

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

|                         |   |                      |
|-------------------------|---|----------------------|
| CARL and ALICIA FURMAN, | ) |                      |
|                         | ) |                      |
| Plaintiffs,             | ) |                      |
|                         | ) |                      |
| v.                      | ) | Civil No. 05-124-B-H |
|                         | ) |                      |
| JOHN C. RUGER and RUGER | ) |                      |
| ASSOCIATES, INC.,       | ) |                      |
|                         | ) |                      |
| Defendants.             | ) |                      |

**AMENDED<sup>1</sup> RECOMMENDED DECISION ON DEFENDANTS'  
MOTION TO DISMISS PLAINTIFFS' FRAUD CLAIM**

Carl and Alicia Furman contracted with Ruger Associates, Inc., to construct a house in Stonington. According to the Furmans, the project went well over the estimated budget and well beyond the estimated completion date. In addition to asserting a breach of contract claim and negligent misrepresentation claim, the Furmans contend that John Ruger, the principle of Ruger Associates, Inc., fraudulently misrepresented the anticipated costs and completion time in order to win the contract and, during the construction process, fraudulently billed the Furmans for material and labor costs that were never incurred during construction of the house and/or in an amount above what was permitted by the contract. The defendants answered all but the fraud claim and now move to dismiss the fraud claim under Rule 12(b)(6) for want of sufficient specificity under Rule 9(b). The plaintiffs have submitted a Proposed Second Amended Complaint and a Motion to Amend in conjunction with their opposition. I grant the Motion to Amend and recommend that the Court deny the Motion to Dismiss.

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<sup>1</sup> The only amendment is a formatting correction on Page 3.

## The Fraud Pleading Standard

Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure: "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." Rule 9(b) thus creates an exception to the low bar set by Rule 8's notice pleading standard. The First Circuit Court of Appeals "has consistently required strict compliance with Rule 9(b)." Bailey v. Linsco/Private Ledger Corp., 136 F.R.D. 11, 15 (D. Me. 1991). In order to allege a claim of fraud<sup>2</sup> with sufficient specificity, the claimant must set forth allegations pertaining to "the time, place and content of an alleged false representation," but need not specifically allege the facts on which the allegation of fraudulent intent is based. McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980); see also Philippe v. Shape, Inc., 688 F. Supp. 783, 786 (D. Me. 1988). The heightened pleading requirement is designed, among other things, "to protect defendants whose reputation[s] may be harmed by meritless claims of fraud . . . and to prevent the filing of suits that simply hope to uncover relevant information during discovery." Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996).

## Plaintiffs' Allegations of Fraud

In conjunction with their response to the Motion to Dismiss, the Furmans have filed a Proposed Second Amended Complaint. (See Pl.'s Opp'n, Docket No. 25.) Although they take this step "out of an abundance of caution," (id. at 5), arguing that their First Amended Complaint contained sufficient allegations, the Proposed Second Amended Complaint has been filed ahead

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<sup>2</sup> Under Maine law, a person is liable for fraud if he: (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff. Fitzgerald v. Gamester, 658 A.2d 1065, 1069 (Me. 1995).

of the deadline for amendment of the pleadings and no objection has been filed with respect to the request to amend the complaint a second time. I now **GRANT** the Motion to Amend and evaluate the Motion to Dismiss by reference to the Second Amended Complaint.

The allegations in the Second Amended Complaint assert, among other things, that the following representations were fraudulent:

- (1) Ruger's initial representation, on or about March 17, 1998, "under the terms of the contract," that "work on the House would be substantially complete by December, 1999." (Proposed 2d Am. Compl. ¶¶ 6, 11, 36.)
- (2) A representation five months later that contained a "written budget" that was substantially less than the amount Ruger Associates ultimately billed the Furmans. (Id. ¶¶ 12, 36.)
- (3) Several representations made in billings sent to the Furmans's Massachusetts residence between April 8, 1998, and December 5, 2000, concerning the amount due to Ruger Associates for material and labor costs, *to wit* (in the words of the Second Amended Complaint):
  - He billed the Furmans approximately \$88,000 for framing materials whose value was actually \$63,716, or 72% of the total amount billed. In other words, he overcharged the Furmans by 38%.
  - He billed the Furmans labor costs totaling 10,103 hours for framing which should have taken only 1,919.2 hours. In other words, he overbilled the Furmans by a factor of more than five.
  - Labor costs that Mr. Ruger billed the Furmans for which purportedly related to framing the House during the period January 2000 to December 2000 bear no reasonable relationship to material costs for framing during that time frame. Specifically, as depicted in the table below, labor hours peaked twice (at 688 hours in February 2000 and at 535 hours in August), however, the quantities of materials decreased sharply for the relative period: [chart omitted]

- He billed the Furmans labor costs totaling 498 hours to lay 610 square feet of top boards on their deck (1.225 square feet per hour), exclusive of framing. According to industry standards, this job should have taken a maximum of 21 hours (39.5 square feet per hour), meaning that Mr. Ruger overbilled the Furmans for more than 32 times work than he should have.

(Id. ¶ 39A.) In addition to these allegations, the Furmans allege the following:

- Mr. Ruger billed the Furmans 87% of the total cost to complete the HVAC (Airotherm) system in the House, however, the work he performed only completed a maximum of 60% of its installation.
- With regard to the ice and water shield on the roof of the House, Mr. Ruger billed the Furmans for 10,350 square feet of materials. The roof only measures 7,050 square feet, meaning that he overbilled the Furmans by 47%.
- Plans specified that 2 x 12 pressure treated framing lumber was to be used to construct the garage floor, however, Mr. Ruger initially used regular kiln dried lumber. This lumber had to be removed, disposed of and replaced with the proper material all of which resulted in additional cost to the Furmans.

(Id. ¶ 39B.) The Furmans further allege that Ruger, on behalf of Ruger Associates and himself, misrepresented in his billings the number of hours he and others worked on the house.

According to the Proposed Second Amended Complaint, Furman billed for 100 hours of his time and for work purportedly performed by six carpenters in the month of August 1999, although he was only present at the house "a few days" and only three carpenters worked at the house during that month. (Id. ¶ 39C.) The Furmans allege that they substantially overpaid Ruger Associates as a result of these misrepresentations. (Id. ¶ 41.)

### **Discussion**

The allegations set forth in the Second Amended Complaint set forth enough detail concerning the time, place and content of the alleged fraudulent statements to overcome the defendants' Motion to Dismiss. In doing so, they serve both to define and to limit the scope of what was previously a rather broad and general fraud claim that potentially covered every billing ever sent to the Furmans. (See First Am. Compl. ¶¶ 38-39.)

**Conclusion**

I hereby **GRANT** the Furmans' Motion to Amend (Docket No. 25), thereby making the Proposed Second Amended Complaint the operative pleading in this matter. I further **RECOMMEND** that the Court **DENY** the Motion to Dismiss (Docket No. 22) because the Second Amended Complaint contains sufficient specificity to serve the purposes of Rule 9.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated: December 6, 2005

FURMAN et al v. RUGER et al

Assigned to: JUDGE D. BROCK HORNBY

Case in other court: US District Court, District of  
Massachusetts, 05-cv-11271-RWZ

Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 08/10/2005

Jury Demand: Plaintiff

Nature of Suit: 190 Contract: Other

Jurisdiction: Diversity

**Plaintiff**

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**HAROLD J. FRIEDMAN**  
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V.

**Defendant**

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**Counter Claimant**

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V.

**Counter Defendant**

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**Counter Defendant**

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