

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

**FILED**

APR 5 2006

ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
BY 65 DEPUTY

**ROBERT H. BRAVER, an individual** )  
)  
**Plaintiff,** )  
)  
**v.** )  
)  
**AMERIQUEST MORTGAGE COMPANY,** )  
**a Delaware corporation, et al.** )  
)  
**Defendants.** )

**No. CIV-04-1013-W**

**AMERIQUEST MORTGAGE COMPANY,** )  
**a Delaware corporation,** )  
)  
**v.** )  
)  
**INNOVATIVE MARKETING, INC. d/b/a** )  
**LEAD EXTREME, a Washington Corpo-** )  
**ration, et al.** )  
)  
**Cross-Defendants.** )  
)

**ORDER**

Before the Court is Defendant Ameriquest Mortgage Company's Motion to Dismiss Plaintiff Robert H. Braver's Third Amended Complaint (docket entry no. 280). The matter has been fully briefed and after careful consideration of the parties' submissions, the Court makes its determination.

**Legal Standards**

There is a powerful presumption against dismissal pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure. Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d

1357, 1359 (10<sup>th</sup> Cir. 1989). Dismissal of a cause of action for failure to state a claim is improper unless it appears beyond doubt that the non-moving party can prove no set of facts in support that would entitle him to relief. Perington Wholesale, Inc. V. Burger King Corp., 631 F.2d 1369, 1372 (10<sup>th</sup> Cir. 1979)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In reviewing a Rule 12(b)(6) motion, the court must accept as true all well-pleaded facts and must view those facts and all reasonable inferences arising therefrom in the light most favorable to the non-moving party. See Seamons v. Snow, 84 F.3d 1226, 1231-32 (10<sup>th</sup> Cir. 1996). Thus, the issue is not whether the non-movant will ultimately prevail at trial, but whether his allegations are legally sufficient to state a claim for relief. Sutton v. Utah State Sch. For Deaf and Blind, 173 F.3d 1226, 1236 (10<sup>th</sup> Cir. 1999).

#### I. Plaintiff's State Law Claims

Ameriquet Mortgage Company (“Ameriquet”) moves to dismiss Counts III and IV of Mr. Braver’s Third Amended Complaint on the grounds that Oklahoma’s statutes prohibiting fraudulent and unsolicited electronic mail impose liability only on the senders of unlawful email, not those who merely “procure” it. Ameriquet contends that Mr. Braver, in his Third Amended Complaint, admits that Ameriquet was not the sender of the emails at issue in this case. It therefore urges that Mr. Braver’s state law claims be dismissed, presumably for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Mr. Braver maintains that his complaint does in fact state a cause of action. He argues that regardless

whether Ameriquest was the immediate sender of the emails, it may incur liability as a sender under such common law precepts as agency, ratification, conspiracy, and non-delegable duty.

Anticipating at least one aspect of Mr. Braver's argument, Ameriquest asserts that Mr. Braver should not be permitted to proceed on an agency theory because his complaint fails to set forth sufficient facts to prove an agency relationship existed between Ameriquest and the companies from which it purchased customer leads. A review of the Third Amended Complaint reveals that Mr. Braver has indeed alleged such facts as would fairly put Ameriquest on notice that he intended to pursue common law theories of liability, including an agency theory. See Third Amended Complaint at ¶¶ 64, 137, 141, 142. That is all that is required under the liberal pleading standards of the Federal Rules. See Fed.R.Civ.P. 8(a)(2); United Steel Workers of America v. Oregon Steel Mills, Inc., 322 F.3d 1222, 1228 (10<sup>th</sup> Cir. 2003); see also Swierkiewicz v. Sorema, 534 U.S. 506, 514 (2002) (“[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”). Ameriquest's argument that it “does not know the identity of the sender, when or if an e-mail is sent, or even if the leads it purchases are generated by e-mails in the first place” raise factual issues that should be tested as the litigation proceeds.

It is simply too early in the litigation to conclude that Mr. Braver cannot support his common law theories of liability under Oklahoma's statutes prohibiting fraudulent and unsolicited electronic mail. A 12(b)(6) motion to dismiss is not properly granted to screen out claims that may have little likelihood of success on the merits. See MacArthur v. San Juan

County, 309 F.3d 1216, 1221 (10<sup>th</sup> Cir. 2002); see also Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Oklahoma statutes at issue are relatively new and remain largely uncharted. While Mr. Braver's common law theories of liability under those statutes may be novel, dismissal is particularly unsuited for novel claims as "it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions." 5B C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1357 at 690-92 (2d ed. 1983).

#### Conclusion

For the foregoing reasons, the Court finds that Defendant Ameriquest Mortgage Company's Motion to Dismiss Plaintiff Robert H. Braver's Third Amended Complaint should be and hereby is DENIED.

ENTERED this 5<sup>th</sup> day of April, 2006.

  
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LEE R. WEST  
UNITED STATES DISTRICT JUDGE