

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

LP ENTERPRISES, LLC d/b/a LP IN-STORE
SERVICES, LLC,

Plaintiff,

v.

Civil Action No. 16-C-213
Hon. David H. Sanders, III

LEAFGUARD OF MARYLAND, INC., d/b/a
LEAFGUARD OF MARYLAND AND
NORTHERN VIRGINIA/BELDON

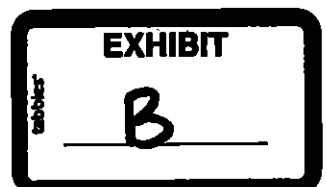
Defendant.

**DEFENDANT, LEAFGUARD OF MARYLAND, INC.'S, MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

The Defendant, Leafguard of Maryland, Inc. ("LeafGuard"), by its undersigned counsel, and pursuant to West Virginia Rule of Civil Procedure 12(b)(6), moves to dismiss the Complaint of Plaintiff, LP Enterprises LLC ("Plaintiff"), upon the following grounds:

1. Plaintiff's breach of contract claims are time-barred by the applicable statute of limitations.
2. Plaintiff's claim for untimely cancellation/termination of the Contracts must fail because the terms of the contract allow for early termination of the contract.
3. Plaintiff has failed to plead facts sufficient to support its claim that Leafguard did not comply with the terms of the 2009 Contract.
4. Plaintiff has failed to state a claim for breach of contract under the applicable law.

WHEREFORE, for the foregoing reasons, and as more fully set forth in the accompanying Memorandum of Law, the Defendant requests that this Court dismiss the claims as set forth in the Plaintiff's Complaint.



LEAFGUARD OF MARYLAND, INC.
By Counsel

/s/ Eric J. Hulett

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Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I filed the foregoing "Defendant, Leafguard of Maryland, Inc.'s Motion to Dismiss Plaintiff's Complaint" with the Clerk of the Court using the West Virginia E-Filing system, which will send notification of such filing to the below named counsel:

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/s/ Eric J. Hulett

Eric J. Hulett

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LEAFGUARD OF MARYLAND, INC., d/b/a
LEAFGUARD OF MARYLAND AND
NORTHERN VIRGINIA/BELDON,

Defendant.

**MEMORANDUM IN SUPPORT OF DEFENDANT, LEAFGUARD OF MARYLAND,
INC.'S, MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

The Defendant, Leafguard of Maryland, Inc. ("LeafGuard"), by its undersigned counsel, and pursuant to West Virginia Rule of Civil Procedure 12(b)(6), moves to dismiss the Complaint of Plaintiff, LP Enterprises LLC ("Plaintiff"), and respectfully submits this memorandum of law in support.

Statement of Facts

Plaintiff's Complaint provides few facts to support its claims for breach of contract. Plaintiff alleges that the Plaintiff and LeafGuard executed two contracts, one on March 2, 2010 (the "2010 Contract") and the other on September 2, 2009 (the "2009 Contract") (collectively, "the Contracts"), whereby the Plaintiff agreed to provide LeafGuard with promotional/marketing services on "various occasions" in 2009 and 2010. Compl. ¶ 3.¹ Plaintiff alleges that "the Defendant failed to pay for the services provided by the Plaintiff" and "also that the Defendant untimely cancelled/terminated the Contracts." Compl. ¶ 4. Plaintiff alleges that due to the LeafGuards's alleged breach of these Contracts, it is owed \$371,495.99, comprised of

¹ LeafGuard disputes the validity and authenticity of the document attached to the Complaint as the 2010 Contract and disputes that there was an enforceable, written contract or a meeting of the minds relative to any services in 2010.

\$183,830.00 in “unpaid services and contractual cancellation fees, termination fees and other expenses” and \$187,665.99 in “contractual interest from May 2010.” Compl. ¶ 4. Plaintiff does not provide any further facts nor does Plaintiff attach any exhibits to support these amounts.

Standard of Review

When considering a motion to dismiss, the Court is to construe the complaint in the light most favorable to the plaintiff and to consider all allegations contained therein as true. However, “this liberal standard does not relieve a plaintiff . . . of the obligation of presenting a valid claim, that is a claim upon which relief can be granted.” *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 96-7, 479 S.E.2d 602, 606-07 (1996). Additionally, a Rule 12(b)(6) motion to dismiss “enables a circuit court to weed out unfounded suits.” *State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995); accord, *Harrison v. Davis*, 197 W. Va. 651, 657-58 n. 17, 478 S.E.2d 104, 110-11 n. 17 (1996).

While a plaintiff is minimally required to make a “short and plain” statement of the claim, a plaintiff may not “fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint.” Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 199 (4th ed. 2012). Furthermore, “liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading. As stated in Lugar and Silverstein, *West Virginia Rules of Civil Procedure* (1960) at 75: ‘Simplicity and informality of pleading do not permit carelessness and sloth: the plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.’” *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-58 (1981). Because Plaintiff’s brief five paragraph Complaint has failed to meet the standard of stating a breach of contract claim upon

which relief can be granted, the claims contained within the Plaintiff's Complaint should be dismissed under Rule 12(b)(6).

Argument

1. Plaintiff's Breach Of Contract Claims Are Time-Barred By The Applicable Statute Of Limitations

Plaintiff fails to state a claim upon which relief can be granted because Plaintiff's breach of contract claims fall outside the applicable statute of limitations, and therefore, Plaintiff's claims should be dismissed under Rule 12(b)(6). The Plaintiff's Complaint alleges that "Defendant has failed to pay for services provided by the Plaintiff" and that LeafGuard "untimely cancelled/terminated the Contracts." Compl. ¶ 4. The Plaintiff's Complaint alleges that the Plaintiff provided these services on "various occasions" in 2009 and 2010 under the terms of the 2009 Contract and 2010 Contract. Compl. ¶ 3. The Plaintiff further states that it was owed "\$187,665.99 for contractual interest from May 2010." Compl. ¶ 4.² Obviously, by Plaintiff's own pleadings, this is the date when the statute of limitations began to run on its claims.

As the Plaintiff is a West Virginia limited liability company and LeafGuard is a Maryland corporation, choice of law principles must come into consideration when determining which state's statute of limitations should apply to this contract. As further discussed below, Maryland's three year statute of limitations applies to these breach of contract claims, and as a result, Plaintiff's breach of contract claims are time-barred. M.D. Code Ann., Cts. & Jud. Proc. § 5-101. Therefore, Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted.

² President and CEO, Lucas Zarlengo, alleges in his Affidavit of Claim that interest began accumulating on the alleged unpaid accounts beginning on May 12, 2010. Compl. Ex. B, ¶ 4. Therefore, this is the latest date when the statute of limitations began to run on the Plaintiff's claim.

Under West Virginia Code § 55-2-17, "[U]pon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred either by the laws of such state or country or by the laws of this state." The West Virginia Supreme Court has held that:

[T]he clause, properly interpreted, means that, if the right to maintain an action on contracts made and to be performed in another state by one who then resided therein is barred by the laws of that state, no action thereon may be maintained in this state, though, if made and to be performed in this state, it may not be so barred. Any other construction is unauthorized, and at variance with the decisions of other courts. When the will of the Legislature is clearly expressed, it should control. All statutory provisions are to be construed and applied 'according to the exact and specific language of the enactments.'

Brown v. Hathaway, 73 W. Va. 605, 606, 80 S.E. 959, 960 (1914) (internal citations omitted).³

Under West Virginia law, "[a] contract is made at the time when the last act necessary for its formation is done, and at the place where the final act is done." *Carper v. Kanawha Banking & Trust Co.*, Syl. 3, 157 W. Va. 477, 207 S.E.2d 897 (1974). Furthermore, when a contract is the result of an offer made in one state and an acceptance in another state, the contract will be deemed to have been made in the state in which the acceptance occurred. *State v. Knapp*, Syl. 3, 147 W. Va. 704, 131 S.E.2d 81 (1963). Here, Plaintiff has failed to allege any of the circumstances surrounding the formation of the contract. However, the Contracts are the

³ The cases which have found this statute to be inapplicable are easily distinguishable from the Plaintiff's position. For example, at issue in *Selected Kentucky Distillers, Inc. v. Foloway*, 124 W. Va. 72, 72, 19 S.E.2d 94, 95 (1942), was the balance due on a check issued in Kentucky but drawn on and payable at a bank in West Virginia. The Court held that since the "contract" in that case was the check itself, performance of the contract was the act of paying on the check. *Id.* The Court held that the place of performance was the place where the check was drawn on and made payable at, which in that case was West Virginia. *Id.* Here, performance of the Contracts consisted of the completion of the services by the Plaintiff, which took place in Maryland and Virginia. Furthermore, the subject of the dispute in *Davidson v. Browning*, 73 W. Va. 276, 80 S.E. 363 (1913), was a contract for the sale of cattle, which under modern law would now be governed by the UCC's four year statute of limitations. The UCC has been adopted both in Maryland, M.D. Code Ann., Com. Law § 2-725(1), and West Virginia, W. Va. Code § 46-2-725(1). Therefore, neither *Foloway* nor *Browning* apply to the decision in the case at bar.

Plaintiff's forms,⁴ and under basic principles of contract law, served as an offer to LeafGuard, which could have been accepted or rejected by the LeafGuard. Here, LeafGuard allegedly accepted the terms of the Plaintiff's offer, as indicated by the alleged signatures of LeafGuard's authorized representatives on page 11 of the 2009 Contract and page 11 of the 2010 Contract.⁵ This would have been the final act necessary to finalize the contract. As a Maryland corporation with its principal place of business in Maryland, LeafGuard accepted the Plaintiff's offer in Maryland. Furthermore, the alleged "marketing and promotional services" to be performed by the Plaintiff would have been performed in Maryland and Virginia, the states where LeafGuard primarily conducts its business, but not in West Virginia. Therefore, given that the contract was made in Maryland and performed in Maryland, the above statute should apply, and Maryland's statute of limitations should be applied to bar the Plaintiff's claim.

Even if the above statute does not apply, West Virginia's borrowing statute supports the application of the Maryland statute of limitations in this situation. Under West Virginia's borrowing statute, "[t]he period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim." W. Va. Code § 55-2A-2. The Plaintiff's Complaint claims that LeafGuard's alleged breach of the Contracts, including the failure to pay for services provided by Plaintiff and the untimely cancellation and termination of the Contracts, resulted in \$371,495.99 in unpaid services, contractual cancellation fees, termination fees, other expenses, and contractual interest from at least May 2010, if not earlier. As LeafGuard is a Maryland

⁴ "It is a basic principle of contract law that, in construing the language of a contract, ambiguities are resolved against the draftsman of the instrument." *John L. Mattingly Constr. Co., Inc. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327, 999 A.2d 1066, 1074 (2010) (citing *Burroughs Corp. Chesapeake Petroleum & Supply Co., Inc.*, 282 Md. 406, 411, 384 A.2d 734, 737 (1978)).

⁵ LeafGuard disputes the validity and authenticity of the document attached to the Complaint as the 2010 Contract and disputes that there was an enforceable, written contract, or a meeting of the minds relative to any services in 2010.

corporation, with its principal place of business in Maryland and its corporate offices in Maryland, the alleged breach of the Contracts would have occurred in Maryland, where LeafGuard allegedly refused to pay for services and allegedly “untimely cancelled/terminated” the Contracts. Thus, the claim for breach of contract would have accrued in Maryland. Therefore, given that Maryland’s statute of limitations is three years for breach of contract claims, M.D. Code Ann., Cts. & Jud. Proc. § 5-101, and West Virginia’s statute of limitations is ten years for breach of contract claims, W. Va. Code § 55-2-6, Maryland’s statute of limitations is applicable here, as it bars the Plaintiff’s claim which arose approximately 6 years ago in 2010. Plaintiff filed its Complaint more than 6 years after the claim accrued and is therefore time-barred.

2. Plaintiff’s Claim For Untimely Cancellation Or Termination Of The Contracts Must Fail Because The Terms Of The Contract Allow For Early Termination Of The Contract

Plaintiff’s claims also must fail due to the terms of the 2009 and 2010 Contract, specifically that both allow for the early termination of the contract by either party. Under West Virginia choice of law doctrine, “[m]atters bearing on the performance of a contract are determined by the law of the place in which the contract was to be performed.” *Jones v. Tri-County Growers, Inc.*, Syl. 1, 197 W. Va. 218, 366 S.E.2d 726 (1988). Here, given that the Plaintiff is alleging breach of contract due to untimely cancellation and failure to pay for Plaintiff’s services, Maryland law would be applicable, because both the services and the payment/breach would have occurred in Maryland.

Under Maryland law, when stating a claim for breach of contract, a plaintiff must show that there was a contractual obligation owed by the plaintiff to the defendant, and that the defendant materially breached this obligation. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413

Md. 638, 658, 994 A.2d 430, 442 (2010). Plaintiff has alleged that LeafGuard “untimely cancelled/terminated the Contracts.” Compl. ¶ 4. In Paragraph 3 on page 10 of the 2009 Contract, the following provision states: “Termination of the contract may be exercised by either party, upon seven (7) days advance written notice to the other, in writing, delivered by Certified US Mail. All work completed at that point will be billed, including minimum charges, in addition to a “reasonable” administrative cost.” Paragraph 7 of page 10 of the 2010 Contract has a similar provision, stating “Termination of the contract may be exercised by either party, upon seven (7) days advance written notice to the other, must be made in writing, and delivered by Certified US Mail. . . . All work completed at that point will be billed, including minimum charges, in addition to a “reasonable” administrative cost.” The terms of the Contracts, therefore, permit either party to terminate the contract at any time. Thus, the Plaintiff has failed to demonstrate that LeafGuard materially breached its obligation to the Plaintiff by cancelling/terminating the contract, as the Contracts permitted LeafGuard to terminate the Contracts at any time. In fact, Plaintiff admits that LeafGuard “terminated” rather than breached the Contracts. Therefore, the Plaintiff has failed to state a claim upon which relief can be granted, and its breach of contract claims should be dismissed.

3. Plaintiff Has Failed To Plead Facts Sufficient To Support Its Claim That Leafguard Did Not Comply With The Terms Of The 2009 Contract

Plaintiff’s Complaint has attempted to state a cause of action for breach of contract under the 2009 Contract for “untimely cancellation/termination” and “unpaid services and contractual cancellation fees, termination fees, and other expenses . . . and contractual interest from May 2010,” and Plaintiff requests relief for the breach of the 2009 Contract.⁶ However, Plaintiff has not stated a claim upon which relief can be granted, as the 2010 Contract states that “This

⁶ Plaintiff has failed to specify in the Complaint how much of the requested relief is attributable to the LeafGuard’s alleged breach of the 2009 Contract.

contract is an extension to one *completing in 2009*, with similar terms.” Compl. Ex. A, 1 (emphasis added).

In order to state a claim for breach of contract under Maryland law, a plaintiff must “allege the existence of a contractual obligation owed by the defendant to the plaintiff, and a material breach of that obligation by the defendant.” *RRC Northeast, Inc.*, 413 Md. 638 at 654, 994 A.2d at 440. Here, Plaintiff has failed to demonstrate that there was an “obligation owed” by LeafGuard relative to the 2009 Contract, as the 2010 Contract, by its own terms, recognizes the completion of the 2009 Contract. Likewise, there cannot have been a “material breach” of the Contract where LeafGuard “complete[d]” the contract. Furthermore, in the section labeled “Initial Deposit,” the Contract states that “Initial deposit and fees are waived” and “Due: N/A.” Compl. Ex. A, 1. From this information, it can be inferred that the LeafGuard did not owe anything to the Plaintiff at the beginning of the 2010 Contract, as both parties considered the 2009 Contract to be complete, all fees and deposits were waived, and the amount due was “N/A.”

Additionally, the Plaintiff’s President and CEO, Lucas Zarlengo, alleges in his Affidavit of Claim that interest began accumulating on the alleged unpaid accounts beginning on May 12, 2010. Had there been any outstanding amounts owed from 2009, interest would have been collecting on those accounts beginning in 2009. Thus, Plaintiff’s own Complaint and Exhibits not only fall short of supporting its claims of breach of contract and failure to pay on the 2009 Contract, but directly contradict and disprove those claims. Therefore, Plaintiff has failed to state a claim upon which relief can be granted and Plaintiff’s claim should be dismissed under Rule 12(b)(6).

4. Plaintiff Fails To Plead A For Breach Of Contract Under Maryland Law

Plaintiff has failed to adequately state a claim for breach of contract under Maryland law. Under Maryland law, a plaintiff “must of necessity allege with certainty and definiteness *facts* showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by the defendant.” *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638 at 654, 994 A.2d at 440 (citing *Continental Masonry Co., Inc. v. Verdel Constr. Co., Inc.*, 279 Md. 476, 480, 369 A.2d 566, 569 (1977)) (emphasis in original). Here, Plaintiff’s Complaint falls below the minimum standard established under Maryland law for stating a claim for breach of contract. While Plaintiff has alleged that there were two contracts formed on March 2, 2010 and September 2, 2009, and attached those alleged contracts to the Complaint to support that claim, Plaintiff has failed to allege the essential facts to support its claims that it “provided the Defendant with promotional/marketing services on various occasions in 2009 and 2010,” and that LeafGuard “failed to pay for the services provided by the Plaintiff and untimely cancelled/terminated the Contracts.” Compl. ¶¶ 3-4. Plaintiff has not produced any invoices for services provided, listed any specific dates of services provided, alleged any attempts to collect payment from LeafGuard, or provided any facts showing how LeafGuard “untimely” cancelled/terminated the contract. Therefore, because the Plaintiff has failed to adequately plead a claim for breach of contract under Maryland law, the Plaintiff’s Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Conclusion

WHEREFORE, because the Plaintiff’s claims are barred by the applicable statute of limitations, the express terms of the Contracts allow for early termination of the Contracts, the 2010 Contract, by its terms, discharges any potential remaining obligations the Plaintiff would

have had against LeafGuard at that time, and the Plaintiff has failed to state a cause of action for breach of contract under Maryland law, LeafGuard respectfully requests that this Court dismiss the Complaint with prejudice.

LEAFGUARD OF MARYLAND, INC.
By Counsel

/s/ Eric J. Hulett

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I filed the foregoing **"Memorandum in Support of Defendant, LeafGuard of Maryland, Inc.'s Motion to Dismiss Plaintiff's Complaint"** with the Clerk of the Court using the West Virginia E-Filing system, which will send notification of such filing to the below named counsel:

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/s/ Eric J. Hulett

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