

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE DOW CHEMICAL COMPANY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
ANTHONY L. GELARDI, et al.,)	
)	Civil No. 89-0179 P
<i>Defendants and</i>)	
<i>Third-Party</i>)	
<i>Plaintiffs</i>)	
)	
v.)	
)	
DOW CREDIT CORPORATION,)	
)	
<i>Third-Party</i>)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON PLAINTIFF'S MOTION TO DISMISS
COUNTERCLAIM AND THIRD-PARTY DEFENDANT'S MOTION
TO DISMISS THIRD-PARTY COMPLAINT**

In this diversity action the plaintiff, The Dow Chemical Company ("Dow Chemical"), seeks to enforce a stock repurchase agreement between the defendants and third-party plaintiffs, Anthony L. Gelardi and Paul J. Gelardi ("Gelardis"), and the third-party defendant, Dow Credit Corporation ("Dow Credit") (Dow Chemical and Dow Credit sometimes hereinafter referred to collectively in the singular as "Dow").¹ The Gelardis have brought a counterclaim against Dow Chemical as well as a third-party complaint ("pleadings") against Dow Credit seeking, in each, declaratory and injunctive

¹ Dow Chemical brings this action as the assignee of Dow Credit's rights under the stock repurchase agreement. Complaint & 6.

relief as well as monetary damages. Before the court are Dow Chemical's and Dow Credit's respective motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).²

On a motion to dismiss, the material factual allegations of the claim must be taken as true, *Cooper v. Pate*, 378 U.S. 546 (1964), and interpreted in the light most favorable to the pleader, *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987). Exempt from this court's consideration for purposes of deciding a motion to dismiss, however, are "those facts which have since been conclusively contradicted by [the pleader's] concessions or otherwise, and . . . bald assertions, unsupportable conclusions, and opprobrious epithets." *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10 (1944)). The motion may be granted "only if, when viewed in this manner, the pleading shows no set of facts which could entitle [the pleader] to relief." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988) (citing *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957)).

² Dow Credit has adopted and incorporated by reference the arguments and authorities set forth in Dow Chemical's Memorandum in Support of its Motion to Dismiss the Defendants' Counterclaim.

Applying these guidelines, the material facts for purposes of these motions are as follows: The Gelardis are the majority shareholders of SHAPE Inc. ("Shape") which manufactures compact and optical discs, videocassettes and related products and, in connection therewith, purchases large quantities of commercial resins. They determined in 1987 that Shape needed additional funds, and to that end they obtained from the Bank of New England ("BNE") a commitment to loan Shape up to \$30 million, contingent upon Shape's procurement of an additional \$10 million in equity or subordinated debt. As a result of negotiations undertaken by the Gelardis in their capacities as officers and directors of Shape, the General Electric Corporation agreed to provide Shape with the needed funding. In the fall of 1987 Dow represented to the Gelardis in their corporate officer and director capacities that it would provide Shape with \$5 million for the purchase of Shape preferred stock and with an additional \$5 million in subordinated debt or equity from its research and development budget.³ On November 9, 1987 Dow, Shape and the Gelardis executed the following documents in various combinations: a Preferred Stock Purchase Agreement ("stock purchase agreement"), a Sales Contract for Commercial Resins ("resin sales agreement"), a Loan Agreement ("loan agreement") and a Stock Repurchase Agreement ("stock repurchase agreement"). Pursuant to the stock purchase agreement, entered into by Shape and Dow Credit, Dow Credit agreed to pay Shape \$5 million in exchange for 1,000 shares of Series A Convertible Shape Preferred Stock. The resin sales agreement, entered into by Dow Chemical and Shape, provided, *inter alia*, that Shape would purchase from Dow Chemical more than 200 million pounds of resins over a period of six years for a total purchase price exceeding \$150 million. The loan agreement, entered into between Dow Credit and Shape, provided, *inter alia*, that Dow Credit would loan \$2 million to Shape. Pursuant to the stock repurchase agreement, entered into between Dow Credit and the Gelardis, each of the Gelardis agreed to

³ The pleadings do not allege that there was any *written* agreement reflecting such representations.

purchase from Dow Credit upon demand at least 50 preferred shares of Shape stock in the event of a default as defined in that agreement or in the loan agreement. Prior to the execution of the stock repurchase agreement Dow told the Gelardis that it would not enforce the agreement unless the Gelardis voluntarily left Shape.

Dow did not provide Shape with the \$3 million difference between the \$10 million needed to satisfy BNE's requirements and the aggregate \$7 million it paid Shape as consideration for stock and as a loan. Nor did it convert the \$2 million loan into subordinated debt or equity. As a result, Shape was unable to satisfy the conditions of the BNE commitment. Eventually Shape filed a petition for relief under Chapter 11 of the Bankruptcy Code. Dow, as a participant in the bankruptcy proceedings, exerted pressure on the court-appointed bankruptcy trustee, as well as the officers and directors of Shape, to dismiss the Gelardis from the management of Shape. Paul Gelardi, in fact, was dismissed from management and Anthony Gelardi lost much of his management control. In their counterclaim and third-party complaint the Gelardis assert claims for fraud (Count I), breach of contract (Count II), promissory estoppel (Count III) and interference with contract (Count IV). They claim monetary damages (based on "the failure of Dow to provide the promised funding to Shape and the efforts of Dow to have the Gelardis removed from the control and management of Shape," Pleadings & 38) consisting, *inter alia*, of reductions in their salaries and bonuses, and reductions in the value of their Shape stock and dividends. *Id.* They also seek declaratory and injunctive relief.

Dow argues that the Gelardis lack standing to assert the claims in Counts I through III to the extent that these claims are based on Dow's alleged representations concerning an additional \$3 million loan and the conversion of the \$2 million loan into subordinated debt or equity ("funding representations"). In addition it asserts that none of the counts states a claim on which relief can be granted.

The first issue, therefore, is whether the Gelardis have standing to assert personal claims based on representations made to them in their capacities as corporate officers. It is well established that a stockholder lacks standing to assert a direct personal claim for an injury inflicted upon the corporation. *Roeder v. Alpha Indus., Inc.*, 814 F.2d at 29-30. The same precept applies to claims brought by employees who may incidentally lose their jobs as a result of wrongful conduct directed at the corporation. *See Warren v. Manufacturers Nat'l Bank of Detroit*, 759 F.2d 542, 545 (6th Cir. 1985) (where a fraud committed on a corporation brings about ultimate bankruptcy and as a result employees lose their jobs, the corporation rather than the employees have a fraud claim against the wrongdoer). Thus, in order for the Gelardis to be entitled to assert a nonderivative claim based on Dow's prior representations to Shape, they must allege that they suffered some injury "separate and distinct from that suffered by other shareholders, or the corporation as an entity." *Gaff v. Federal Deposit Ins. Corp.*, 814 F.2d 311, 315 (6th Cir.) (quoting *Twohy v. First Nat'l Bank*, 758 F.2d 1185, 1194 (7th Cir. 1985)), *vacated in part on other grounds*, 828 F.2d 1145 (6th Cir. 1987). The diminution in the value of a shareholder's corporate stock "is generally not recognized . . . as the type of direct, personal injury which is necessary to sustain a direct cause of action." *Id.*, 814 F.2d at 315. *See also Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896-97 (5th Cir. 1968) (a direct injury arises where the stockholder shows a violation of a duty owed personally to him; it is not enough, however, to allege that "the acts complained of resulted in damage both to the corporation and to the stockholder"). Thus, the Gelardis lack standing to assert personal claims based on the decline in the price of Shape stock because it "merely reflects the decrease in value of the firm as a result of the alleged [wrongful] conduct." *Roeder*, 814 F.2d at 30 (quoting *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986)). Similarly, they cannot assert a claim based on injuries they suffered incidentally as employees as the result of an injury inflicted upon Shape.

Warren, 759 F.2d at 545. Accordingly, I conclude that the Gelardis have no standing to assert personal claims based on the funding representations.⁴

⁴ I note that, the Gelardis' contentions notwithstanding, the pleadings contradict the claim that the funding representations were made to them personally. See Pleadings §§ 17-19. The Gelardis also argue that they were owed a duty personally by Dow because the stock repurchase agreement is in actuality a guarantee agreement. This argument must fail. The pleadings simply do not allege *facts* which support the conclusion that the stock repurchase agreement is a guarantee agreement. Moreover, I observe that several courts have concluded that guarantor status is insufficient to establish standing where the injuries claimed are those resulting from a wrong to the corporation and the damages claimed derive from the loss suffered by the corporation. See *Olson Motor Co. v. General Motors Corp.*, 703 F.2d 284, 290 (8th Cir.), *cert. denied*, 464 U.S. 894 (1983); *Stein v. United Artists Corp.*, 691 F.2d 885, 896 (9th Cir. 1982); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439 (9th Cir. 1979); *Howell Steel Co. v. Trustmark Nat'l Bank*, 666 F. Supp. 930, 932 (S.D. Miss. 1987); *Pennsylvania House Div. of Gen. Mills v. McCuen*, 621 F. Supp. 1155, 1156 (S.D. Miss. 1985). Finally, the Gelardis claim that they have standing based on the assertion that as majority shareholders they were intended third-party beneficiaries of the alleged oral contract between Dow Credit and Shape. Pleadings § 50. This argument is equally without merit. An allegation of majority or sole shareholder status is insufficient to establish standing to bring suit in an individual capacity. See *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 602-03 (6th Cir. 1988) (president and sole shareholder of distributor did not have standing to maintain distributor's breach of contract action). See also *Sherman*, 601 F.2d at 440 n.13.

Because the second alleged representation -- that Dow would not enforce the stock repurchase agreement as long as the Gelardis did not voluntarily leave the management of Shape -- was made personally to the Gelardis, I do not conclude that the Gelardis' claims should be dismissed solely on the basis of standing. Rather, I proceed to determine whether any of the counts, to the extent that they are based on allegations other than the funding representations, state a claim on which relief can be granted.

Fraud

Count I alleges a cause of action for fraud. The Gelardis claim that Dow knowingly falsely represented to them that it would provide Shape with an additional \$3 million in funds, convert the \$2 million loan to subordinated debt or equity and forbear from enforcing its rights under the stock repurchase agreement unless the Gelardis left Shape voluntarily, all for the purpose of inducing the Gelardis to execute various loan documents in reliance upon these false representations, and that the Gelardis justifiably relied upon these false representations as being true and acted upon them in entering into the loan documents. Dow asserts that under Maine law an action will not lie for fraud based on a promise to perform a future act. I agree. The Law Court has stated "`on several occasions" that an action for fraud "`must be based on misrepresentations of past or existing fact and not merely on broken promises for future performance." *Wildes v. Pens Unltd. Co.*, 389 A.2d 837, 840 (Me. 1978) (citations omitted). Thus, it has held that an action for fraud cannot be based on a defendant's representation that she would guarantee dividends as an inducement for the plaintiff to buy stock because "`it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform." *Shine v. Dodge*, 157 A. 318, 130 Me. 440, 443 (1931). Under existing Maine law,

therefore, the Gelardis, who allege only breach of promise of future performance, have not stated a cause of action for fraud.⁵

⁵ Dow also asserts that the fraud claim fails to comply with the specificity requirement of Fed. R. Civ. P. 9(b) because it fails to particularize the time and place of the representation allegedly made by it. *See McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980). The Gelardis claim, however, that sufficient specificity is supplied by the allegation that they decided to enter into the various agreements with Dow in "the fall of 1987", *see* pleadings & 17, and the implicit identification of the time of the alleged fraud as that period and its location as "negotiation space" comprised of telephone conferences and meetings at Dow's and the Gelardis' offices. I note that the pleadings appear to fall short of the First Circuit's specificity requirement, the purpose of which is to furnish the opposing party "with adequate notice of the fraud claim against them, and to reduce the likelihood of spurious and unnecessarily damaging fraud claims." *Phillipe v. Shape, Inc.*, 688 F. Supp. 783, 786 (D. Me. 1988) (citing *Wayne Investment, Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 13 (1st Cir. 1984)). In *McGinty*, the complaint was found to be sufficiently specific where it stated the date of the alleged misrepresentation and only one specific location could be inferred from the pleadings. *Id.*, 633 F.2d at 229 n.3. In *Phillipe*, where the complaint provided the specific dates, places and content of the alleged fraud, the court held that the specificity requirements of Fed. R. Civ. P. 9(b) were satisfied. In contrast, the Gelardis' pleadings allege that the fraudulent representations occurred in the fall of 1987 prior to the November 9 execution of the various contracts. There is no indication of the circumstances of the alleged misrepresentations beyond the allegation that they occurred during negotiations. *See Wayne*, 739 F.2d at 14. I do not, however, recommend that this claim be dismissed

Breach of Contract and Promissory Estoppel

for failure to comply with Fed R. Civ. P. 9(b) since I have determined that Count I fails altogether to state a claim on which relief can be granted.

Count II alleges a cause of action for breach of contract and Count III for promissory estoppel. Both are based on the two alleged representations made by Dow. Because I have already determined that the Gelardis lack standing to assert claims based on the funding representations, I address here only the question whether the pleadings state a claim for breach of the alleged promise not to enforce the lending agreement. Dow asserts that a claim based on a promise to forbear is merely a defense to enforcement of the contract and thus cannot stand as a claim in its own right.⁶ If the alleged promise to forbear is merely a condition precedent to the duty of the Gelardis to perform, then it "[does] not create any remedial rights or duties." 3A A. Corbin, *Corbin on Contracts* ' 633 at 26 (1960). The question to be answered is: "Was this expression intended to make the duty of one party conditional and dependent upon some performance by the other (or on some other fact or event)?" *Id.* at 32. If the answer is "yes," then the expression limits a promisor's duty but does not create a legal duty in the promisee. *Id.*; see also 5 S. Williston, *A Treatise on the Law of Contracts* ' 665 at 132 (3d ed. 1961) ("Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, *but subjects him to no liability.*") (emphasis added) (footnote omitted).

In this case, Dow's alleged promise to forbear at most limits the Gelardis' duty to perform under the stock repurchase agreement. Such a limitation is a defense rather than a claim, the Gelardis'

⁶ Dow also asserts that the breach of contract claim is barred by the application of the parol evidence rule which "operates to exclude from judicial consideration extrinsic evidence offered to vary, add to, or contradict the terms of an integrated written agreement." *Clarke v. Dipietro*, 525 A.2d 623, 625 (Me. 1987). The court must first determine whether the repurchase agreement is a fully integrated document. *Id.* Parol evidence of the parties' negotiations and mutual understandings is admissible for the purpose of such preliminary determination. *Id.* Thus, it would be inappropriate for the court to dismiss the breach of contract claim on the basis of the parol evidence rule especially where the particular document in question -- the stock repurchase agreement -- contains no integration clause.

prayer for damages notwithstanding. The Gelardis have, in fact, pleaded the alleged agreement as an affirmative defense. Answer, Thirteenth Affirmative Defense.⁷

The Federal Rules of Civil Procedure provide that "[w]hen a party has mistakenly designated a defense as a counterclaim . . . , the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Fed. R. Civ. P. 8(c). In *Horsford v. Romeo*, 407 F.2d 1302 (3d Cir. 1969), the defendant's answer in an action for the proceeds of the sale of land contained a counterclaim which alleged that the defendant was the equitable owner of the land and as such was entitled to the proceeds of its sale. The Court of Appeals for the Third Circuit held that the district court was justified in treating the counterclaim as an answer raising affirmative defenses and therefore upheld its determination that the failure of the plaintiff to answer the counterclaim did not constitute an admission of the allegations therein. *See also Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1379 (7th Cir. 1985) ("The label 'counterclaim' has no magic. What is really an answer or defense to a suit does not become an independent piece of litigation because of its label."); *Office & Professional Employees Int'l Union v. Allied Indus. Workers Int'l Union*, 397 F. Supp. 688, 691 (E.D. Wis.), *aff'd*, 535 F.2d 1257 (7th Cir. 1976) (where the counterclaim, which sought dismissal of the complaint, specific performance of an agreement settling a controversy, an injunction restraining plaintiff from commencing any legal action relating to the controversy which was the subject matter of the settlement agreement, and defendant's costs, disbursements, and attorney's fees, alleged that the

⁷ The thirteenth affirmative defense states: "[Plaintiff's Complaint is barred by the doctrine of estoppel in that the plaintiff and its subsidiaries agreed not to act upon the Stock Repurchase Agreement unless the Defendants voluntarily left Shape, Inc." Answer, Thirteenth Affirmative Defense.

action to compel arbitration was in violation of an alleged settlement agreement, the so-called counterclaim was treated as an affirmative defense).

In this case justice does not require the court to treat the counterclaim as an affirmative defense because the Gelardis' answer already pleads the affirmative defense of estoppel based on the alleged agreement to forbear. I therefore determine that Count II fails to state a claim on which relief can be granted. For the same reason I conclude that the Gelardis' promissory estoppel claim asserted in Count III also must fail.*

Interference with Contract

The Gelardis allege that Dow "` without privilege or justification, with knowledge thereof and intent to do so, and through fraud, duress, or intimidation; has knowingly and intentionally interfered with the contractual relationships and prospective advantages of the Gelardis in connection with Shape." Pleadings & 60. Such conduct presumably is the alleged behavior of representatives of Dow in exerting pressure upon the court-appointed bankruptcy trustee, as well as the officers and directors of Shape, to dismiss the Gelardis from the management of Shape. Pleadings & 35.

* As stated above, the promissory estoppel claim fails for lack of standing to the degree that it is based on the funding representations. Whether the alleged agreement to forbear is characterized as a contract or a promise inducing reliance, *see Chapman v. Bomann*, 381 A.2d 1123, 1127 (Me. 1978), does not change the fact that the effect of the alleged promise is to assert a bar to enforcement of the stock repurchase agreement.

Under Maine law an action for tortious interference with an existing employment or contract relationship will lie “wherever a person, by means of *fraud* or *intimidation*, procures, either the breach of a contract or the discharge of [the pleading party] from an employment, which but for such wrongful interference would have continued.” *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982) (quoting *Perkins v. Pendelton*, 90 Me. 166, 176, 38 A. 96, 99 (1897)) (emphasis added). In this case, the only supporting *factual* allegation is that Dow, as a creditor in the bankruptcy proceedings, exerted pressure on the bankruptcy trustee, as well as Shape's officers and directors, to dismiss the Gelardis from Shape's management. Although this general statement does not provide any means of establishing whether such alleged pressure rose to the level of intimidation, it precludes a determination that, when viewed in a light most favorable to the Gelardis, the pleadings “show[] no set of facts which could entitle [the Gelardis] to relief.” *Gooley*, 851 F.2d at 514.⁹

⁹ If, for example, Dow threatened the trustee or others in order to effect a rift in the Gelardis' contractual relationship with Shape, and such threats achieved the desired result, such behavior would be actionable. See *Perkins*, 90 Me. at 177, 38 A. at 99 (“[T]o intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong.”); see also *MacKerron*, 445 A.2d at 683 (intimidation occurred when the defendant policeman interfered with the relationship between the attorney plaintiff and his client by threatening that he would not seek to have the criminal complaint against the client dismissed unless the plaintiff withdrew his representation); but see *Boston Casualty Co. v. Bath Iron Works Corp.*, 136 F.2d 31 (1st

Cir. 1943) (employer which urged its employees insured with plaintiff to take out insurance with a different insurer and made it more convenient to do so did not intimidate its employees into changing insurers). Because such behavior could be generally characterized as "exerting pressure," it would be inappropriate for this court to dismiss the claim on a 12(b)(6) motion.

Dow also cites provisions of Chapter 11 of the Bankruptcy Code and argues that, as lawful behavior under the Code, its actions cannot constitute unlawful interference with contract under Maine law. It is not at all clear from the pleadings, however, that this is the case. The pleadings essentially allege intimidation by Dow of the court-appointed trustee and others. As stated above, whether or not the alleged pressure exerted by Dow rose to the level of intimidation cannot be determined at this stage of the litigation. It is therefore impossible to determine whether, as a member of the creditors' committee, Dow merely engaged in permitted activities pursuant to 11 U.S.C. ' 1103 or instead exceeded its statutory rights under the Code. I therefore determine that Count IV states a claim upon which relief can be granted.

Conclusion

For the foregoing reasons, I conclude that Counts I-III of the Gelardis' counterclaim and third-party complaint fail to state claims on which relief can be granted, but that Count IV does state a claim for interference with contract. Accordingly, I recommend that the motions of Dow Chemical and Dow Credit to dismiss be ***GRANTED*** as to Counts I-III and ***DENIED*** as to Count IV.

NOTICE

A party may file objections to those specified portions of a magistrate'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, within ten (10) days after being served with a copy thereof. A responsive memorandum 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.

Dated at Portland, Maine this 11th day of April, 1990.

David M. Cohen
United States Magistrate