Cartessa Aesthetics LLC v. Aesthetics Biomedical Incorporated

2021 | Cited 0 times | D. Arizona | March 1, 2021

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cartessa Aesthetics LLC,

Plaintiff, v. Aesthetics Biomedical Incorporated,

Defendant.

No. CV-19-05827-PHX-DWL ORDER

Aesthetics Biomedical Incorporated,

Counter-Claimant, v. Cartessa Aesthetics LLC,

Counter-Defendant.

Pending before the Court is Plaintiff/Counter-Defendant and/or strike certain counterclaims and an accounting request asserted by Defendant/Counter-Claimant (Doc. 89.) For the following reasons, the motion is denied.

PROCEDURAL HISTORY On December 16, 2019, Cartessa initiated this action. (Doc. 1.) On January 14, 2020, Cartessa filed a first amended complaint On February 11, 2020, ABM filed an answer to the FAC. (Doc. 20.) In the same

document, ABM asserted the following seven counterclaims against Cartessa: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) tortious interference with contractual agreements; (4) negligent/fraudulent misrepresentation; (5) conversion of customer payments and Vivace units; (6) replevin; and (7) defamation. (Id. at 20-25.) 1 On March 3, 2020, Cartessa filed an an On March 12, 2020, the parties filed the Rule 26(f) report. (Doc. 34.) Among other things, the parties agreed that July 31, 2020 would be an acceptable deadline for the completion of fact discovery. (Id. at 2, 8.) On June 18, 2020, the parties jointly requested a referral to a magistrate

judge for a settlement conference. (Doc. 57.) This request was granted (Doc. 58) but the parties were unable to reach a settlement during the resulting settlement conference (Doc. 64).

On August 12, 2020, the parties filed a joint status report that, among other things, included new proposed case management deadlines. (Docs. 67, 67-1.)

(Doc. 69.) Although the Court did not alter the deadline for amending the pleadings (because it had already expired and the parties did not request a retroactive extension), the Court extended the deadline for final supplementation of MIDP responses and the completion of fact discovery (except for depositions) to September 30, 2020 and the deadline for completing fact-witness depositions to December 11, 2020. (Id.) On September 24, 2020 that is, six days before the deadline for completing fact discovery the parties filed a joint stipulation for leave to allow amendments to the pleadings. (Doc. 73.) Upon receipt of this stipulation, the Court clarified that leave of to the dueling amendments. (Doc. 74.)

1 This pleading also includes what purports to be an additional counterclaim against -28), but this is best categorized as a request for a particular form of relief (as opposed to an independent theory on which liability might be premised).

On October 15, 2020, ABM filed its answer to the SAC. (Doc. 88.) In the same document, three new counterclaims (with the new count numbers denoted in parentheses): (8) unfair competition under the Lanham Act, 18 U.S.C. § 1125; (9) false advertising under the Lanham Act, 18 greement with SheNB. (Doc. 85-1 at 54-58 [denoting changes in redline]; Doc. 88 at 33-38 [final version].) ABM also requested one additional form of relief that it initial set of counterclaims: a request for an accounting. (Doc. 85-1 at 36; Doc. 88 at 18.)

On October 26, 2020, Cartessa filed the pending motion to dismiss and/or strike certain counterclaims and the accounting request. (Doc. 89.)

On October 30, 2020, ABM moved to amend the scheduling order. (Doc. 90.) On November 9, 2020, ABM filed a response and/or strike. (Doc. 97.)

the scheduling order to the extent it sought a 90- -expired

fact-witness depositions (from December 2020 to March 2021) but did not extend the already-expired deadline for all other forms of fact discovery. (Id.)

On November 16, 2020, Cartessa filed a reply in support of its motion to dismiss and/or strike. (Doc. 100.) 2

DISCUSSION Cartessa moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,

Cartessa also moves to

strike Id.) In response, ABM defends the sufficiency of all of its challenged counterclaims and its accounting request and 2 See LRCiv 7.2(f).

for the procedural reasons of (1) non-compliance with Local Rule 12.1(c) and (2) untimeliness. (Doc. 97.) I. Local Rule 12.1(c)

failure to state a claim or counterclaim, pursuant to Federal Rule of Civil Procedure 12(b)(6), or motion for judgment on the pleadings on a claim or counterclaim, pursuant to Federal Rule of Civil Procedure 12(c), will be considered or decided unless the moving party includes a certification that, before filing the motion, the movant notified the opposing party of the issues asserted in the motion and the parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by the pleading Id. ugh Id.

Id. Here, Cartessa attempted to comply with Local Rule 12.1(c) by including a footnote

were unable to agree that the pleading was curable Cartessa also included, as an attachment, the August 14, 2020 letter. (Doc. 89-5.)

-and-confer efforts. (Doc. 97 at 6-7.) As for the October 23, 2020 not engage in a conversation with ABM to try and cure any part of the alleged deficiencies

ng ABM the Motion would be forthcoming on Monday, Id.) As for the August 14, 2020 letter, ABM states that it was a Rule alleged insufficiency of (without addressing any of the other

counterclaims or the accounting request). (Id.) the telephone call on October 23, 2020 that is, there was no substantive conversation

about whether the alleged deficiencies could be cured by amendment but argues its conferral efforts were nevertheless sufficient under Local Rule 12.1(c) because it informed ABM of its intent to file a motion to dismiss and disclosed the basis for its anticipated motion. (Doc. 100 at 3.) Cartessa also includes a supplemental certificate of conferral in

ABM raised no objection to the Motion and did not request an opportunity to amend the -1 at 2.) In a related vein, complaints about non-compliance with Local Rule 12.1(c) are disingenuous because

Doc. 100 at 3.) Finally, as for the August 14, 2020 letter, Cartessa acknowledges that it was a Rule 11 letter directed at only one of the counterclaims but argues that, because ABM subsequently wrote a letter refusing to withdraw that counterclaim, this course of dealing shows that the parties were at an impasse over the possibility of amendment. (Id.) Leibel v. City of Buckeye, 2020 WL 516671, *2 (D.

Ariz. 2020). The purpose of Local Rule 12.1(c) is to avoid unnecessary motions practice, which squanders judicial resources and undermines the just, speedy, and inexpensive determination of every action and proceeding See also Wine Educ. Council v. Ariz. Rangers, 2020 WL 7352632, *8 (D. Ariz. 2020) (Local Rule 12.1(c) to promote communication and an attempted resolution by opposing counsel prior to parties filing motions to To that end, Local Rule 12.1(c) provides that a party contemplating filing a motion to dismiss under Rule 12(b)(6) or a motion for judgment on the pleadings under Rule 12(c) must first engage in a meaningful conversation with its adversary about whether the perceived deficiencies might be cured by amendment. If so, the parties can avoid motions practice, and its attendant costs and delays, by simply agreeing to the amendment.

Although such agreements may be rare in practice, it is still incumbent upon the parties to confer with each other in a sincere attempt to find common ground. e Court can

dismiss, which Cartessa proceeded to file the very next business day (the ensuing Monday).

It is hard to understand how such a perfunctory gesture could be deemed compliant with Local Rule 12.1(c). Cf. Fletcher v. U-Haul Co. of Ariz., 2008 WL 3843752, *2 (D. Ariz. 2008) (denying discovery motion based on non-compliance -and- confer requirement, where the movant provided notice of its intent to seek relief via a cursory letter sent only three days before filing its o accept the utterly perfunctory effort made here as satisfaction of the meet and confer requirements . . . would do a disservice to the interests of the court and litigants generally Nev. Power Co. v. Monsanto Co. -and-confer proper operation, is the requirement that parties treat the informal negotiation process as a substitute for, and not simply a formalistic prerequisite to, judicial resolution of discovery disputes. To that end, the parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a sincere effort to resolve the matte

The Court acknowledges that Cartessa states, in its supplemental certificate of

n to file a motion. Meeting-and-conferring is a two-way street, and the better practice would have been for ABM to engage with Cartessa about the possibility of amendment after the issue came to the fore. Nevertheless, Local Rule 12.1(c) places the burden on the movant

that topic during the October 23, 2020 phone call, Cartessa cannot credibly make this

certification. invocation of permission to amend its Counterclaims. (Doc. 100 at 3.) I

; id. at 19 [requesting that the Court deny the .) The presence of this request amplifies why Cartessa needed to do a better job of conferring with ABM before filing its motion. For these reasons, the

Court concludes with one exception noted below that Cartessa did not comply with Local Rule . Under Local Rule 12.1(c), a court may 6) or Rule 12(c) motion based on such non-compliance and the Court chooses, in its discretion, to employ that remedy here. partial counterclaim. Cartessa wrote a letter to ABM in August 2020 that explained, in extensive detail, why Cartessa viewed the challenged portion of this counterclaim as frivolous and warranting sanctions under Rule 11 (Doc. 89-5) and ABM responded by writing a lengthy letter in September 2020 explaining why it was refusing to withdraw the counterclaim (Doc. 89-6). Under these circumstances, further meeting-and-conferring about this particular counterclaim would have been pointless. Accordingly, the Court will not deny claim based on non-compliance with Local Rule 12.1(c). II. Timeliness first counterclaim should be denied untimeliness. (Doc. 97 at 12-14.) ABM notes that this counterclaim appeared in the initial set of counterclaims it filed in February 2020, that Cartessa chose to file an answer to those counterclaims in March 2020 (without filing a motion to dismiss), and that the original counterclaims remained unchanged when it filed its amended set of counterclaims in October 2020 (which merely added three new counterclaims). (Id.) ABM contends that, under these circumstances, Cartessa was only entitled to invoke Rule 12(b)(6) to seek dismissal of the three new counterclaims and was barred from seeking dismissal of the earlier-asserted counterclaims. (Id.) In reply, first counterclaim under Rule 12(b)(6) but argues that the Court may convert its Rule

12(b)(6) motion into a motion for judgment on the pleadings under Rule 12(c), which is subject to the same timing and forfeiture requirements. (Doc. 100 at 8-9.) On the one hand, ABM is correct that Cartessa dismissal of the first counterclaim under Rule 12(b)(6) is untimely. Cartessa filed an answer to the first counterclaim in March 2020, some eight months before it filed its pending Rule 12(b)(6) motion to dismiss that very same counterclaim. This approach is verboten under Rule 12(b), which motion asserting any of [the Rule 12(b)] defenses must be made before pleading if a responsive pleading is allowed Moreover [t]he filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in a timely fashion prior to the amendment of the pleading Jaeger v. Howmedia Osteonics Corp., 2016 WL 520985, *4 (N.D. Cal. 2016) (internal

quotation marks omitted). On the other hand, it is well recognized that a district court may treat an untimely motion to dismiss under Rule 12(b)(6) as a motion for judgment on the pleadings under Rule 12(c). See, e.g., Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 954 (9th Cir. A Rule 12(b)(6) motion must be made before the responsive pleading. Here, the Defendants filed their motion to dismiss after filing their answer. Thus, the motion should

have been treated as a motion for judgment on the pleadings, pursuant to Rule 12(c) or 12(h)(2). (citation omitted); Lu v. Menino, 98 F. Supp. 3d 85, 93 (D. Mass. 2015) umerous courts consider a Rule 12(b)(6) motion on the merits or construe it as a Rule 12(c) motion even though the defendant filed the Rule 12(b)(6) motion after filing an answe promotes efficiency. Cf. In re Apple iPhone Antitrust Litig., 846 F.3d 313, 317-19 (9th Cir. 2017). See also 1 Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 12, at 330 (2018 When this occurs, the sensible path for the court to take is to treat

the motion as having been made under Rule 12(c) request is that,

12(b)(6) motions, they still are subject to some limits. The First Circuit has suggested that district court should hesitate to entertain a Rule 12(c) motion that asserts a complaints failure to satisfy the plausibility requirement is the parties have invested substantial resources in discovery, reviewing the sufficiency of the co [i]gnoring the entire panoply of facts developed during discovery Grajales v. P.R. Ports Auth., 682 F.3d 40, 46 (1st Cir. 2012). That is arguably the situation here Cartessa filed its motion in October 2020, several weeks after the fact discovery deadline had expired.

xt of Rule 12(c), which fter the pleadings are closed but early enough not to delay trial a party may move for judgment on the pleadings Because no trial date has e 12(b)(6) motion into a Rule 12(c) motion will delay the trial. III. Rule 12(c) Challenge To Counterclaim One

A. Legal Standard under Rule 12(c) is substantially identical to analysis under Rule

12(b)(6) because, under both rules, a court must determine whether the facts alleged in the United States v. Chavez, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks omitted).

Thus, to survive a motion for judgment a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the Id. -pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non- , 714 F.3d 1141, 1144-45 (9th Cir. 2013).

Legal conclusions couched as factual allegations are not entitled to the presumption of truth. Iqbal, 556 U.S. at 678-79

conclusions can provide the framework of a complaint, they must be supported by factual aId. at 679.

-pleaded factual allegations, a court should assume their Id. Taking as true all of the well-pleaded factual allegatId. at 678. The

Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015). B. Summary Of Counterclaim One ABM alleges that it is the exclusive North American distributor of the Vivace micro- needling device, which is manufactured in Korea, and that it entered into a contract with Cartessa in February 2017 under which Cartessa agreed to serve as its distributor . (Doc. 88 at 17-18 ¶¶ 6-10.) In general, the Agreement gave Cartessa the

(initially, New York, Connecticut, and Florida). (Doc. 89-2 at 3 ¶ 1.1, 11.) 3

The Agreement contemplated that Cartessa would solicit orders from customers in this territory and then forward those orders to ABM, which would make a final determination as to whether to accept them. (Id. at 4 ¶ 3.2.) For accepted orders, the Agreement provided that

[Cartessa] receives any Customer payments, it shall immediately forward such payments Id. at 4 ¶ 3.3) Cartessa in the

clinical in- and/ (Id. at 3 ¶ 2.1.)

As relevant here, t otherwise exclusive hich were defined

Id. at 2, 14 ¶ 3.1.)

or commission will be paid to [Cartessa] for Corporate Group sales that fall within [its] territory, except that [Cartessa] will receive a lead generation fee for referring the Id. at 14 ¶ 3.1.)

In Counterclaim One, ABM alleges that Cartessa breached the Agreement in six different ways. (Doc. 88 at 28 ¶ 83.) One of those theories of breach the only one at issue here is that Cartessa breached the provision of the Agreement giving ABM the exclusive right to makes sales to Corporate Groups. (Id. at 18-19 ¶¶ 14-20, 28 ¶ 83(a).) Specifically, ABM alleges that Cartessa sold at least 57 Vivace devices to Corporate Groups between 2017 and 2019, causing ABM to suffer at least $1,734,695 in damages. (Id.) 3 Cartessa attached a copy of the Agreement to its motion (Doc. 89-2) and argues that, because Counterclaim One expressly refers to the Agreement and incorporates it by reference, the Court may consider the Agreement without converting its motion into a summary judgment motion. (Doc. 89 at 14 n.10.) The Court agrees. United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

C. rguments

Cartessa moves to dismiss this theory of liability for two reasons. (Doc. 89 at 13- 15.) First, Cartessa argues that because [were] clearly contemplated under the Agreement, ABM cannot establish a breach of the

Agreement. (Id.) Cartessa elaborates that, because the Agreement contemplated that ABM s, this shows that the Agreement authorized Cartessa to make such sales. (Id.) Second, Cartessa

reviewed and accept the sales, shipped the devices to the customers, received $1,734,695.48, paid Cartessa commissions, Id.)

ABM disagrees. (Doc. 97 at 16-17.) ABM contends that the contractual language at issue m the allegation that Cartessa made such sales is sufficient to state a claim. (Id.) 4

ABM further improper sale[s] to Corporate Groups, the commission paid to Cartessa for each sale it otherwise would have received if the Agreement was not breached and Cartessa Id.)

In reply, Cartessa argues that the Agreement cannot be construed as precluding it

at 10-11, emphases omitted.) As for the damages-related issue, Cartessa does not directly

misrepresented the nature of these sales or otherwise tricked ABM into exercising its 4 ABM analyzes this issue under the standard applicable to a motion for summary judgment under Rule 56. (Doc. 97 at 16-17.) As discussed above, the Court analyzes arguments as defending the sufficiency of its claim under Rule 12(c).

Id.) D. Analysis

To prevail on a breach-of- the plaintiff has the burden of proving the existence of a contract, breach of the contract, and resulting damages Chartone, Inc. v. Bernini, 83 P.3d 1103, 1111 (Ariz. Ct. App. 2004). As noted, Cartessa challenges only the second (breach) and third (damages) elements.

ourts have granted motions to dismiss on contract claims where it is clear from the unambiguous terms of the contract that the alleged conduct by the defendant does not constitute a breach of contract. Mieuli v. DeBartolo, 2001 WL f a contract is ambiguous, it presents a question of fact inappropriate for resolution on a motion to dismiss. Hicks v. PGA Tour, Inc., 897 F.3d 1109, 1118 (9th Cir. 2018). Here, the Agreement is not a model of clarity as to whether it affirmatively prohibited Cartessa from making sales to Corporate Groups. Although Cartessa may be able to advance plausible arguments in support of its position why else would the Agreement specifically retain[ed] the exclusive right to sell its Pr ? Because the contractual language does not unambiguously support Cartessa dismissal under Rule 12(c). See, e.g., Res. Recovery Corp. v. Inductance Energy Corp., 2020 WL 6149844, *6 (D. Ariz. 2020) (denying motion to dismiss breach-of-contract claim the presence of [contractual] ambiguity precludes dismissal at this stage ; Raygarr LLC v. Employers Mut. Cas. Co. To the extent the underlying terms of the insurance policies at issue are ambiguous, the Court declines to reach any conclusive interpretation at this stage of the proceedings. The Court merely finds that Raygarr has stated a plausible claim for breach of contract. EMCs motion to dismiss Raygarrs breach-of-contract claim will be denied -related arguments fare no better. ABM that it would have earned more money by making sales directly to the Corporate Groups than it actually

earned from the allegedly improper sales that Cartessa made to the Corporate Groups paid a commission to Cartessa). s that, even though it made some profit based on the challenged transactions, it still missed out on some additional profit to which it was entitled under the Agreement. Although the parties have not briefed this issue in any depth, this appears to be a valid theory of recovery in a contract action under Arizona law. See, e.g., A.R.A. Mfg. Co. v. Pierce The familiar aim of compensatory contract damages, the computation of which is hardly an exact science,

is to yield the net amount of the losses caused and the gains prevented by the breach of contract, i.e., [t]he expected additions to the plaintiffs wealth and the actually resulting subtractions therefrom. To recover for gains prevented, [plaintiffs] were entitled to have the jury consider any loss of profits shown Thus, ABM has plausibly stated a claim for relief. 5 IV.

A.

accounting. In its amended c sales during the t heNB in

inception of its contract with She 11-13.)

Based on this nomenclature, it is unclear whether Cartessa seeks the dismissal of accounting request under Rule 12(b)(6) or seeks 5

would have made the same 57 sales to Corporate Groups is a question for a different day. o before the Court at this time, it does not provide a basis for dismissal under Rule 12(c).

request under Rule 12(f). Adding to the confusion, Cartessa appears to challenge both the allegations related to the request for an accounting, which suggests that Cartessa is requesting dismissal under Rule 12(b)(6), and their relevance, which suggests that Cartessa is requesting that an be stricken under Rule 12(f). (Doc. 89 at 16-17; Doc. 100 at 11.) Despite this lack of clarity, the Court construes motion as requesting that the Court strike the accounting request under Rule 12(f). In various portions of its brief, Cartessa offsets its request to strike the accounting request from its other requests for dismissal, which tends to indicate that it viewed its basis for striking the accounting request as separate from its basis for dismissing See, e.g., Doc. 89 at 17 fourth, eighth, ninth, and tenth causes of action, and portions of the first, fifth, and sixth

t 11.) Furthermore, ABM accounting request struck,

rchased demo units as under Rule 12(f) (which also means that the request is not subject to forfeiture based on

-compliance with Local Rule 12.1(c)).

B. Legal Standard Fed. R. Civ. P. 12(f). A statement is not

s underlying claim Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010). A statement is not impertinent Id. Rule 12(f) is not a vehicle to challenge the legal sufficiency of claims or allegations. Id.

Motions to strike under Rule Operating Eng rs Local 324 Health Care Plan v. G & W Constr. Co., 783

F.3d

1045, 1050 (6th Cir. 2015). ion to strike should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation. If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court shou Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (citations omitted).

C. Cartessa argues that the accounting request should be stricken because it [s] Virtue, or any other device or product that Cartessa is thus irrelevant. (Doc. 89 at 16-17.) Cartessa to Virtue, or alleged any facts about any other devices or products sold by Cartessa. Id. at 17.) Last, Vivace under the Distribution Agreement with ABM, ABM already ha (Id.)

claims that implicate Cartessa in inappropriate sales of purchased demo units as well as

Id. s that it will be submitting a discovery dispute on this question. (Id.)

demonstrations of Virtue Vivace is relevant

D. Analysis The Court is not prepared on this record to conclude accounting request has no bearing on the litigation. Cartessa does not dispute that its sales and demonstrations of Virtue are relevant to its claimed damages. And, although Cartessa argues that

appear to dispute that sal with which courts view motions to strike, is denied. Platte Anchor Bolt, 352 F. Supp. 2d at 1057. Accordingly, IT IS ORDERED and/or strike (Doc. 89) is denied. Dated this 1st day of March, 2021.