

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|--|---|---------------------------------|
| ROBERT RENNIE, JR., on behalf of himself and all others similarly situated, | } | |
| | } | |
| Plaintiff, | } | |
| | } | |
| | } | |
| vs. | } | Case No. 5:10-cv-00810-C |
| | } | |
| (1) PITNEY BOWES, INC. and | } | |
| (2) PITNEY BOWES GLOBAL | } | |
| FINANCIAL SERVICES, LLC, | } | |
| | } | |
| Defendants. | } | |

**DEFENDANTS PITNEY BOWES INC. AND PITNEY BOWES GLOBAL
FINANCIAL SERVICES, LLC’S MOTION TO DISMISS
AND BRIEF IN SUPPORT**

Defendants Pitney Bowes Inc. (erroneously named in Plaintiff’s Petition as “Pitney Bowes, Inc.”) and Pitney Bowes Global Financial Services, LLC (“Pitney Bowes Global”) (collectively, “Defendants”) file this Motion to Dismiss Plaintiff’s claims against both Defendants for unjust enrichment, fraud, deceit and violation of the Oklahoma Consumer Protection Act and his claims against Pitney Bowes Global for breach of contract and breach of the duty of good faith and fair dealing since Plaintiff fails to state a claim upon which relief can be granted and fails to plead the claims with particularity. In support of this Motion, Defendants submit the following Brief.

I. Summary of Argument

Plaintiff has filed a bare-bones Class Action Petition (the “Petition”) that fails to sufficiently identify what actions his claims are based upon. The only specific act he alleges, the sending of an invoice in February 2006 by Pitney Bowes Global, occurred outside the statute of limitations for the deceit, Oklahoma Consumer Protection Act and unjust enrichment claims. Plaintiff also attempts to assert a contract claim against a defendant with whom he does not allege he has a contract, Pitney Bowes Global.

II. Factual Background

Plaintiff alleges in his Petition that he entered into a contract with Defendant Pitney Bowes Inc. to lease postage equipment on or about June 21, 2005. Petition, ¶ 6. Plaintiff contends Pitney Bowes Inc. determines the amount of property taxes assessed on this postage equipment and submits an invoice to Plaintiff and others for such tax, which Pitney Bowes Inc. then pays to the appropriate tax authorities. *Id.*

Plaintiff identifies only one such invoice, which he claims he received on or about February 2006.¹ Petition, ¶ 7. Plaintiff contends the amount charged to him in property tax exceeded the amount paid to the Garvin County Assessor by “Defendants” to satisfy Plaintiff’s property tax debt. Petition, ¶ 8. Based upon these allegations, Plaintiff alleges a breach of contract with Pitney Bowes Inc. and Pitney Bowes Global. Notably, though Plaintiff referred to a contract with Pitney Bowes Inc. in his Petition, he has identified no

¹ Though the Petition claims this single invoice was attached as Exhibit “A,” no exhibit was attached to the Petition filed with the state court and served on Pitney Bowes Inc. *See* Exhibit 2 to Defendants’ Notice of Removal.

contract with Pitney Bowes Global. *Compare* Petition, ¶¶ 6, 9, *with* ¶ 17. Plaintiff further alleges that “Defendants” have been unjustly enriched by charging and collecting an amount greater than that actually owed for property tax by Plaintiff and the other putative class members. Petition, ¶ 20. Without any further explanation, Plaintiff alleges that Defendants have accepted and retained these benefits, “despite the Defendants’ knowledge of these overcharges.” *Id.* Plaintiff, without explanation, also alleges that the acts of Defendants constitute a violation of the Oklahoma Consumer Protection Act. Petition, ¶ 23. Similarly, and with a similar lack of explanation, Plaintiff alleges fraud and deceit on the basis that the “actions and representations of the Defendants were designed and intended to defraud Plaintiff and others similarly situated,” and that “Plaintiff and other class members acted in reliance on these representations by paying the amounts billed by Defendants.” Petition, ¶ 25.

III. Argument and Authorities

A. Statute of Limitations Bars Plaintiff’s Claims for Unjust Enrichment, Deceit and Violation of the Oklahoma Consumer Protection Act

Though statute of limitations is an affirmative defense, when the dates in a complaint make clear that the right sued upon has been extinguished, the claim may be appropriately resolved with Rule 12(b)(6) motions to dismiss. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980); *McDonald v. Oklahoma*, No. CIV-09-710-C, 2010 WL 545870, *2 (W.D. Okla. Feb. 9, 2010) (Cauthron, J.).² Here, the

² All unpublished decisions cited in this Motion to a Westlaw citation are collectively attached hereto as Exhibit 1 in accordance with Federal Rule of Appellate Procedure 32.1.

only action Plaintiff specifically alleges in support of his claims is the sending of a single invoice from Pitney Bowes Global in February 2006. Petition, ¶ 7. Thus, any claim with a shorter statute of limitations than 4 years, 3 months (the time between the February 2006 invoice and when Plaintiff filed his Petition on June 25, 2010) must be barred.³ An action for deceit is based upon statute in Oklahoma. OKLA. STAT. ANN., tit. 76, § 2. The statute of limitations on a liability created by statute other than a forfeiture or penalty is three years. OKLA. STAT. ANN., tit. 12, § 95(A)(2). The statute of limitations for unjust enrichment is the one for actions not arising in contract or specifically enumerated elsewhere, which is two years. OKLA. STAT. ANN., tit. 12, § 95(A)(3). Finally, the statute of limitations for the actual damages portion of the claim for violation of the Oklahoma Consumer Protection Act is three years, given that liability is created by statute and is not seeking a civil penalty. *See* OKLA. STAT. ANN., tit. 15, §§ 751, *et seq.*; OKLA. STAT. ANN., tit. 12, § 95(A)(2). The statute of limitations for the civil penalties damages claim regarding the Oklahoma Consumer Protection Act is one year. OKLA. STAT. ANN., tit. 12, § 95(A)(4); *see* Petition, p. 7 (Prayer); Defendants' Notice of Removal, ¶ 21. Since none of these statutes of limitations allows recovery for a cause of

³ This criteria *may* not apply to the fraud claim. Unlike the other statutes of limitations at issue in this case, the statute of limitations for fraud dates from the time of discovery of the fraud. *Compare* OKLA. STAT. ANN., tit. 12, § 95(A)(3), *with* §§ 95(A)(2-4). Where the text of the statute of limitations dates from the time of discovery of the cause of action, the plaintiff does not bear the burden of pleading facts to show that his discovery fell within the limitations period. *See Cosgrove v. Kansas Dept. of Soc. and Rehab. Servs.*, 332 Fed. Appx. 463, 467 (10th Cir. 2010). Given Plaintiff has not pled when he discovered the alleged fraud, Defendant did not include that claim as part of the statute of limitations basis of this motion. *See id.*

action which allegedly accrued in February 2006, all of these claims are barred by limitations and must be dismissed. *See Aldrich*, 627 F.2d at 1041 n.4.

B. Because No Contract with Pitney Bowes Global Is Alleged, the Contract Claim against It Must Be Dismissed

Plaintiff's only contractual allegation against Pitney Bowes Global here is the type of formulaic recitation of elements that the Supreme Court held in *Twombly* is insufficient to state a claim. Petition, ¶ 17; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In the "Facts" section of Plaintiff's Petition, Plaintiff describes a contract he entered into with Pitney Bowes Inc. on or about June 21, 2005 but mentions nothing of a contract with Pitney Bowes Global. Petition, ¶ 6. This factual description is wholly consistent with Plaintiff's allegation in his class definition that his putative class includes those who leased equipment from "Pitney Bowes, Inc." Petition, ¶ 10. Then, without explanation, in listing the elements of his breach of contract claim, Plaintiff states, "Plaintiff and class members entered into a contract ('The Lease Agreement') with the Defendants [Pitney Bowes Inc.] and [Pitney Bowes Global] for the lease of postal metering equipment." Petition, ¶ 17. If, as Plaintiff alleges in ¶ 6 of his Petition, his contract is only with Pitney Bowes Inc., there can be no liability for Pitney Bowes Global, who should be a nonparty. *See Fuqua v. Lindsey Mgmt. Co.*, No. CIV-07-827-HE, 2008 WL 2894064, at *2 (W.D. Okla. July 22, 2008). Likewise, if Pitney Bowes Global were not a party to the contract, it could have no liability for violating a duty of good faith and fair dealing arising out of that contract. *Id.* at *3. Thus, Plaintiff's failure to identify a contract with Pitney Bowes Global is fatal to Plaintiff's breach of contract

and breach of the alleged duty of good faith and fair dealing claims against that entity, and the claims must therefore be dismissed. *See Gooden v. Onmi Air Transport L.L.C.*, No. 06-CV-618-GKF-FHM, 2008 WL 686882, *4 (N.D. Okla. March 16, 2008) (dismissing a claim for tortious interference with contract where the plaintiff failed to identify the contract that was allegedly interfered with).

Plaintiff's failure to describe any contract that he (or any other putative class member) entered into with Defendant Pitney Bowes Global requires that his contract claim against that defendant be dismissed. *See* Petition, ¶¶ 6, 9, 10. The Court must determine whether Plaintiff's Petition contains "enough facts to state a claim for relief that is plausible on its face." *See Twombly*, 550 U.S. at 570; *Ridge at Red Hawk L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). The complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The reason for dismissing such claims is to prevent a defendant from undergoing costly discovery unless the complaint contains enough detail to indicate the plaintiff has a substantial case. *See Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 802 (7th Cir. 2008).

While a court must accept well-pleaded allegations of the complaint as true and construe them in a light most favorable to the plaintiff, *Moffett v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1231 (10th Cir. 2002), the court need not accept conclusory allegations as true. *Erikson v. Pawnee County Bd. Of County Comm'rs*, 263 F.3d 1151, 1154-55 (10th Cir. 2001). Such conclusory allegations without factual support are

insufficient to state a claim. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Thus, the conclusory allegation of a contract with Pitney Bowes Global in contradiction of all other allegations in the Petition that the lease agreement was only with Pitney Bowes Inc. is not sufficient to sustain a breach of contract claim against Pitney Bowes Global. *Compare* Petition, ¶ 17, with ¶¶ 6, 9, 10. The breach of contract claim against Pitney Bowes Global must, therefore, be dismissed with prejudice.⁴

C. Fraud, Deceit, Unjust Enrichment, and Consumer Protection Act Claims Must Be Dismissed Because They Are Not Pled with Particularity

Rule 9(b) of the Federal Rules of Civil Procedure provides, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Thus, a complaint alleging fraud must “set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.” *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (internal quotations omitted); *see also United States ex rel. Lacy v. New Horizons, Inc.*, No. CIV-07-0137-HE, 2008 WL 4415648, *2 (W.D. Okla. Sept. 25, 2008). A fraud plaintiff must “give the fraud defendant and the court an intelligible factual preview, at the pleading stage, sufficient to establish that there is a viable fraud claim if the essential allegations are true and that the plaintiff is not merely using the complaint as a ticket to the discovery process in the hope of finding a case.” *Steed v. Warrior Capital, L.L.C.*,

⁴ After conferring with Plaintiff’s counsel regarding Federal Rule 12(e) issues, Plaintiff’s counsel agreed to re-plead Plaintiff’s contract claims. Nonetheless, as currently pled, the breach of contract claim as to Pitney Bowes Global is subject to dismissal with prejudice. This remedy is not overly-harsh since Plaintiff has an opportunity to amend his complaint before this Motion is determined. *See* FED. R. CIV. P. 15(a)(1).

No. CIV-06-348-F, 2007 WL 1110757, *2 (W.D. Okla. April 11, 2007). Federal courts have applied these requirements to plead with particularity to unjust enrichment claims and consumer protection act claims where the gravamen of the complaint is fraud. *Vernon v. Qwest Comms. Int'l, Inc.*, 643 F. Supp. 2d 1256, 1264 (W.D. Wash. 2009) (addressing unjust enrichment and consumer protection act claims); *ADT Sec. Serv., Inc. v. Swenson*, 2008 WL 2828867, *6 (D. Minn. July 21, 2008). Plaintiff's Consumer Protection Act claim states only that the "acts of the Defendants, set out herein" constitute "unconscionable, deceptive trade practices," with no additional detail about what such acts are. Petition, ¶ 23. The fraud and deceit allegations, lumped together without any differentiation between what acts are relied upon for each claim, are similarly sparse. Petition, ¶ 25. Plaintiff refers only to the "actions and representations of Defendants," giving no indication to which actions and representations Plaintiff refers. *Id.* The unjust enrichment allegation is pled in somewhat more detail, with at least an indication that the claim is based upon Defendants' alleged overcharging and collecting of property tax, but even this allegation does not meet the requirements of Rule 9(b). Petition, ¶ 20. It does not identify the specific instances of alleged overcharging. *Id.*

Even if the pleading of these claims had sufficiently referred to the factual allegations in the Petition on which each claim relied, none of the information contained in the Petition is sufficiently specific to provide Defendants adequate notice of the basis of Plaintiff's fraud claim. The only specific representation to which Plaintiff refers is a single alleged February 2006 invoice (which Plaintiff fails to attach to his Petition, as

alleged) that falls outside the statute of limitations for each of the fraud-related claims. *See* Petition, ¶ 7; Section III.A, *supra*. To meet the pleading requirements, the petition must allege details concerning the dates of the invoices, the contents of the invoices, and the amount of money charged. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006) (quoting *Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004)). Though all of this need not be pled with respect to every act of fraud alleged, it must be pled for at least some of them to satisfy Rule 9(b). *Id.* at 727-28. Even the allegation concerning the February 2006 invoice does not specify the amount charged or the amount plaintiff alleges he actually owed, and nothing is said about any subsequent invoices. Such vagueness is fatal to Plaintiff's claims. *See Koch*, 203 F.3d at 1237 (finding that an allegation that representations were made "during 1982 and continuing to the present time" were not sufficiently specific as to the precise time frame and thus insufficient under Rule 9(b)).

Plaintiff is also vague about who it is he alleges overcharged him. As noted, Plaintiff alleges a contract only with Pitney Bowes Inc. Petition, ¶ 6. Further, he states that Pitney Bowes Inc. calculated the property tax and sent him an invoice annually.⁵ *Id.* But in his fraud-related allegations, Plaintiff fails to distinguish between Pitney Bowes Inc. and Pitney Bowes Global. Petition, ¶ 25. In his unjust enrichment allegation, he alleges that "Defendants" have been unjustly enriched by allegedly overcharging him. Petition, ¶ 20. In the Consumer Protection Act allegation, he refers only to the acts of

⁵ Inconsistent with paragraph 6 of the Petition, Plaintiff alleges that Pitney Bowes Global sent him the February 2006 invoice, the single invoice of which he makes specific complaint. Petition, ¶ 7.

“Defendants.” Petition, ¶ 23. Similarly, his fraud and deceit allegation refers to the actions and representations of “Defendants.” Petition, ¶ 25. Nowhere in these allegations, or anywhere else in his Petition, does he allege how it is that Pitney Bowes Global engaged in any of this conduct if, as he alleges, Pitney Bowes Inc. was doing the billing. Such a failure to distinguish between Defendants is fatal to each of Plaintiff’s fraud-related claims. *See Koch*, 203 F.3d at 1237 (noting a plaintiff’s failure to identify a specific defendant who made the fraudulent misrepresentations or omissions); *Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1103 (N.D. Okla. 2003) (dismissing a plaintiff’s claim because he failed alleged the fraud only by “defendants” and did not specify which defendant had committed the acts or omissions).

Of the allegations concerning fraud, deceit, the Consumer Protection Act, and unjust enrichment, none are specific about what acts are complained of, when those acts occurred, or who among Defendants committed those acts. The claims are therefore insufficiently pled under Rule 9(b) and must be dismissed with prejudice. *See Koch* 230 F.3d at 1236-37.

IV. Prayer

WHEREFORE, Defendants respectfully request as follows:

a) That Plaintiff's deceit, unjust enrichment, and Consumer Protection Act claims against both Defendants each be dismissed with prejudice as barred by the statute of limitations;

b) Alternatively, that Plaintiff's fraud, deceit, unjust enrichment, and Consumer Protection Act claims against both Defendants each be dismissed with prejudice as inadequately pled under Rule 9(b);

c) That Plaintiff's breach of contract and breach of the alleged duty of good faith and fair dealing claims against Pitney Bowes Global be dismissed with prejudice for failure to state a claim since no contract is alleged; and

d) For such other and further relief to which Defendants Pitney Bowes Inc. and Pitney Bowes Global each is entitled.

Dated: August 4, 2010

Respectfully Submitted,

By: s/ Bobby G. Pryor

Bobby G. Pryor

Texas State Bar No. 16373720

Dana G. Bruce

Texas State Bar No. 03232032

PRYOR & BRUCE

302 N. San Jacinto

Rockwall, Texas 75087

Telephone (972) 771-3933

Facsimile (972) 771-8343

Email: bpryor@pryorandbruce.com

and

Michael W. Brewer

OBA No. 11769

HILTGEN & BREWER, P.C.

One Benham Place, 8th Floor

9400 North Broadway Extension

Oklahoma City, OK 73114

Telephone: (405) 605-9000

Facsimile: (405) 605-9009

Email: mwbrewer@hiltgenbrewer.com

Attorneys for Defendants Pitney Bowes Inc. and
Pitney Bowes Global Financial Services, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Terry W. West, Esq.
Bradley C. West, Esq.
Gregg W. Luther, Esq.
The West Law Firm
124 W. Highland- P.O. Box 698
Shawnee, Oklahoma 74802-0698
Counsel for Plaintiff Robert Rennie, Jr.

Brett Agee, Esq.
Garvin, Agee, Carlton & Mashburn
101 E. Grant Avenue – P.O. Box 10
Pauls Valley, Oklahoma 73075-0010
Counsel for Plaintiff Robert Rennie, Jr.

s/ Bobby G. Pryor _____