

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE CLEMENT GROUP, LLC.,	§	
	§	
v.	§	
	§	
ETD SERVICES, LLC., D/B/A THE	§	Civil Action No. 4:16-cv-00773
DAVITZ GROUP;	§	Judge Mazzant
E. EARL DAVIS, II;	§	
TARA DAVIS,	§	
	§	
v.	§	
	§	
BILL’S BOOKKEEPING SERVICES, LLC.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff’s Partial Motion to Dismiss Defendants’ First Amended Counterclaim (Dkt. #13). After reviewing the pleadings, the Court finds the motion should be denied.

BACKGROUND

The Clement Group, LLC (“Clement”), is an Alabama-based company operating in Montgomery, Alabama (Dkt. #10 at p. 11). Clement’s members are Alabama citizens (Dkt. #10 at p. 12). ETD Services, LLC d/b/a The Davitz Group (“ETD”), is a Texas-based company operating in McKinney, Texas (Dkt. #10 at p. 10). ETD’s sole member is a Texas citizen (Dkt. #10 at p. 12). Bill’s Bookkeeping Services, LLC (“BBS”) is an Alabama-based company operating in Montgomery, Alabama (Dkt. #10 at p. 11). BBS’s members are Alabama citizens (Dkt. #10 at p. 12).

Both Clement and ETD operate as construction companies (Dkt. #10). On May 3, 2013, Clement and ETD agreed to become partners as part of the United States Small Business

Association's Mentor/Protégé Program (the "SBA Mentor Program") (Dkt. #10 at p. 17). Under this program, ETD, the protégé, sought to gain business insight and experience in providing contacting services to federal government agencies in construction and renovation projects on military installations (Dkt. #10 at p. 17). The program allowed joint ventures between Clement and ETD to bid for federal contracts for which the companies individually would otherwise not have been eligible to bid (Dkt. #10 at p. 17). ETD alleges that Craig Clement, the president of Clement, represented to Earl Davis, ETD's sole member, that he had the experience and knowledge to utilize the opportunities provided by the SBA Mentor Program (Dkt. #10 at p. 18).

On or about May 2014, ETD and Clement formed a joint venture known as ETD-TCG, LLC (Dkt. #10 at p. 18). On July 17, 2014, ETD and Clement entered into a Joint Venture Agreement to bid for projects involving construction services for the United States Army Corp of Engineers (the "USACE"), Norfolk District (Dkt. #10 at p. 18). On August 12, 2014 and December 18, 2014, ETD-TCG, LLC entered into two addenda to the Joint Venture Agreement to provide construction services for the USACE, Mobile District (Dkt. #10 at p. 18). On January 20, 2015, ETD-TCG, LLC entered into another addendum to the Joint Venture Agreement to provide design-build construction services to the USACE, Louisville District (collectively, the "Joint Ventures") (Dkt. #10 at p. 19).

Prior to Clement and ETD forming ETD-TCG, LLC, BBS performed bookkeeping services for Clement (Dkt. #10 at p. 15). BBS managed a "pooling arrangement" in which participants contributed a percentage of their revenue from construction projects to a general fund managed by BBS (Dkt. #10 at p. 15). Participants could use the fund to pay their overhead expenses as well as direct and indirect costs (Dkt. #10 at p. 15). ETD alleges it was required to participate in the "pooling arrangement" during the entirety of the Joint Ventures (Dkt. #10 at p. 19).

ETD alleges that “from the beginning of the operation of the Joint Ventures” it expressed concerns to Clement that “all did not seem appropriate with respect to the allocations for costs and expenses of the Joint Ventures, the profits and losses of the Joint Ventures.” (Dkt. #10 at p. 19). ETD alleges it received limited financial reports and that BBS and Clement ignored its requests for project information and pay requests (Dkt. #10 at p. 19–20). Specifically, ETD alleges that in September 2015, it sought bonding coverage for a construction project in Arkansas from Baldwin Cox (Dkt. #10 at p. 20). ETD alleges that as part of its bond application, it provided Baldwin Cox a set of financial records prepared by BBS (Dkt. #10 at p. 20). ETD alleges that Baldwin Cox found the financial records reflected a \$1.1 million distribution to ETD’s members (Dkt. #10 at p. 20). ETD alleges that during that same period, BBS advised Earl Davis that ETD’s financial records reflected a \$600,000 loss (Dkt. #10 at p. 20). ETD alleges it continued to ask BBS and Clement about this apparent discrepancy and BBS and Clement refused to respond to ETD. ETD alleges that, on information and belief, Clement and BBS charged ETD-TCG, LLC excessive consulting fees (Dkt. #10 at p. 20).

ETD alleges that ETD and Clement met several times in late 2015 and early 2016 to attempt to resolve the dispute (Dkt. #10 at p. 21). As a part of the discussions between Earl Davis and Craig Clement, ETD alleges Craig Clement proposed that Clement enter into a subcontract with ETD-TCG, LLC (Dkt. #10 at p. 21). Pursuant to the subcontract, Clement would perform the administration of ETD-TCG, LLC’s contract with the USACE for various projects pending between the two entities (Dkt. #10 at p. 21). ETD alleges Craig Clement “made assurances to ETD” that such a subcontract was acceptable to the SBA Mentor Program and that Clement’s position as a subcontractor of ETD-TCG, LLC would not negatively affect ETD’s financial position in ETD-TCG, LLC (Dkt. #10 at p. 21). On February 15, 2016, ETD-TCG, LLC entered

into a subcontract (the “Subcontract”) with Clement that allowed Clement to assume the role of a prime subcontractor for ETD-TCG, LLC (Dkt. #10 at p. 22); (Dkt. 10, Exhibit F).

After the execution of the Subcontract, ETD continued to serve as ETD-TCG, LLC’s project manager and remained responsible for approving pay applications addressed to the USACE (Dkt. #10 at p. 22). ETD also remained responsible for approving payments to all subcontractors, including Clement, in its role as subcontractor (Dkt. #10 at p. 22). ETD alleges that Clement demanded that ETD approve all Clement’s pay requests to the USACE without providing appropriate supporting documentation (Dkt. #10 at p. 22). On June 23, 2016, and July 5, 2016, ETD sent Clement a letter terminating the subcontracts between ETD-TCG, LLC and Clement (Dkt. #10 at p. 22).

ETD alleges Clement then advised its lower-tier subcontractors working on projects for the USACE that they were no longer under contract and payment was no longer assured (Dkt. #10 at p. 23). ETD also alleges that Clement informed the USACE of the dispute and that all work would cease on USACE projects (Dkt. #10 at p. 23). On July 11, 2016 and July 21, 2016, the USACE issued ETD, Clement, and ETD-TCG, LLC notices threatening to terminate the contract between the USACE and ETD-TCG, LLC for cause (the “Cure Notices”) (Dkt. #10 at p. 23); (Dkt. #10, Exhibit G). In response to the Cure Notices, ETD issued a partial rescission of the cancellation of the Subcontract in order to allow lower-tier subcontractors working under Clement to continue to work on the USACE projects (Dkt. #10 at p. 23). ETD also agreed to approve pay requests from lower-tier subcontractors provided ETD received sufficient documentation establishing such subcontractors’ right to payment (Dkt. #10 at p. 23)

On October 7, 2016, Clement brought suit against ETD, alleging breach of contract, breach of fiduciary duty, defamation, conversion, unjust enrichment and fraud (Dkt. #1). On December

26, 2016, ETD filed a First Amended Original Answer, Affirmative Defenses, and Counter-Complaint (Dkt. #10). ETD brings counterclaims against Clement for breach of contract, breach of fiduciary duty, unjust enrichment, common law fraud, and statutory fraud under the Texas Deceptive Trade Practices Act (“DTPA”) (Dkt. #10). ETD’s Counter-Complaint included a Third-Party Complaint against BBS alleging unjust enrichment, common law fraud, and statutory fraud under the DTPA (Dkt. #10).

On January 9, 2017, Clement filed its Partial Motion to Dismiss ETD’s First Amended Counterclaim (Dkt. #13). Clement seeks to dismiss ETD’s statutory fraud and DTPA claims. On February 1, 2017, ETD filed a response (Dkt. #19). On January 31, 2017, Clement filed a reply (Dkt. #18).

LEGAL STANDARD

The Federal Rules of Civil Procedure require that each claim in a complaint include a “short and plain statement . . . showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Each claim must include enough factual allegations “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A Rule 12(b)(6) motion allows a party to move for dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded facts in plaintiff’s complaint and view those facts in the light most favorable to the plaintiff. *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012). The Court may consider “the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The Court must then determine

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