IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DE LAGE LANDEN FINANCIAL SERVICES, INC.	:	
v.	:	
CARDSERVICE INTERNATIONAL, INC.	:	**CIVIL ACTION**
v.	:	**NO. 00-2355**
INTERNATIONAL BUSINESS EQUIPMENT, INC., DE LAGE LANDEN FINANCIAL SERVICES, INC., PULLMAN BANK & TRUST CO. and HOWARD KARJALA	:	

MEMORANDUM ORDER

Plaintiff De Lage Landen Financial Services Inc. ("DLL") filed this action seeking to recover allegedly overdue lease payments. Defendant Cardservice International, Inc. ("Cardservice") filed counterclaims against DLL and the third-party defendants, International Business Equipment, Inc. ("IBE"), Pullman Bank and Trust Company ("Pullman") and Howard Karjala. Cardservice's first counterclaim is against all parties, except Pullman, for violation of the California unfair trade practices law. Its fifth and sixth counterclaims are for fraudulent inducement against all parties except Pullman. Its seventh counterclaim seeks rescission of all lease agreements on the basis of fraud against all parties except third-party defendant Howard Karjala. Counterclaims eight through twelve seek declaratory relief against all parties. Presently before the

court is the motion of DLL and Pullman to dismiss the counts against them pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b).[1]

Jurisdiction is based upon diversity of citizenship. The court exercises supplemental jurisdiction over defendant's counterclaims against third-party defendants.

The pertinent facts as alleged by Cardservice are as follow.

On July 23, 1998, Cardservice and IBE entered a lease agreement pursuant to which IBE leased photocopiers ("copiers") to Cardservice on a cost-per-copy basis, with a guaranteed minimum of 225,000 copies per month. The lease agreement granted IBE the right to assign all of its rights under the agreement, without its obligations. The lease agreement also contains a choice of law clause which states "[t]his agreement has been made in Berwyn, Pennsylvania and . . . is governed by and construed in accordance with the laws of Pennsylvania."

Although the lease agreement contains a disclaimer of all warranties, including that of fitness for a particular purpose, Cardservice alleges that IBE assured it upon entering the agreement that the copiers were compatible with Cardservice's

---

[1]IBE and Mr. Karjala have never been served in this action and have not appeared or otherwise waived service. Counsel for Cardservice filed a "certificate of service" last November stating that its answer with counterclaims had been served by mail "upon counsel for plaintiff." This is clearly insufficient to effect service upon third-party defendants. See Fed. R. Civ. P. 14(a).

software programs. IBE further assured Cardservice that its obligations under the agreement were limited to its minimum copy requirements and that it could receive as many copiers as it needed. Cardservice does not identify who at IBE initially made these representations.

After signing the lease agreement but before the copiers were delivered, Cardservice was visited by Mr. Karjala, an IBE sales representative, who reiterated that the copiers would meet Cardservice's needs and that they could receive additional copiers with no further obligations. Shortly after receiving the copiers, Cardservice discovered that they were not compatible with its software applications. After unsuccessfully attempting to remedy the problem, Mr. Karjala met with Don Wilson, Cardservice's Controller, to discuss replacing the incompatible copiers with new copiers. At this time Mr. Karjala reassured Mr. Wilson that Cardservice was only responsible for the 225,000 minimum copies regardless of the number of copiers it received. Cardservice subsequently entered two new agreements with IBE, dated October 6, 1998 ("second lease") and November 30, 1998 ("third lease").

The second and third leases each require Cardservice to pay for a minimum of 225,000 copies per month. The second lease listed seven copiers to be delivered to Cardservice and the third

lease listed five.[2] Cardservice alleges that it entered the second and third leases based upon Mr. Karjala's representations that these agreements would supercede the parties' initial agreement. According to Cardservice, the parties agreed that the new leases would not increase its guaranteed minimum copy requirement above 225,000 copies.

After signing the second and third leases and receiving new copiers, Cardservice discovered that the new copiers were also incompatible with its needs. It terminated its agreement with IBE by letter of January 20, 2000. Cardservice then learned that IBE had assigned all of its rights to payments under the leases to DLL "and/or Pullman" and that Cardservice had been paying and was expected to continue paying DLL based upon a guaranteed minimum of 675,000 total copies rather than 225,000. The 675,000 guaranteed minimum represented the aggregate guaranteed minimum requirements of the three leases. DLL sued Cardservice in this district as assignee of IBE's rights and Cardservice's counterclaims followed.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See

[2]The seven copiers listed in the second lease were simply identified as "Konica 7060" copiers whereas the five copiers listed in the third agreement were specifically identified by their serial numbers. Cardservice alleges that it never received these five copiers.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

DLL and Pullman have moved to dismiss Cardservice's California unfair trade practices counterclaim on the basis of the Pennsylvania choice of law clause and offer no argument in support of the applicability of Pennsylvania law other than this clause. Cardservice argues that the choice of law clause is limited to interpretation of the contract and does not apply to tort claims.

A federal court sitting in diversity applies the choice of law rules of the forum state. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941); Kruzits v. Okuma Machine Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994). Pennsylvania follows Section 187 of the Restatement (Second) of Conflict of Laws which "'generally honor[s] the intent of the contracting parties and enforce[s] choice of law provisions in contracts executed by

them.'" Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc., 94 F. Supp. 2d 589, 593 (E.D. Pa. 1999) (quoting Kruzits, 40 F.3d at 55). Not all choice of law provisions, however, are the same. The parties may choose to limit their chosen law to the interpretation and execution of the terms of their agreement or they may draft the provision more broadly to encompass collateral matters arising from the relationship, including tort claims. See Id. at 592; Jiffy Lube Int'l Inc. v. Jiffy Lube of Pa., Inc., 848 F. Supp. 569, 576 (E.D. Pa. 1994); Composiflex, Inc. v. Advanced Cardiovascular Sys., Inc., 795 F. Supp. 151, 157 (W.D. Pa. 1992).

The choice of law clause at issue states that the parties' agreement will be "governed by and construed in accordance with the laws of Pennsylvania." The operative terms "governed by" and "construed in accordance with" are limited to the interpretation and enforcement of the agreement. While the clause encompasses questions of fraudulent inducement, it does not encompass a statutory tort claim for deceptive business practices. See In re Alleghany Int'l, Inc., 954 F.2d 167, 178 (3d Cir. 1992) (applying Pennsylvania law to question of whether contract was voidable for fraudulent inducement when contract provision stated it was to be "governed by and construed in accordance with" Pennsylvania law); Composiflex, 795 F. Supp. at 157 (California choice of law clause covering "all matters,

including, but not limited to, matters of validity, construction, effect or performance" governed trade secrets misappropriation claim).

DLL and Pullman also argue that Cardservice's claims for fraudulent inducement are defective for lack of specificity. When pleading fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ.
P. 9(b). Although a defendant's knowledge or other condition of mind may be averred generally, a party alleging fraud must "still allege facts that show the court their basis for inferring that the defendants acted with 'scienter.'" In re Burlington Coat Factories Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997). When multiple defendants are accused of fraud, the complaint must also separately allege each defendant's fraudulent conduct. See In re Home Health Corp. of America Sec. Litig., 1999 WL 79057, *20 (E.D. Pa. Jan. 29, 1999); Rosenbaum & Co. v. H.J. Myers & Co., 1997 WL 689288, *3 (E.D. Pa. Oct. 9, 1997). It is insufficient to attribute individual acts of fraud to all defendant's generally. See Vicom, Inc. v. Harbridge Merch. Servs. Inc., 20 F.3d 771, 777-78 (7th Cir. 1994) (allegations that misrepresentations were made with knowledge and consent of all defendants "falls short" of Rule 9(b) standards); Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is

not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants'").

Cardservice's fraud claims are predicated on the alleged representations of Howard Karjala and perhaps other unidentified IBE representatives to Don Wilson and perhaps other Cardservice representatives. Cardservice alleges only that DLL "and/or Pullman" were parties to assignments without Cardservice's knowledge. From this one cannot discern DLL's or Pullman's participation in or knowledge of any fraudulent acts.[3] The agreement expressly permits IBE to assign its rights and does not require it to notify Cardservice upon doing so. Cardservice has failed to make specific averments of DLL's or Pullman's individual complicity in fraudulent conduct.

DLL and Pullman finally seek dismissal of Cardservice's claims for declaratory relief. Cardservice seeks declarations that the second and third leases successively superceded the first agreement (count eight), that it never received the five copiers identified in the third lease (count nine) and that defendants breached the third lease agreement by failing to deliver the five copiers (count ten). Cardservice seeks declarations that it has no obligations with respect to the five copiers identified in the third agreement (count eleven) and

[3]Cardservice's averments actually suggest that it has no idea what role Pullman assumed with respect to the transactions at issue.

defining the rights and obligations of all parties under the various lease agreements (count twelve). DLL and Pullman correctly note that Cardservice's requests for declaratory relief are essentially replicative of the claims and counterclaims comprising the substance of this lawsuit and that resolution of the parties' dispute through the medium of declaratory relief will not simplify the issues. Cardservice correctly notes that the presence of an alternative remedy does not automatically preclude declaratory relief and contends that such relief is appropriate to educate the parties on their rights and obligations.

The decision whether to entertain declaratory relief is within the sound discretion of the court. See 28 U.S.C. § 2201(a) (federal court may grant declaratory relief in cases of actual controversy in which there is an independent basis of jurisdiction) (emphasis added); Wilton v. Seven Falls Co., 515 U.S. 277, 282-83 (1995). A court should exercise its discretion to entertain declaratory actions when doing so will clarify legal relations and serve a useful purpose. See Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992) (court should consider whether declaratory relief would serve useful purpose, clarify legal relations and terminate controversy); Fort Howard Paper Co. v. William D. Witter, Inc., 787 F.2d 784, 790 (2d Cir. 1986)(same). Where a declaratory judgment will not serve a

useful purpose, the court may decline to entertain such relief. See Wilton, 515 U.S. at 288; Dominium Mgmt. Servs., Inc. v. Nationwide Housing Group, 195 F.3d 358, 367 (8th Cir. 1999) (counterclaims seeking declaration that contract was unenforceable would serve no useful purpose); Aluminum Co. of America v. Beazer East Inc., 124 F.3d 551, (3d Cir. 1997); McGraw-Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 343 (9th Cir. 1966) (declaratory judgment would serve no useful purpose where it would merely serve to determine issues involved in case already pending); Old Republic Ins. Co. v. Hansa World Cargo Serv. Inc., 170, F.R.D. 361, 386 (S.D.N.Y. 1997) (refusing to entertain declaratory judgment request concerning claims raised in remainder of complaint). See also Grand Trunk Western R.R. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984); Cartier v. Secretary of State, 506 F.2d 191, 200 (D.C. Cir. 1974).

Resolution of Cardservice's requests for declaratory judgments would require a determination of the same factual issues which underlie the parties' substantive legal claims. Insofar as each request is adjudicated discretely, the result would be an unacceptable series of minitrials and unwarranted expenditure of resources. See Travelers Ins. Co. v. Davis, 490 F.2D 536, 544 (3d Cir. 1972). As the legal and declaratory claims are essentially redundant and adjudication of one would

effectively resolve the other, there also would be no practical utility in adjudicating them simultaneously.

ACCORDINGLY, this day of July, 2001, upon consideration of the Motion of counterclaim defendants Pullman Bank and De Lage Landen to Dismiss Counterclaims (Doc. #20), and the response of Cardservice International thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** as to Cardservice's fifth, sixth and seventh counterclaims, without prejudice to replead with particularity; is **GRANTED** as to Cardservice's eighth, ninth, tenth, eleventh and twelfth counterclaims seeking declaratory relief; and, is otherwise **DENIED**.

BY THE COURT:

_____

JAY C. WALDMAN, J.