

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AMERIQUEST MORTGAGE COMPANY, a )  
 Delaware corporation; INNOVATIVE MARKETING, )  
 INC., d/b/a LEAD EXTREME, a Washington )  
 corporation; THE LOAN PAGE, INC., )  
 a Delaware corporation; GO APPLY, INC., )  
 d/b/a ELEADZ, a Nevada corporation; and )  
 JOHN DOES 1-50 )  
 Defendants. )

Case No. CIV-04-1013-W

**FILED**  
OCT 13 2006  
ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT WESTERN DIST. OF OKLA.  
BY BS DEPUTY

AMERIQUEST MORTGAGE )  
COMPANY, a Delaware corporation, )  
 )  
 Cross-Complainant, )  
 )  
 v. )  
 )  
 INNOVATIVE MARKETING, INC. dba )  
 LEAD EXTREME, a Washington Corporation; )  
 VISIUM SOLUTIONS CORPORATION, a )  
 Florida corporation; PROFESSIONAL )  
 EQUITY MARKETING, a California )  
 Corporation; and ROES I-50, inclusive, )  
 )  
 Cross-Defendants. )

**ORDER**

This matter comes before the Court on the motion to dismiss (docket entry no. 275) filed by defendant Stecroft Holdings, Inc. ("Stecroft"). The matter has been fully briefed and on October 11, 2006, the Court heard the parties' oral arguments on the motion. After careful consideration of the parties' submissions and oral arguments, the Court makes its determination as follows.

On February 24, 2005, Stecroft filed its motion to dismiss the plaintiff's claims against it pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Stecroft argues that the plaintiff, Robert Braver, fails to meet Rule 9(b)'s requirement that fraud claims be pleaded with particularity. Stecroft further argues that Mr. Braver has failed to state a claim under the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act"), 15 U.S.C. §7704, Oklahoma's Fraudulent Use of Electronic Mail Statutes, 15 O.S. §§ 776.1-776.4, and the Oklahoma Unsolicited Commercial Electronic Mail Statutes, 15 O.S. §§ 776.5-776.7 (collectively the "Oklahoma Electronic Mail Statutes"). Finally, Stecroft contends that Mr. Braver has failed to state a claim for civil conspiracy.

**1. The plaintiff is not required to plead his claims with particularity.**

Robert Braver's Third Amended Complaint sets forth causes of action for alleged violations of the "CAN-SPAM Act, violations of Oklahoma's Electronic Mail Statutes, and for civil conspiracy. Stecroft asserts that Mr. Braver's claims should be dismissed because they have not been pleaded with requisite particularity. Stecroft contends all of Mr. Braver's claims sound in fraud and are, therefore, subject to the requirements of Rule 9(b) of the Federal Rules of Civil Procedure which provides that in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." While Rule 9(b) applies to both federal and state law causes of action, only those that assert fraudulent conduct must be pleaded with particularity. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9<sup>th</sup> Cir. 2003). Thus, the Court must consider each of the plaintiff's claims in light of the rule's particularity requirement.

A. The CAN-SPAM Act and the Oklahoma Unsolicited Commercial Electronic Mail Statutes

While few cases directly address the matter, the Court is persuaded that neither the CAN-SPAM Act, nor the Oklahoma Unsolicited Commercial Electronic Mail Statutes (15 O.S. §§ 776.5-776.7) falls within Rule 9(b)'s particularity requirement. At the outset, the Court is mindful that the special requirements of Rule 9(b) are contrary to the generally favored "short and plain" approach to pleading embraced by the Federal Rules. Rule 9(b) should therefore be "construed narrowly and not extended to other legal theories or defenses." 5A Federal Practice & Procedure, § 1297 (3<sup>rd</sup> edition).

To succeed on a claim of fraud under the law of almost all jurisdictions, including Oklahoma, a plaintiff must show (1) that the defendant made a material representation, (2) that it was false; (3) that the defendant made the representation when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) that the defendant made it with the intention that it should be acted upon by the plaintiff, (5) that the plaintiff acted in reliance upon it, and (6) that the plaintiff thereby suffered injury. *See* North Texas Production Credit Ass'n v. McCurtain County Nat. Bank, 222 F.3d 800, 813 (10<sup>th</sup> Cir. 2000). Both the CAN-SPAM Act, and the Oklahoma Unsolicited Commercial Electronic Mail Statutes prohibit the use of commercial electronic mail that misrepresents information identifying the message's origin or that contain false or misleading information in the subject line. However, neither Act requires that the sender of unlawful e-mails know the information in the subject line or transmission path to be false or misleading. Neither Act requires the misleading information in the e-mails to be material. Furthermore, neither Act requires the recipient of the subject e-mail to act in reliance. Because

neither the CAN-SPAM Act nor the Oklahoma Unsolicited Commercial Electronic Mail Statutes concern activities that rise to the level of actual fraud, the Court concludes that Mr. Braver's claims arising out of those Acts do not trigger the heightened pleading requirements of Rule 9(b). *See Gordon v. Impulse Marketing Group, Inc.*, 375 F.Supp.2d 1040, 1048 (E.D.Wash. 2005).

B. Oklahoma's Fraudulent Use of Electronic Mail Statutes

While Oklahoma's Fraudulent Use of Electronic Mail Statutes (15 O.S. §§ 776.1 -776.4) incorporate several elements of fraud missing from the Acts discussed above, they still fail to require a showing of fraudulent conduct sufficient to trigger Rule 9(b)'s particularity requirement. Pursuant to Oklahoma law, actionable fraud cannot be established absent a showing of the defendant's detrimental reliance. *See Rogers v. Meiser*, 2003 OK 6, ¶ 17, 68 P.3d 967, 976 (setting out the elements of actionable fraud). Under the Act, a person may be injured by electronic mail deemed a "fraudulent electronic mail message" or "fraudulent bulk electronic mail message" without ever having relied upon the misrepresentations contained therein. For example, it appears the injured party may recover damages which result solely from the transmission of the e-mail, separate and apart from the e-mail's content. Because Oklahoma's Fraudulent Use of Electronic Mail Statutes do not sound in fraud, Mr. Braver's claim based upon those provisions is not subject to Rule 9(b)'s heightened pleading requirement.

C. Civil Conspiracy

The essential elements of actionable fraud are likewise missing from the plaintiff's claim for civil conspiracy. Mr. Braver does not contend that Stecroft conspired to defraud him. Rather, he argues that Stecroft colluded with its co-defendants and others to conduct business in a such a way that electronic mail servers such as his would be inundated with unlawful mortgage spam. He does

not suggest that he relied to his detriment upon the allegedly unlawful mortgage spam which forms the basis of his action. Rather, he maintains that the sheer volume of such mortgage spam burdened his servers and damaged his business. Taken as a whole, the civil conspiracy claim does not fall within the type of claims to which Rule 9(b) applies. Because the plaintiffs' claims do not sound in fraud, Rule 9(b)'s particularity requirements are not implicated and Stecroft's motion to dismiss for lack of particularity should be denied.

**2. The plaintiff has adequately pleaded his claims under the federal CAN-SPAM Act and the Oklahoma Electronic Mail Statutes.**

Stecroft appears to argue that even if Rule 9(b)'s particularity requirements do not apply to the plaintiff's claims, they should nonetheless be dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. There is a powerful presumption against dismissal pursuant Rule 12(b)(6). 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, a 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).

Because a Rule 12(b)(6) motion tests only whether a claim has been adequately pleaded, the court's inquiry is ordinarily limited to the content of the complaint. MacArthur v. San Juan County, 309 F.3d 1216, 1221 (10<sup>th</sup> Cir. 2002) *cert. denied*, 539 U.S. 902 (2003). However, the court can consider matters incorporated by reference or integral to the claim, such as items subject to judicial notice, matters of public record, exhibits attached to the complaint whose authenticity is unquestioned. GFF Corp. v. Associated Wholesale Grocers Inc., 130 F.3d 1381, 1384-85 (10<sup>th</sup> Cir. 1997). Consideration of such material does not convert a Rule 12(b)(6) motion into a motion for summary judgment. Id.

A. The CAN-SPAM Act

The CAN-SPAM Act makes it unlawful to initiate the transmission of fraudulent, abusive and deceptive commercial e-mail. "The term 'initiate', when used with respect to a commercial electronic mail message, means to originate or transmit such message or to procure the origination or transmission of such message ...." 15 U.S.C. § 7702(9). To "procure" transmission of an unlawful electronic mail message means to intentionally "pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf." 15 U.S.C. § 7702(12). Stecroft argues that the plaintiff's Third Amended Complaint fails to allege that Stecroft initiated or procured the initiation of unlawful electronic mail messages. A review of the complaint, however, reveals a number of allegations that Stecroft, as one of the defendants to this action, sent or caused to be sent unlawful electronic mail messages to his servers and customers. The complaint sets forth allegations that each defendant to the suit "actually transmitted the spam that is the subject of this action." The plaintiff alleges that the defendants, including Stecroft, transmitted or procured transmission of unlawful electronic messages both directly and as part of a conspiracy. Taking as true the facts

pleaded the Third Amended Complaint, the Court finds the plaintiff has adequately pleaded his claim arising under the CAN-SPAM Act.

B. The Oklahoma Electronic Mail Statutes

The Oklahoma Electronic Mail Statutes make it unlawful for a person to “initiate” the transmission of an electronic mail message that the sender knows or has reason to know misrepresents or conceals the origin or transmission path of the message. 15 O.S. § 776.1(A). Stecroft argues that the plaintiff has failed to adequately plead a claim under the Oklahoma Electronic Mail Statutes because he has failed to allege that Stecroft initiated unlawful electronic mail messages received by his servers and clients. Stecroft contends that unlike the CAN-SPAM Act, the Oklahoma Electronic Mail Statutes fail to make liable those who “procure” transmission of e-mail. Stecroft bases this position on the definition of “initiate the transmission” provided at §776.4(3). According to that provision, “initiate the transmission” means “the action of the original sender of an electronic mail message, not to the action by any intervening computer service that may handle or retransmit the message.” The statutory definition appears designed to protect from liability those providers of electronic mail service who merely relay the transmissions of others. The definition does not expressly negate procurement liability.

Regardless whether Oklahoma’s anti-spam statutes impose liability on those who procure the transmission of unlawful electronic mail messages, the Third Amended Complaint is replete with allegations that Stecroft initiated unlawful electronic mail messages whether directly or through its agents and co-conspirators. The plaintiff has adequately pleaded his claims arising under the Oklahoma Electronic Mail Statutes. Stecroft’s motion to dismiss the plaintiff’s state and federal statutory claims should, therefore, be denied.

3. **The plaintiff has adequately pleaded his claim for civil conspiracy.**

To succeed on a civil conspiracy claim under Oklahoma law, a plaintiff must show that two or more persons acted in concert to accomplish an unlawful objective. Dill v. City of Edmond, Oklahoma, 155 F.3d 1193, 1208 (10<sup>th</sup> Cir. 1998). In his Third Amended Complaint, Mr. Braver has alleged facts which, if true, establish that mortgage spam was intentionally transmitted to his Oklahoma servers for the purpose of generating commercially marketable Oklahoma mortgage leads. When Mr. Braver replied to the mortgage spam messages, he received mortgage solicitation communications from the defendant Ameriquest. Stecroft purchased spam-generated Oklahoma mortgage leads knowing or actively avoiding knowledge that they were generated from spam. Stecroft sold spam-generated Oklahoma mortgage leads to the defendant Ameriquest for commercial gain. The complex chains of sellers and re-sellers of the spam-generated mortgage leads were intentionally created so as to allow businesses such as Stecroft and Ameriquest to benefit from unlawful methods of lead generation while insulating themselves from liability for those unlawful methods.

While the plaintiff's case is largely circumstantial, it is well-recognized that direct evidence of conspiracy is rare. *See* 15A Corpus Juris Secundum, *Conspiracy* § 33, p. 372 (2002). Direct evidence of conspiracy is most often in the possession and control of the alleged conspirators and can therefore, seldom can be obtained. Thus, "a conspiracy usually is susceptible of no other proof than that of circumstantial evidence." Id. The law permits "great latitude" in the admission of circumstantial evidence tending to establish a conspiracy, and to connect those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into

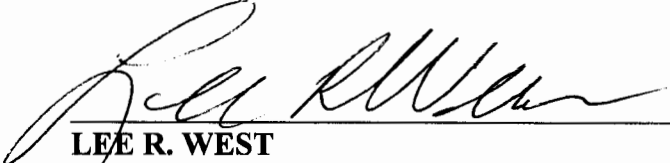
effect the objects of the conspiracy. Id. at 372-73; *see also* Felt v. Westlake, 1918 OK 360, 174 P. 1041 (Okla. 1918).

The assertions set forth in Mr. Braver's complaint are more than mere conclusory allegations of conspiracy such as were rejected by the Tenth Circuit Court of Appeals in Hunt v. Bennett, 17 F.3d 1263, 1266 (10<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 837 (1994). They are factual links in a circumstantial case from which a jury could infer a meeting of the minds of the alleged conspirators. Accepting these factual allegations as true for purposes of the defendant's motion, they are sufficient to state a claim for civil conspiracy.

**Conclusion**

For the reasons set forth above the Court the defendant Stecroft's motion to dismiss is DENIED.

ENTERED this 13<sup>th</sup> day of October, 2006.

  
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**LEE R. WEST**  
**UNITED STATES DISTRICT JUDGE**