was felt in North Carolina by the Debtor, a North Carolina corporation with a presence in North

Carolina, and thus occurred in North Carolina. Plaintiff therefore concludes that North Carolina law is controlling. The Defendant, relying upon a choice of law provision in the Original Agreement which calls for the application of Illinois law, maintains that Illinois law is controlling.

In the Fourth Circuit, a bankruptcy court must apply the conflicts of law rules of the forum state in deciding which state's law to apply. See In re Merritt Dredging Co., Inc., 839 F.2d 203, 205-06 (4th Cir. 1988). The general rule in North Carolina is that a choice of law provision in a contract is enforceable unless it is shown that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. See Perkins v. CCH Computax, Inc., 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992); Tanglewood Land Co. v. Byrd, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). None of these circumstances regarding the Original Agreement are apparent in the present case. Therefore, the court will give effect to the choice of law provision contained in the Original Agreement which provides that "[t]he validity and construction of this Agreement shall be governed by the laws of the state of Illinois applicable to agreement made and performed wholly therein, conflicts of law notwithstanding." The reference in this clause to Illinois law controlling both as to "validity and construction" of the Agreement makes the clause a broad one. While there apparently is no North

Carolina case dealing with such a clause, most of the cases that have done so have concluded that such a clause is controlling as to claims involving construction of the contract as well as contract related tort claims such as fraudulent inducement or promissory fraud. See Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 628 (4th Cir. 1999); In re Allegheny Int'l, Inc., 954 F.2d 167, 178 (3rd Cir. 1992); Moses v. Business Card Express, Inc., 929 F.2d 1131, 1139-40 (6th Cir. 1991). The court believes that the North Carolina Supreme Court would follow these cases if confronted with the choice of law clause involved in this case. Therefore, since the fraud claim in the present case is a contract related fraud claim, the court concludes that the claim is subject to the choice of law provision in the Original Agreement and hence is controlled by Illinois law.

The Defendant contends that the Plaintiff's claim is one for promissory fraud and that such a claim is not recognized under Illinois law. Promissory fraud is a form of fraud based upon a false representation of present intent concerning future conduct and includes a promise to perform a contract when there is no intent to perform the contract. See Gen. Elec. Credit Auto Lease, Inc. v. Jankuski, 177 Ill. App. 3d 380, 384, 532 N.E.2d 361, 363-64 (1988); Stamatakis Indus., Inc. v. King, 165 Ill. App. 3d 879, 881-82, 520 N.E.2d 770, 772 (1987). The general rule under Illinois law is that misrepresentations of intention to perform future

conduct, even if made without a present intent to perform, do not constitute actionable fraud. See HPI Health Serv., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 168, 545 N.E.2d 672, 682 (1989); Roda v. Berko, 401 Ill. 335, 339-40, 81 N.E.2d 912, 914-15 (1948); International Meat Co., Inc. v. Bockos, 157 Ill. App. 3d 810, 545 N.E.2d 1013 (1987). However, the Illinois cases recognize an exception to this rule where "the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud." Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 334, 371 N.E.2d 634, 641 (1977); HPI Health Care., 131 Ill. 2d at 168; 545 N.E.2d at 682; Roda v. Berko, 401 Ill. at 340; 81 N.E.2d at 915; Gold v. Dubish, 193 Ill. App. 3d 339, 349-50, 549 N.E.2d 660, 665-66 (1989); Gen. Elec. Credit, 177 Ill. App. 3d at 384; 532 N.E.2d at 363-64.

While acknowledging the general rule under Illinois law, the Plaintiff maintains that this case falls within the foregoing exception and that the allegations in the complaint are sufficient to state a fraud claim. The court disagrees. The complaint alleges only a single fraudulent misrepresentation, i.e., that the Defendant "made a false representation that it would comply with the contractual terms." The complaint does not refer to a fraudulent scheme or characterize Defendant's conduct as involving a scheme. Further, there are not sufficient factual allegations from which it reasonably could be inferred that the Defendant was

engaged in a scheme to defraud the Plaintiff when the false representation regarding its intent to comply with the contract was made or that the false representation regarding future compliance with the contract was one of a pattern of fraudulent acts on the part of the Defendant. In short, the bare bones allegations in Plaintiff's complaint are insufficient for the court to say that Defendant's alleged false representation is "the scheme employed to accomplish the fraud" within the meaning of the Illinois cases and hence within the exception to the general rule that prevails under Illinois law. At the same time, the court is not satisfied that this case is one in which the plaintiff can prove no set of facts which would support a claim against the defendant for fraud involving the Amended Agreement. Accordingly, the fraud claim will be dismissed without prejudice so that the Plaintiff may amend the complaint. See Kwang Dong, 205 F. Supp. 2d at 495; Point DX Inc. v. Voxar Ltd., 2002 WL 31189696 (M.D.N.C.); 2 MOORE'S FEDERAL PRACTICE § 12.34[5] (3d ed. 2003).

III. Motion to Dismiss Claims Arising Prior To February 10, 2000

Plaintiff's complaint has attached to it a number of documents, including a copy of the February 10, 2000 Amended Agreement. This portion of the Defendant's motion to dismiss is based upon a release provision contained in the Amended Agreement. The release provides that the Defendant and the Debtor "hereby release each other . . . and unconditionally waive all rights and

claims which each may have against the other concerning the Agreement which arose prior to the date this First Amendment is executed." Pursuant to Rule 10(c), it is appropriate for the court to consider this provision in assessing the sufficiency of the Plaintiff's complaint. See Jeffrey M. Brown Assoc., Inc. v. Rockville Ctr. Inc., 7 Fed.Appx. 197, 202 (4th Cir. 2001); Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974)("If the appended document . . . reveals facts which foreclose recovery as a matter of law, dismissal is appropriate."); see also 10 COLLIER ON BANKRUPTCY ¶ 7010.05 (15th ed. rev. 2003)("It should be remembered . . . if the exhibit shows that there is not a cause of action, it can be used against the pleader instead of in his favor."). The Defendant argues that the Plaintiff is precluded by the release in the Amended Agreement from pursuing a claim for breach of the Original Agreement and that Plaintiff's claim for breach of that agreement therefore should be dismissed. The Defendant points out that the Plaintiff has asserted a claim for breach of the Amended Agreement[1], as well as the Original Agreement, and therefore is bound by the release provision, since Plaintiff may not claim the benefit of the favorable provisions of the Amended Agreement and at the same time

[1]In the contract claim, the Plaintiff alleges that the Defendant breached "the original and the amended agreement" and that the Plaintiff has been damaged by "breaches of the original contract and the amended Lucky agreement. . . ."

disavow the burdensome provisions. The cases cited by the Defendant support this proposition. See International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000)(party may not claim the benefit of a contract and simultaneously avoid its burdens); Upstate Shredding, LLC v. Carloss Well Supply Co., 84 F. Supp. 2d 357, 363 (N.D.N.Y. 2000)("[P]laintiffs cannot have it both ways. They cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage."); Lewis v. Southern Mills, 53 F. Supp. 443, 450 (W.D.N.C. 1944)("A party to a contract may not rescind it in part; he must either reject it or accept it. If the last contract . . . was entered into validly, then by its plain terms it effectively cancelled the first one."); Parker v. White, 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952)(party claiming that he was fraudulently induced to enter a contract "is not allowed to rescind in part and affirm in part, - he must do one or the other."); Williams v. Joines, 228 N.C. 141, 143, 44 S.E.2d 738, 739 (1947)("One who would take the benefits of a contract must assume its burdens, or else bear the consequences attendant thereon."). Thus, if the Plaintiff intends to pursue a damages claim for breach of the Amended Agreement, Plaintiff becomes bound by the terms of the release contained in that agreement which precludes any claims which predate February 10, 2000, including a claim for breach of Original Agreement. However, it is almost a certainty that the

Plaintiff will file an amended complaint. Various pleading alternatives are available. Plaintiff may seek damages for breach of contract as to the Original Agreement and limit the claim regarding the Amended Agreement to a fraud claim seeking damages incurred as a result of alleged fraud related to the Amended Agreement or may elect some form of alternative pleading. In any event, it would be premature to conclude at this time that Plaintiff cannot state a claim for breach of the Original Agreement. Therefore, Defendant's motion to dismiss Plaintiff's claim for breach of the Original Agreement will be granted, but without prejudice, leaving the Plaintiff the opportunity to file an amendment or amended complaint.

CONCLUSION

An order in accordance with the foregoing opinion is being entered contemporaneously with the filing of this Memorandum Opinion.

This 29th day of March, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

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v.	)	Case No. 03-2035
	)	
Albertson's, Inc.,	)	
	)	
Defendant.	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Defendant's motion to dismiss Plaintiff's second cause of action for fraud is granted and such cause of action is dismissed without prejudice;

(2) Defendant's motion to dismiss also is granted as to the cause of action for breach of the original contract between the Debtor and Lucky Stores, Inc. and such cause of action is dismissed without prejudice; and

(3) The Plaintiff is allowed to and including April 30, 2004,

within which to amend the complaint or file an amended complaint in this adversary proceeding.

This 29th day of March, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge