

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-04074

ADVERSARY PROCEEDING NO: 07-80165

ORDER

The relief set forth on the following pages, for a total of 16 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
10/17/2008



Entered: 10/20/2008

A handwritten signature in black ink, appearing to read "John L. Currie".

US Bankruptcy Court Judge
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

CHARLES J. COLE,

Debtor(s).

PROSPECT CAPITAL CORPORATION,

Plaintiff(s),

v.

CHARLES J. COLE,

Defendant(s).

C/A No. 07-04074-HB

Adv. Pro. No. 07-80165-HB

Chapter 7

**ORDER DENYING PROSPECT
CAPITAL CORPORATION'S
MOTION TO DISMISS
COUNTERCLAIMS FOR
NEGLIGENCE, BREACH OF
FIDUCIARY DUTY AND
INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS, AND
GRANTING ITS MOTION TO
DISMISS COUNTERCLAIMS FOR
FRAUD, CONSTRUCTIVE FRAUD,
NEGLIGENT SUPERVISION,
BREACH OF CONTRACT AND
DEFAMATION**

This matter came before the Court on the Motion of Plaintiff Prospect Capital Corporation to Dismiss Amended Counterclaims of Defendant Charles J. Cole pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b).

Background

The following is gleaned from Cole's pleadings. Cole was the majority shareholder of ESA Environmental Specialists, Inc., a contractor doing business with the government. On April 11, 2007, Prospect entered into a Credit Agreement with ESA for credit of up to \$12,200,000, and Cole executed a Guaranty Agreement for ESA's

obligations to Prospect.¹ The loan documents were amended on May 5, 2007, and May 17, 2007, to increase the amount of the loan. On August 1, 2007, ESA filed for Chapter 11 relief in the United States Bankruptcy Court for the Western District of North Carolina, C/A No. 07-031532, and Cole filed a Chapter 11 petition for bankruptcy relief in this Court, converting subsequently to Chapter 7.

Prospect initiated this adversary proceeding to oppose discharge, to challenge dischargeability, and to demand judgment in its favor against Cole on the outstanding debt under the Guaranty Agreement in the amount of \$13,800,000, plus reasonable attorneys' fees and costs. Cole filed counterclaims against Prospect alleging causes of action for fraud, constructive fraud, negligence, negligent supervision, breach of fiduciary duty, tortious interference and breach of the covenant of good faith and fair dealing. This Court previously granted Prospect's request to dismiss those counterclaims as they asserted causes of action and requested relief for damage done to ESA, and not for any direct harm suffered by Cole in his individual capacity for which he could recover under applicable law.² With leave of court Cole filed an Amended Answer and Counterclaim alleging that Prospect is liable for his personal damages suffered on account of Prospect's alleged fraud, constructive fraud, negligence, negligent supervision, breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and defamation. Cole also filed, and the Court granted, a Motion to join the Chapter 7 Trustee as an additional plaintiff in this matter.

¹ Copies of the "Credit Agreement" and "Guaranty Agreement" were attached to Prospect's Complaint as "Exhibit A" and "Exhibit B," respectively.

² In other words, any damage Cole has suffered as a shareholder of ESA is derivative in nature and belongs to the corporation absent injury to the shareholder that is separate from the corporation's injury. See In re Greenwood Supply Co., C/A No. 01-13697, 295 B.R. 787, 795 (Bankr.D.S.C. 2002).

In his Objection to Prospect's Motion, Cole argues that the Amended Counterclaims set forth "additional allegations showing that much of Prospect's conduct has been directed at the Debtor [Cole] personally and that he has suffered damages in his individual capacity." He also adds allegations that Prospect's conduct jeopardized certain valuable government certifications that were personal to him and relevant to his future employment. Prospect again argues that Cole's alleged injuries are merely indirect harm as a result of Cole's status as a shareholder of ESA and are not actionable at law.

Standard for Determining a Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a party to move for dismissal if the opposing party fails to state a claim for which relief can be granted. The purpose of such a motion is to test the sufficiency of the complaint. Graves v. Horry-Georgetown Technical College, 512 F.Supp.2d 413, 421 (D.S.C. 2007). "[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). A motion to dismiss will not be granted unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984). Further, the pleadings must also comply with Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, a complaint does not require detailed facts; however, a "formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v.

Twombly, 127 S. Ct. 1955, 1964-65 (2007). Finally, “[u]nder the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to infer that all the required elements of the cause of action are present.” City of Charleston, S.C. v. Hotels.com, LP, 520 F.Supp.2d 757, 763-64 (D.S.C. 2007). The Amended Counterclaims identify eight causes of action discussed separately below.³

Fraud and Constructive Fraud

Prospect argues that the fraud and constructive fraud claims are subject to dismissal because Cole failed to plead them with particularity. When bringing a fraud claim under South Carolina law⁴:

A plaintiff must specifically . . . allege . . . the following nine distinct elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. Enhance-It, L.L.C. v. American Access Technologies, Inc., 413 F.Supp.2d 626, 629-30 (D.S.C. 2006). A complaint that fails to allege each of these nine elements is wholly insufficient and subject to dismissal. Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676, 680 (S.C.Ct.App. 2001).

Williams v. Hinson, No. 06-3465, 2008 WL 410110, at *6 (D.S.C. Feb. 12, 2008). The constructive fraud claim differs from the fraud claim only in that the element of intent to deceive is not required to be established in a constructive fraud claim. Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (S.C.Ct.App. 2005).

As required by Fed. R. Civ. P. 9(b), made applicable to this adversary proceeding via Fed. R. Bankr. P. 7009, when pleading fraud “a party must state with particularity the

³ The Amended Answer and Counterclaims consist of 230 separate paragraphs including general allegations applicable to numerous causes of action. The Court has reviewed each and will summarize the allegations herein whenever possible for brevity.

⁴ Both parties referred to South Carolina law in developing their arguments and positions in relation to Cole’s tort claims. Therefore, this Court will apply South Carolina law in determining whether Cole’s Amended Counterclaims survive Prospect’s Motion to Dismiss pursuant to Rule 12(b)(6).

circumstances constituting fraud Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” The Fourth Circuit has provided that “the ‘circumstances’ required to be pled with particularity under Rule 9(b) are “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citing 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1297 (2d ed. 1990)).

“Rule 9(b) has four purposes: (1) the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of; (2) the rule exists to protect defendants from frivolous suits; (3) the rule eliminates fraud actions in which all the facts are learned after discovery; and (4) the rule protects defendant from harm to their goodwill and reputation.”

In re Derivium Capital, LLC, 380 B.R. 407, 421 (Bankr.D.S.C. 2006) (citing Harrison, 176 F.3d at 784).

When dealing with Rule 9(b):

“A court should hesitate to dismiss a complaint . . . if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.”

Harrison, 176 F.3d at 784.

Analysis of the allegation supporting these causes of action is difficult due to the fact that many of the representations set forth in the general allegations are alleged to have been made to ESA, not a party to this lawsuit, and resulting actions were taken by ESA rather than Cole. Further, Cole simply alleges that allegations were made by “Prospect.” Analysis is further complicated by the structure and length of the counterclaim. Working backwards from the two damage allegations relevant to these causes of action, it appears that Cole claims (1) had he known the truth about

representations made to him, he would not have signed the Guaranty Agreement; and (2) he would not have jeopardized his government certifications “by entering into new contracts when Prospect had no intention of resolving the bonding problem or providing additional funding for the purchase of equipment.”

The law requires Cole to identify the time and place of any false representations, and the identity of the person making such representations. Cole does allege a specific date in one paragraph of the allegations—a meeting held on July 3, 2007. Representations about “resolving the bonding problem” and “providing additional funding” for ESA occurred at that meeting per a reading of all of the allegations.⁵ That meeting occurred after Cole signed the Guaranty Agreement and after the amendment of the loan documents, so any representations on that date could not have induced him to execute the Guaranty Agreement or any associated documents to his detriment.

Regarding any representation about further equipment funding, the counterclaim specifically alleges:

118. Prior to closing, Prospect advised ESA that it would provide the necessary financing, above the amount in the Credit Agreement, for ESA to purchase new equipment.

119. In reliance on that commitment, ESA secured more than 100 million in opportunities from the Department of Interior and Army Corp of Engineers which would require \$25 million in equipment purchases.

120. Prospect provided no additional funding for the purchase of equipment.

⁵ See paragraphs 110 and 111 of Amended Answer and Counterclaim.

121. ESA lost the opportunities with the Department of Interior and Army Corp of Engineers and its ability to obtain such contracting in the future.

122. Because the certifications were personal to the Defendant [Cole], ESA's loss of opportunities with the Department of Interior and Army Corp of Engineers may prevent Defendant [Cole] from obtaining such contracting in the future.⁶

The timeframe of "prior to closing" is vague, and there are no allegations whatsoever regarding the place of or identity of the person making any representation. In fact, there is no allegation that there was any representation to Cole.

Finally, the counterclaim asserts that as a result of an alleged misrepresentation Cole "may" be harmed in the future. Even if the Court can get past the other weaknesses of the fraud allegations, the use of the term "may" in this damage allegation renders it uncertain and speculative, and therefore insufficient to constitute a "consequent and proximate injury" to Cole individually. See Williams v. Hinson, No. 06-3465, 2008 WL 410110, at *6 (D.S.C. Feb. 12, 2008). "Fraud without damage or damage without fraud is not actionable." 28 S.C. Jur. Fraud § 16 (2008) (citing Williams v. Haverty Furniture Co., 182 S.C. 100 (1936)).

It is not necessary that the damage be actual or present, but rather it is sufficient that the injury is to accrue in the future. 17A C.J.S. Contracts § 170 (2008) (citing Lacey v. Edmunds Motor Co., 269 Ala. 398 (1959)). However, Cole does not state that he has been harmed or even that he will be harmed in the future with any certainty. He has not

⁶ Further, the counterclaim generally alleges that Prospect had the requisite intent (for the fraud cause of action), and that the hearer of any misrepresentation was ignorant of the truth and had the right to rely on the representation.

stated that he has or will experience any harm that is personal to him, separate and distinct from any harm to ESA.

Prospect's Motion to Dismiss Cole's Amended Counterclaims for fraud and constructive fraud is granted as he has failed to plead them sufficiently to survive a 12(b)(6) challenge.

Breach of Contract

Cole labeled this cause of action "Breach of the Covenant of Good Faith and Fair Dealing" in the Amended Counterclaim, but argued in his brief that it is actually an action for breach of contract. A party must allege "the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach." Taylor v. Cummins Atlantic, Inc., 852 F.Supp. 1279, 1286 (D.S.C. 1994). "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Regions Bank v. Schmauch, 354 S.C. 648, 660 S.E.2d 432, 439 (S.C.Ct.App. 2003). Cole alleges that, via the Guaranty Agreement, "Prospect promised that its conduct would not purposefully create additional liability for Defendant [Cole]" and Prospect's misrepresentations and conduct have caused Cole's liability under the Guaranty Agreement to be greater than it should be. A guaranty agreement is a contract, but a guarantor cannot claim breach when the other contracting party merely exercises its contract rights. See First Federal v. Dangerfield, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (S.C. Ct. App. 1992). There are no allegations that Prospect is taking any action other than exercising its collection rights under the Guaranty Agreement. Therefore, Cole has failed to state a claim for breach of contract upon which relief can be granted.

Defamation

To avoid Rule 12(b)(6) dismissal of a defamation claim, the party bringing the claim must show the statement to be actionable and defamatory. White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). Defamatory means the statement impeached the plaintiff's reputation, whereas actionable means the statement caused injury to the plaintiff. Id. Further, the party bringing a defamation claim must allege the following elements: (1) a defamatory meaning, (2) published with actual or implied malice, (3) the falsity of the statement, (4) published by the defendant, (5) the statement concerns the plaintiff, and (6) damages are presumed or the plaintiff has special damages. Parker v. Evening Post Publishing Co., 317 S.C. 236, 242-43, 452 S.E.2d 640, 644 (S.C.Ct.App. 1994).

A claimant must plead defamation "with sufficient particularity to enable the court to determine whether the statement was defamatory." Esancy v. Quinn, 2006 WL 322607, at *4(W.D.N.C. 2006) quoting Stutts v. Duke Power Co., 47 N.C.App. 76, 83-84, 266 S.E.2d 861, 866 (1980). Cole includes the following allegations in the Amended Counterclaim:

229. Upon information and belief, Prospect or John Barry, or an agent on behalf of either, has contacted potential employers of Defendant [Cole] and has made false, disparaging comments about Defendant [Cole].
230. Defendant's [Cole] reputation has been harmed because of Prospect's slanderous statements.

Cole's counterclaim fails to provide enough information to infer the content of the statements, the publisher of the statements, to whom the statements were made, and when

the statements were made. Therefore, Prospect's motion to dismiss Cole's Amended Counterclaim for defamation is granted.

Negligent Supervision

Cole alleges that Prospect owed a duty of care in the supervision of its agents and employees; Prospect breached that duty towards Cole; Cole is no longer employed; and, therefore, Cole has been damaged by Prospect's negligent supervision of its employee's and agents. More specifically, Cole identifies the following relevant allegations of the Amended Counterclaim:

196. Numerous agents and/or employees of Prospect were involved in the day to day affairs of ESA.
197. Numerous agents and/or employees of Prospect were involved in the development of the guaranty agreement signed by Defendant [Cole].
198. Such agents/employees, acting on behalf of Prospect, made representations that were fraudulent and which harmed ESA and Defendant [Cole].
199. Such agents/employees took certain actions that have harmed ESA and the Defendant [Cole].
200. Because of its relationship with ESA, Prospect had a duty to exercise due care by providing the necessary supervision of such agents/employees.
201. Because Prospect received direct benefit from and knew that Defendant's [Cole] livelihood depended upon his sole source government certifications, Prospect had a duty to exercise due care with regard to ESA and to Defendant [Cole], individually.
202. Prospect breached that duty by failing to adequately supervise its agents/employees that have caused harm to ESA and Defendant [Cole].

Under South Carolina law, negligent supervision subjects an employer to liability for intentional harm caused by an employee's acts that fall outside the scope of

employment. Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). In addition, notice of the following elements must be shown: the employee “(1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control his employee, and (3) the employer knows or should know of the necessity and opportunity for exercising such control.” Moore v. Berkeley County School District, 326 S.C. 584, 590, 486 S.E.2d 9, 12 (S.C.Ct.App. 1997).

Cole’s Amended Counterclaim for negligent supervision fails to allege any wrongdoing on behalf of Prospect’s employees occurring outside the scope of their employment. On the contrary, the allegations of the Amended Counterclaim suggest that any wrongdoing by Prospect’s employees occurred within the scope of employment. Prospect’s Motion to dismiss Cole’s Amended Counterclaim for negligent supervision is granted.

Negligence

In addition to the general allegations of the Amended Counterclaim, in support of his negligence claim Cole alleges:

190. Because of Prospect’s relationship with ESA, Prospect had a duty to exercise due care with regard to its business transactions with ESA.
191. Because Prospect received direct benefit from and knew that Defendant’s [Cole] livelihood depended upon his sole source government certifications, Prospect had a duty to exercise due care with regard to ESA and to Defendant [Cole], individually.
192. Through its misrepresentations and other bad conduct, Prospect breached this duty.
193. Because of such breach, ESA is no longer operating and Defendant [Cole] is no longer employed.

194. Defendant [Cole] has been damaged by Prospect's conduct.

When prosecuting a negligence claim, in order to avoid a Rule 12(b)(6) dismissal under South Carolina law, "[t]he elements of negligence that must be established are a duty, a breach of that duty, proximate cause, and resulting injury." Schumacher v. Cooper, 850 F.Supp. 438, 447 (D.S.C. 1994). The allegations of the Amended Counterclaim provide enough facts for an inference that the required elements of the cause of action are present, which satisfies the notice pleading requirements of Fed. R. Civ. P. 8(a)(2). As a result, 12(b)(6) dismissal of the claim is inappropriate at this time, and Prospect's motion to dismiss Cole's Amended Counterclaim for negligence is denied.

Breach of Fiduciary Duty

Cole alleges that Prospect owed fiduciary duties towards Cole in his individual capacity; Prospect breached that duty by failing to act in accordance with such duties; and, as a result, Cole is unemployed and has been damaged by Prospect's conduct.

South Carolina recognizes the claim of breach of a fiduciary duty. Kuznick v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). The Supreme Court of South Carolina has provided that a fiduciary relationship is found "when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990). Fiduciary relationships are created bilaterally, and the party owing fiduciary duties "must have actually accepted or induced the confidence placed in him." Steele v. Victory Savings Bank, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (S.C.Ct.App. 1988). The list of relationships requiring fiduciary duties is not clearly defined, and courts are

mindful that fiduciary duties may be imposed upon new types of relationships that previously have not given rise to such duties. Goddard v. Fairways Development General Partnership, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993).

Prospect argues that, as lender, it owes no fiduciary duties to Cole in his capacity as guarantor of ESA's debt to Prospect. Prospect contends that, as a matter of law, fiduciary duties cannot exist between Prospect as lender and Cole as guarantor, citing Vercon Construction v. Highland Mortg. Co., No. 03-1370, 2005 WL 6158875 (D.S.C. 2006). However, the Vercon court noted that although a regular creditor-debtor relationship between a bank and customer is not fiduciary in nature, a fiduciary relationship may exist given the right facts. 2005 WL 6158875, at *5. Cole's factual allegations state that not only did he enter into a contract with Prospect, the Guaranty Agreement, but that Prospect needed and benefitted from Cole's assets (the sole source certifications) and exerted great control over ESA and Cole, thereby supplementing the lender/guarantor relationship and allegedly creating a fiduciary duty. Cole argues that these allegations are sufficient to overcome a 12(b)(6) motion, relying on First Federal v. Dangerfield, 307 S.C. 260, 414 S.E.2d 590 (S.C.Ct.App. 1992).⁷

After accepting all the allegations in Cole's Amended Counterclaim as true, and drawing reasonable factual inferences in Cole's favor, Cole has met the minimal test of alleging facts that may be actionable.

Intentional Infliction of Emotional Distress

To avoid Rule 12(b)(6) dismissal of a claim for intentional infliction of emotional distress:

⁷ In First Federal, the court determined that a guarantor cannot claim breach where the other party to the contract exercised its rights provided by the guaranty agreement. 307 S.C. at 267.

[T]he plaintiff must establish . . . (1) the defendant intentionally or recklessly inflicted severe emotional distress, or knew that distress would probably result from his conduct; (2) the defendant's conduct was so extreme and outrageous that it exceeded all possible bounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Gattison v. South Carolina State College, 318 S.C. 148, 151, 456 S.E.2d 414, 416 (S.C.Ct.App. 1995). “Initially, the court determines whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury.” Shupe v. Settle, 315 S.C. 510, 517, 445 S.E.2d 651, 655-56 (S.C.Ct.App. 1994). Cole alleges that Prospect’s conduct was extreme and exceeded the bounds of human decency; that Prospect’s conduct was atrocious and intolerable in a civilized community; and that, as a result, Cole suffered damage. Specifically:

154. Defendant [Cole] received an email written by John Barry, CEO of Prospect, which contained threats to Defendant’s [Cole] wife and daughter.
155. Because of John Barry’s threats, Defendant [Cole] wife and daughter moved in with the wife’s parents in Abilene, Texas.
156. Defendant [Cole] was separated from his family for numerous months which caused a strain on Defendant’s [Cole] marriage.
158. In October of 2007, due to excessive stress, Defendant [Cole] had a minor heart attack and was hospitalized for a week and a half.
159. Prospect or John Barry, individually, hired Gerald Gregory as an investigator.
160. Gerald Gregory was hired to harass Defendant [Cole] and his family.

161. Gerald Gregory has made false representations to Defendant's [Cole] family, prior employees, and neighbors in an effort to obtain information about Defendant [Cole] and his family.
162. Gerald Gregory has been to Abilene, Texas, and has engaged in activities designed to frighten Defendant [Cole] and his family.
164. Upon information and belief, Prospect or John Barry, or an agent on behalf of either, has accessed Defendant's [Cole] personal email account.
224. Prospect hired Gerald Gregory in order to inflict severe emotional distress on Defendant [Cole] and his family.
225. The conduct of Prospect, through Gerald Gregory or others, was so extreme that it exceeded all possible bounds of human decency.
226. The conduct of Prospect, through Gerald Gregory or others, was atrocious and utterly intolerable in a civilized community.
227. Prospect's actions have caused Defendant [Cole] to suffer emotional distress so severe that no reasonable man could be expected to endure it.

The allegations are sufficient for the Court to find that reasonable persons might differ on the question of whether the conduct was so extreme and outrageous as to permit recovery. Therefore, Prospect's motion to dismiss Cole's Amended Counterclaim for intentional infliction of emotional distress is denied.

IT IS THEREFORE ORDERED that Prospect's Motion to Dismiss is **GRANTED** as it relates to Prospect's Amended Counterclaims for Fraud, Constructive Fraud, Negligent Supervision, Breach of Contract, and Defamation. Prospect's Motion to Dismiss Amended Counterclaims for Negligence, Breach of Fiduciary Duty, and Intentional Infliction of Emotional Distress is **DENIED**.