THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Case Number: 217-2023-CV-00285

Casella Waste Systems, Inc.

v.

Jon Swan

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

Defendant, Jon Swan, respectfully submits this objection to Plaintiff Casella Waste Systems, Inc.'s ("Casella") motion to dismiss his counterclaims (the "MTD"), stating as follows:

Argument

I. Mr. Swan States a Claim for Breach of Contract.

Casella argues that Mr. Swan fails to state a claim for breach of contract because: a) breach of the Confidentiality Clause of the parties' settlement agreement (the "Agreement) is not a "material breach;" b) Mr. Swan has not "allege[d] that he suffered any material damage;" and c) Mr. Swan's claim is based solely on allegations in paragraph 13 made "on information and belief," which Casella contends are improper.

All of these arguments fail.

A. Casella's Violation of the Settlement Agreement's Confidentiality Clause is a Material Breach of Contract.

First and foremost, Casella has breached the Agreement. "Under New Hampshire law, a breach of contract occurs when there is a failure without legal

excuse to perform any promise which forms the whole or part of a contract." *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 447 (2020).

The Confidentiality Clause of the Agreement states explicitly and unambiguously that "[t]he Parties agree that the terms and existence of this Agreement shall be confidential," and that "[n]o Party shall disclose the terms set forth in this Agreement to any person, other than members of a Party's immediate family, legal counsel, or tax advisors, or by order of the court, and none of these persons shall disclose the terms of this Agreement." Casella Complaint at ¶4.

Mr. Swan alleges that "[o]n May 25, 2023, Casella . . . initiated this action, publicizing expressly the existence, nature and material terms of the Agreement for the first time." Counterclaims ¶ 12. Not only must the Court accept this allegation as true, but its truth is indisputable.

Casella therefore breached the Agreement. And that breach was material, because it went "to the root or essence of the agreement between the parties" – what the parties were, and were not, permitted to say about the earlier litigation and how it resolved. *Foundation for Seacoast Health v. Hospital Corp. of America*, 165 N.H. 168, 181-82 (2013). *See also Gaucher v. Waterhouse*, 175 N.H. 291, 296 (2022) (breach is material if it "substantially defeats the contract's purpose" or "the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract") (internal citations and quotations omitted).

Casella's own Complaint demonstrates the materiality of the confidentiality obligations. This is true in several ways. First, the only claim in the original Complaint was that Mr. Swan had violated the Confidentiality Clause. Plainly, Casella viewed that obligation as important and vital to the Agreement's

purposes. Otherwise, it would not have drafted a complaint and commenced a new action to vindicate those rights.

Second, the Complaint alleges (and shows) the parties' counsel engaging in extensive and meaningful discussions about how the Confidentiality Clause was to operate. Complaint ¶5; Exhibit 1. The parties would not have made such an effort for an unimportant or secondary obligation.

Courts have held that disclosure of confidential details in a court filing can be a material breach of a settlement agreement. *See e.g.*, *Rivera v. Sharp*, 2021 WL 2228492, at *10 (D.V.I. 2021) (motion to enforce settlement agreement, filed "publicly" via ECF hours prior to motion to seal, was material breach of confidentiality clause); *GDL Masonry Supply, Inc. v. Lopez*, 2016 WL 6835719, at *3 (Tex. App.-Dallas, 2016) (where plaintiff GDL "presented no evidence that the parties did not intend violation of the confidentiality clause to be a material breach nor did [plaintiff] provide any evidence controverting [defendant]'s evidence that GDL had violated the confidentiality provision," the defendant's "continued performance under the agreement was excused"); *Norris v. Ford Motor Credit Co.*, 198 F.Supp.2d 1070, 1073–74 (D.Minn. 2002) (where parties "agreed to keep the contents of the agreement confidential," plaintiff's "filing of the agreement" on the public docket was a breach, regardless of whether defendant "can show that someone actually saw the agreement").

Finally, [w]hether a breach of contract is material is a question of fact" for the factfinder to resolve. *Foundation for Seacoast Health*, 165 N.H. at 181. It cannot, and should not, be resolved on a motion to dismiss.

B. There is No Requirement in the Law of Contracts for a Counterclaim Plaintiff to Suffer "Material Damage" – Indeed, the New Hampshire Supreme Court Has Held to the Contrary.

Casella's contention that Mr. Swan must allege "material damage"[1] to state a valid claim for material breach of contract has been rejected by the New Hampshire Supreme Court. In *Ellis v. Candia Trailers and Snow Equipment, Inc.*, 164 N.H. 457, 466–67 (2012), "[t]he respondents argue[d] that the court lacked evidence to find that Goff's breach of the NCA was material because the petitioners did not present any evidence of damages at trial. In effect, the respondents argue that the materiality of a breach cannot be proved without evidence of damages."

The Court stated: "We disagree." *Id. "[P]roof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties' agreement that it defeated the essential purpose of the contract." Id.* (italics in original) (*quoting* 23 Williston on Contracts § 63:3 (4th Ed.). *Id.*

In any event, even if no actual damages are shown, Mr. Swan would be entitled to nominal damages. *Cleasby v. Phoenix Auto Body, Inc.*, 2006 WL 8418214, at *1 (N.H. 2006). Nothing about the damages claimed or sought provides a basis for dismissal of Mr. Swan's underlying claim.

C. Mr. Swan's Allegations Adequately Allege a Breach of Contract.

Casella argues that Mr. Swan's claims are based entirely on the factual allegations in paragraph 13 made on "information and belief," and that such an allegation amounts to "nothing more than a conclusion of law" that this Court should not accept. MTD at p. 5.

[1] It is not clear what Casella means by "*material* damage." It cites no authorities that use that term, and Mr. Swan is not familiar with any that do. For purposes of this objection, Mr. Swan assumes that Casella is simply referring to normal contract damages.

The Court should reject this argument for several reasons. First, Mr. Swan's allegations are not confined to paragraph 13. That paragraph does allege additional facts about disclosures Casella made of the Agreement's existence and terms prior to filing the Complaint in this case. But the central breach is alleged in paragraph 12: "On May 25, 2023, Casella then initiated this action, publicizing expressly the existence, nature and material terms of the Agreement for the first time." Nothing about that allegation involves "information and belief." It is an undisputed fact.

Second, Casella relies on federal authority for the proposition that allegations on "information and belief" are unacceptable. The case it cites, *Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, 59 F.4th 948, 954 (8th Cir. 2023), applied the pleading rule announced in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

That is not the rule in New Hampshire. New Hampshire applies the "traditional standard that a complaint be 'reasonably susceptible of a construction that would permit recovery,' *Tessier v. Rockefeller*, 162 N.H. 324, 329 (2011), under '*any* state of the facts findable under the pleadings,' *Lawton v. Great Southwest Fire Insurance Company*, 118 N.H. 607, 610 (1978) (emphasis added)." *Fowler v. O'Hara*, 2015 WL 13404064, at *11 (N.H. Super. Rockingham County Feb. 09, 2015) (Schulman, J.) (rejecting federal standard) (internal citations and emphases retained).

Third and finally, even if Federal law did apply, Casella gets that law wrong. It cites *Ahern* for the putative general proposition that "pleadings made on information and belief cannot cure an otherwise threadbare complaint." *Id.*

Although that language does appear in the *Ahern* opinion,[2] it is not the holding of the Court. The actual holding of *Ahern* was to adopt the "prevailing standard . . . that allegations pled on information and belief are not categorically insufficient to state a claim for relief where the proof supporting the allegation is within the sole possession and control of the defendant or where the belief is based on sufficient factual material that makes the inference of culpability plausible." This is the opposite of what Casella claims *Ahern's* holding to be.

Here, whether *Casella* made disclosures "to third parties prior to the commencement of this action on May 25, 2023 and prior to the Caledonian Record article" is peculiarly within Casella's knowledge. That satisfies the first prong of *Ahern's* standard. Moreover, Casella's disclosure of the existence of the Agreement and several of its material terms on May 25, 2023 – in direct violation of those terms – satisfies the second prong, providing "sufficient factual material t[o] make[] the inference of culpability plausible." If Casella was unconcerned enough about its confidentiality obligations to violate them in a publicly filed pleading, it is more than plausible to infer that it violated them in less public contexts.

II. Mr. Swan States a Claim for Breach of the Duty of Good Faith and Fair Dealing.

Casella's argument that breach of the Agreement's Confidentiality Clause cannot give rise to a claim for breach of the implied duty of good faith and fair

[2] The quoted language comes from the Eighth Circuit's discussion distinguishing its holding from "our previous decisions rejecting upon-information-and-belief pleadings in the narrow context of quiet title actions." *Id.*

dealing is both self-serving and hypocritical. MTD at p. 6-7. Casella itself has made an identical claim. Paragraph 9 of the Complaint alleges that Mr. Swan's

> . . . misrepresentation of the resolution also violated the implied covenant of good faith and fair dealing in that an agreement to maintain as confidential the existence and terms of a resolution of litigation implicitly includes a prohibition on misrepresenting the terms of the agreement.

Complaint ¶9.

The Court, in denying Mr. Swan's summary judgment motion, acknowledged that the choice to obey the Agreement's Confidentiality Clause involved "'limitation of discretion in contractual performance.'" December 14, 2023 Order at 4 (*quoting Short v. LaPlante,* 174 N.H. 384, 391 (2021)).

Casella wishes the Court to adopt one standard for Casella, and an entirely different one for Mr. Swan. The Court should decline to do so. The Confidentiality Clause is reciprocal. If Mr. Swan's compliance with the confidentiality provisions of the Agreement can give rise to a breach of the implied duty, the same rule must apply to Casella.

III. Mr. Swan's Counterclaims are Timely.

Casella contends that a compulsory counterclaim must be filed at the time of the answer to the original complaint – i.e., within 30 days. And if it is not, the counterclaim is untimely and barred. Casella cites no authority for this radical proposition. There is no such authority.

Super. Ct. Rule 10 states only that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."

There is no requirement in the rule, or anywhere else, that compulsory counterclaims be raised within 30 days. The only timing requirement is that compulsory counterclaims be brought at some point during the initial, pending action.

> The theory of compulsory counterclaim rests entirely upon the doctrine of res judicata, which provides that a second action may not be commenced by either party to a former action to determine any matters which were actually litigated or which might have been litigated in the former action.

Gorden J. MacDonald, Wiebursch on New Hampshire Civil Practice and Procedure § 13.04[5] (4th Ed. Matthew Bender & Co.). *See also* 6 Fed. Prac. & Proc. Civ. § 1409 (3d ed.) ("Perhaps the most important characteristic of a compulsory counterclaim is that it must be asserted in the pending case. A failure to do so will result in its being barred in any subsequent action").

The plaintiff in *Winnipesasukee Marine Construction, Inc. v. Patricia Scribner, et al.,* Case No. 211-2021-CV-00216 (N.H. Super. Belknap County June 27, 2022) (Leonard, J.), made an identical argument – contending that a counterclaim first raised in response to an amended complaint should be dismissed as untimely and invalid. (A true and correct copy of this order is attached to this memorandum.) The Court denied the motion, stating that it "sees no support that the Superior Court Rules require all compulsory counterclaims be filed within 30 days of the Complaint." *Id.* at p. 3. It explained:

> Rule 10 allows a party to assert compulsory counterclaims in "a pleading" without reference to any requirement it be contained within an "answer or other responsive pleading," as found in Rule 9, or otherwise filed in 30 days. Super. Ct. Civ. R. 10. Accordingly, the Rules do not require compulsory counterclaims be asserted within 30 days of a Complaint.

Id.

Because Mr. Swan has brought his counterclaims during this case, the compulsory counterclaim rule does not apply.

Conclusion

For the foregoing reasons, the Court should deny Casella's motion to dismiss.

Respectfully submitted,

JON SWAN

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Dated: July 3, 2024 By: */s/ Jeffrey C. Spear*
Jeffrey C. Spear (Bar No. 14938)

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2024, a copy of the foregoing objection was filed electronically with the court and thereby sent to counsel of record.

/s/ Jeffrey C. Spear
Jeffrey C. Spear

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THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

BELKNAP, SS. **SUPERIOR COURT**

Winnipesaukee Marine Construction, Inc.

v.

Patricia Scribner, et al.

No. 211-2021-CV-00216

ORDER ON MOTION TO DISMISS

The plaintiff, Winnipesaukee Marine Construction, Inc. ("WMC"), brought this action against the defendants, Patricia Scribner, Ralph Scribner Jr., Dawn Scribner, Mark Jensen, and Mark Kenney. See Court Index #1 (Compl.). The Complaint alleges Conversion – All Defendants (Count I), Unjust Enrichment – All Defendants (Count II), Breach of Fiduciary Duties – Patricia Scribner (Count III), and Aiding and Abetting a Breach of Fiduciary Duty – All Defendants except Patricia Scribner (Count IV). See Court Index #33 (Amend. Compl.). On March 22, 2022, WMC amended its original Complaint to adjust the amount of damages and to reflect that certain expenses benefitted Ralph and Dawn Scribner equally. See id. In answering the Amended Complaint, Jensen filed a Counterclaim against WMC for the first time. See Court Index #34 (Countercl.). Now, WMC moves to dismiss this Counterclaim as untimely, see Court Index #37 (Mot. Dismiss), and Jensen objects. See Court Index #38 (Obj.). For the reasons that follow, WMC's motion is DENIED.

LEGAL STANDARD

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the Complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb, 168 N.H. at 49. The Court "need not, however, assume the truth of statements in the pleadings that are merely conclusions of law." Id. "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

ANALYSIS

WMC moves to dismiss, arguing Jensen's Counterclaim consists of compulsory counterclaims as per Superior Court Rule 10(a) and therefore were required to have been filed at the time of his original Answer, consistent with Superior Court Rule 9(a). As WMC served its initial Complaint on Jensen on October 22, 2021, it contends his Counterclaim must have been filed on or before November 21, 2021. Finally, WMC argues Jensen has not established any sound reason why he should now be granted leave to amend his initial Answer.

Jensen objects, arguing his Counterclaim is timely as he filed it within 30 days of WMC having filed its Amended Complaint. Furthermore, he contends that no rule requires a party to raise compulsory counterclaims within 30 days; the only requirement

is that said claims are brought while the subject action is pending. Lastly, he submits the Court should allow Jensen to amend his initial Answer to include his counterclaims, consistent with New Hampshire's caselaw in favor of liberal amendment of pleadings.

"An Answer or other responsive pleading shall be filed with the court within 30 days after the person filing said pleading has been served with the pleading to which the Answer or response is made." Super. Ct. Civ. R. 9(a). Furthermore, compulsory counterclaims have specific requirements:

> A pleading shall state as a [compulsory] counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Super. Ct. Civ. R. 10.

Consistent with the above, the Court sees no support that the Superior Court Rules require all compulsory counterclaims be filed within 30 days of the Complaint. Although WMC refers twice in its motions to Wiebusch on New Hampshire Civil Practice and Procedure §13.06 for the notion that "In Superior Court, a Counterclaim must be filed with an Answer within 30 days after service" the Court does not find this persuasive. Wiebusch itself only makes reference to Rule 9(a) in support of this proposition, which only refers to "[a]n Answer or other responsive pleading" and makes no mention of counterclaims in any context. Super. Ct. Civ. R. 9(a). Furthermore, Rule 10 allows a party to assert compulsory counterclaims in "a pleading" without reference to any requirement it be contained within an "answer or other responsive pleading," as found in Rule 9, or otherwise field in 30 days. Super. Ct. Civ. R. 10. Accordingly, the

Rules do not require compulsory counterclaims be asserted within 30 days of a Complaint.

Nevertheless, even if the Court had accepted WMC's reading of the Rules, it would still allow Jensen to assert his Counterclaim via amendment to his initial Answer. Indeed, New Hampshire law allows for "liberal amendment of pleadings . . . unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." Sanguedolce v. Wolfe, 164 N.H. 644, 647 (2013). The Court finds it unlikely the Counterclaims "surprise" WMC given that Jensen's Counterclaim is nearly identical to Ralph Scribner's Counterclaim. See Court Index #22 (Scribner Ans.); Court Index #34 (Jensen Ans.). As the two were partners in the Aquatherm business, the subject of the Counterclaims, it is predictable that both partners would assert nearly identical claims against WMC. Likewise, this fact leads the Court to conclude that Jensen's Counterclaim would not "introduce an entirely new cause of action or call for substantially different evidence." Sanguedolce, 164 N.H. at 647. Accordingly, Jensen's amendment request is consistent with New Hampshire's philosophy of liberal amendment of pleadings and presents an independent ground for his Counterclaim to remain.

CONCLUSION

For the reasons noted above, the plaintiff's motion is DENIED.

SO ORDERED.

June 27, 2022

Elizabeth M. Leonard
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/27/2022