

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FIFTH THIRD BANK OF INDIANA,)
)
Plaintiff,)
vs.) NO. 1:05-cv-00055-JDT-TAB
)
THE MORLEY GROUP, LLC,)
THE MORLEY GROUP, INC.,)
MICHAEL A. MORLEY,)
SHARON M. MORLEY,)
SHARON M. DUNN,)
PREMIER CAPITAL CORPORATION,)
THE UNITED STATES OF AMERICA)
SMALL BUSINESS ADMINISTRATION,)
FIRST INDIANA BANK,)
OLD NATIONAL BANCORP,)
THE CITY OF INDIANAPOLIS,)
)
Defendants.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FIFTH THIRD BANK OF INDIANA,)
)
 Plaintiff,)
)
 vs.)
)
 THE MORLEY GROUP, LLC, et al.,)
)
 Defendants,)
)
 _____)
)
 THE MORLEY GROUP, LLC, et al.,)
)
 Counter Claimants,)
)
 vs.)
)
 FIFTH THIRD BANK OF INDIANA,)
)
 Counter Defendant.)
)
 _____)
)
 THE UNITED STATES OF AMERICA)
 SMALL BUSINESS ADMINISTRATION,)
)
 Cross Claimant,)
)
 vs.)
)
 THE MORLEY GROUP, LLC, et al.,)
)
 Cross Defendants.)

1:05-cv-0055-JDT-TAB

ENTRY ON MOTION TO DISMISS COUNTERCLAIMS (Docket No. 25)¹

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

This matter comes before the court on Plaintiff Fifth Third Bank of Indiana's ("Fifth Third") Rule 12(b)(6) motion to dismiss Counts I and IV of the Counterclaim filed by Defendants The Morley Group, LLC; The Morley Group, Inc.; Michael A. Morley; and Sharon M. Morley (collectively referred to as "Morley"). After reviewing the parties' briefs, the court now finds as follows:

I. BACKGROUND

In June of 2003, Fifth Third renewed a line of credit to Morley in the maximum principal sum of \$100,000 as evidenced by a Revolving Note. The Revolving Note had a maturity date of June 30, 2004. Fifth Third contends that Morley failed to pay the outstanding balance by that date and is now in default. Morley argues in response that it was only to pay *interest* on the Revolving Note, and further that it believed the Note would be renewed.

Similarly, on July 30, 2003, Fifth Third renewed a term loan to Morley as evidenced by a Term Note in the principal amount of \$866,699.06. This Note also had a maturity date of June 30, 2004. As with the Revolving Note, Fifth Third claims that Morley has since defaulted on the Term Note. Morley states that it made all necessary payments on the Term Note and remained under the impression that it, too, would be renewed.²

² Fifth Third extended additional credit to Morley as evidenced by a Promissory Note with a maturity date of June 1, 2015. According to Morley, the Promissory Note does not describe a payment plan and that Fifth Third would therefore call or write to advise what amount was due each month.

In light of Morley's perceived default on the Revolving and Term Notes, Fifth Third made a demand for payment. After receiving nothing in response, Fifth Third commenced a collection and foreclosure action in Marion County Superior Court. The action was then removed to this court on January 12, 2005. On February 8, 2005, Morley filed an Answer and Counterclaim asserting claims for (1) breach of a statutory obligation of good faith; (2) breach of contract; (3) malicious prosecution; and (4) defamation. Fifth Third now moves for dismissal of Counts I (good faith) and IV (defamation) for failure to state a claim upon which relief can be granted.³

II. DISCUSSION

A. Standard of Review

The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the complaint, not to resolve the case on the merits. See 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004). Dismissal is appropriate only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In performing this analysis, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the [cross claimant]. *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 637 (7th Cir. 2004).

³ Morley voluntarily dismissed Count III (malicious prosecution).

B. Count I – Breach of an Obligation of Good Faith

Count I of Morley’s Counterclaim charges that Fifth Third breached the statutory covenant of good faith described in the Uniform Commercial Code and codified in Indiana Code § 26-1-1-203, presumably by seeking collection and foreclosure on the various Notes. Section 26-1-1-203 provides that “[e]very contract or duty within IC 26-1 imposes an obligation of good faith in its performance or enforcement.” However, as the Official Comments to the statute indicate, “[t]his Section does not support an *independent cause of action* for failure to perform or enforce in good faith.” Ind. Code § 26-1-1-203 cmt. (emphasis added); see *First Fed. Sav. Bank v. Key Markets, Inc.*, 559 N.E.2d 600, 604 (Ind. 1990) (“It is not the province of courts to require a party acting pursuant to . . . a contract to be ‘reasonable,’ ‘fair,’ or show ‘good faith’ cooperation . . . It is only where the intentions of the parties cannot be readily ascertained . . . that a court may have to presume the parties were acting reasonably and in good faith in entering into the contract.”); see also *Echo, Inc. v. Whitson, Co.*, 121 F.3d 1099, 1106 (7th Cir. 1997) (applying Illinois law and holding that the U.C.C. does not create an independent cause of action for breach of obligation of good faith).

Rather, “the doctrine of good faith merely directs a court towards *interpreting* contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.” Ind. Code § 26-1-1-203 cmt. (emphasis added); see also *Echo, Inc.*, 121 F.3d at 1106. Morley would thus need to allege a specific duty under the contract that Fifth Third failed to perform in good faith in order to state a claim under this

provision. *Id.*; see *Brown v. Ind. Nat'l Bank*, 476 N.E.2d 888, 894 (Ind. Ct. App. 1985). As the matter stands now, Morley has not done so, and instead asks the court to carve out an independent cause of action for lack of good faith. The court cannot comply with Morley's request, and Count I of the Counterclaim must be dismissed.⁴

C. Count IV – Defamation

Count IV of Morley's Counterclaim alleges that Fifth Third defamed Morley by "falsely publishing to the world that they do not pay their debts" in reference to the Revolving, Term, and Promissory Notes. An action for defamation under Indiana law requires a party to "show a communication with four elements: (1) defamatory imputation; (2) malice; (3) publication; and (4) damages." *Van Eaton v. Fink*, 697 N.E.2d 490, 494 (Ind. Ct. App. 1998) (citation omitted). Fifth Third maintains that Morley's claim for defamation must fail because any statements about Morley being in default are true, which would provide a complete defense to any defamation claim. See *Gatto v. St. Richard Sch., Inc.*, 774 N.E.2d 914, 924 (Ind. Ct. App. 2002).

While Fifth Third is undoubtedly correct that truth is a complete defense to a claim for defamation, resolution of this issue would be premature at the 12(b)(6) stage. Under the federal notice-pleading regime, a party generally does not need to plead facts to support a claim. All that is required is "a short and plain statement of the claim showing

⁴ Fifth Third also argues that Morley seeks to modify the existing credit agreements in the guise of "good faith," which would be impermissible under the Indiana Statute of Frauds. Ind. Code § 26-2-9-5. However, resolution of this issue would be more appropriate at the summary judgment stage when the court can assess the substantive merits of the case.

that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a). Thus, a party can make a conclusory pleading. See, e.g., *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (stating that a general allegation such as “I was turned down for a job because of my race” is sufficient for the purposes of pleading). Though Fifth Third obviously disagrees, Morley maintains that it is not in default on any of the Notes and appears to be headed toward making some sort of estoppel argument. Moreover, until the parties have a chance for discovery, it likely would be difficult for Morley to learn the exact contents of the alleged defamatory communications. In short, Fifth Third has failed to demonstrate that there are no facts that could be proved consistent with Morley’s allegation. Resolution of this issue will have to wait until the court can address the merits of the case, as opposed to just the sufficiency of the pleadings. Fifth Third’s motion to dismiss Count IV of the Counterclaim must be denied.

III. CONCLUSION

Based on the foregoing, Fifth Third’s Rule 12(b)(6) motion to dismiss will be **GRANTED** as to Count I of the Counterclaim (breach of an obligation of good faith) and **DENIED** as to Count IV (defamation). The dismissal of Count I is without prejudice, however, because it is based on a technical pleading deficiency. Morley has **thirty (30)**

days from the date of this entry to file an amended counterclaim if it can do so within the confines of Rule 11 of the Federal Rules of Civil Procedure.⁵

ALL OF WHICH IS ORDERED this 28th day of July 2005.

John Daniel Tinder, Judge
United States District Court

Copies to:

Nelson D. Alexander
Locke Reynolds LLP
nalexander@locke.com

Jeffrey M. Boldt
Locke Reynolds LLP
jboldt@locke.com

Melissa J. DeGross
Locke Reynolds LLP
mdegross@locke.com

Rodger K. Hendershot
Bose McKinney & Evans, LLP
rhendershot@boselaw.com

⁵ Fifth Third also moves to strike Morley's request for a jury trial as to Count IV of the Counterclaim (defamation) on the grounds of certain waiver provisions contained in the subject credit agreements. However, it would be premature at this point to determine how the instant case will be tried. The most appropriate course of action may be to empanel a jury for the defamation claim and then wait until a verdict is reached to decide whether the verdict will be merely advisory. Furthermore, it may become clear as the case progresses that bifurcation is necessary so that the parties' contract claims are litigated before the defamation claim.

Randolph A. Leerkamp
Gresk & Singleton
randolph_leerkamp@yahoo.com

Jeffrey D. Mills
Old National Bancorp
jeff_mills@oldnational.com

Debra G. Richards
United States Attorney's Office
debra.richards@usdoj.gov

Magistrate Judge Tim A. Baker