UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-80184-Civ-SCOLA

MICHAEL C. McINTYRE, and
CAROL G. McINTYRE,

Plaintiffs,
vs.

MARRIOTT OWNERSHIP RESORTS, INC., and
MARRIOTT RESORTS TITLE COMPANY, INC.,

Defendants.
_____/

Order On The Defendants' Motion To Dismiss

This complicated litigation arises out of the sale of vacation timeshare property in South Florida. For the reasons explained in this Order, the Defendants' Motion to Dismiss is granted in part (as to the claims under the Florida Deceptive and Unfair Trade Practices Act and the Florida Vacation Plan and Timesharing Act) and denied in part (as to the unjust enrichment claim). The Plaintiffs will be permitted to replead its claim under the Florida Vacation Plan and Timesharing Act.

1. Background[1]

Marriott Ownership Resorts developed a timeshare property in Palm Beach County, Florida. The Plaintiffs purchased a timeshare unit on that property in 2009. As part of the sales presentation leading up to that sale, Marriott Ownership Resorts allegedly told the Plaintiffs that purchasing title insurance was a necessary and required component of purchasing a Marriott timeshare interest. Through the purchase contract, the Plaintiffs agreed to pay for the closing costs, including title insurance premiums. The purchase contract contained a default provision that Marriott Resorts Title Company would act as the closing agent, and as such would obtain the title insurance. The Plaintiffs did not invoke their option to select a different closing agent. Marriott Ownership Resorts and the Plaintiffs closed their deal for the

[1] The factual background is taken from the allegations in the Amended Complaint, ECF No. 7. A court considering a motion to dismiss must accept well-pleaded factual allegations as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007); *see also Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

timeshare, and title to the timeshare was conveyed to the Plaintiffs under a special warranty deed.

According to the Plaintiffs, because Marriott Ownership Resorts created the timeshare estates on this property, the title insurance that they were required to purchase was superfluous to the protection afforded them under the special warranty deed. In the Plaintiffs' words: "Despite Marriott Defendants' representations that title insurance is a necessary component in a [Marriott Ownership Resorts] timeshare purchase, the quality of the Special Warranty Deed renders Plaintiffs' title insurance policy useless." (Am. Compl. ¶ 37.) The Plaintiffs contend that because Marriott Resorts Title Company collected the fees relating to the purchase of the title insurance, and since Marriott Resorts Title Company is a wholly-owned subsidiary of Marriott Ownership Resorts, both companies unlawfully benefited from this arrangement that was perpetrated through the misrepresentations made in the sales presentation.

The Plaintiffs assert 3 claims: (1) for violation of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA); (2) for violation of Florida's Vacation Plan and Timesharing Act; and (3) for unjust enrichment.

2. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept all of the Complaint's allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Under Federal Rule of Civil Procedure 8, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The plaintiff must nevertheless articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim 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 misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Thus, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not survive dismissal. *Id.*

In applying the Supreme Court's directives in *Twombly* and *Iqbal*, the Eleventh Circuit has provided the following guidance to the district courts:

> In considering a motion to dismiss, a court should 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, assume their

> veracity and then determine whether they plausibly give rise to an entitlement to relief. Further, courts may infer from the factual allegations in the complaint obvious alternative explanation[s], which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.

Kivisto v. Miller, Canfield, Paddock & Stone, PLC, 413 F. App'x 136, 138 (11th Cir. 2011) (citations omitted). "This is a stricter standard than the Supreme Court described in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which held that a complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Mukamal v. Bakes*, 378 F. App'x 890, 896 (11th Cir. 2010). These precepts apply to all civil actions, regardless of the cause of action alleged. *Kivisto*, 413 F. App'x at 138.

Where a cause of action sounds in fraud, however, Federal Rule of Civil Procedure 9(b) must be satisfied in addition to the more relaxed standard of Rule 8. Under Rule 9(b), "a party must state with particularity the circumstances constituting fraud or mistake," although "conditions of a person's mind," such as malice, intent, and knowledge, may be alleged generally. Fed. R. Civ. P. 9(b). "The 'particularity' requirement serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 86 (11th Cir. 2008) (citations omitted). "When a plaintiff does not specifically plead the minimum elements of their allegation, it enables them to learn the complaint's bare essentials through discovery and may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [grounded on] baseless allegations used to extract settlements." *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002). Thus, the Rule's "particularity" requirement is not satisfied by "conclusory allegations that certain statements were fraudulent; it requires that a complaint plead facts giving rise to an inference of fraud." *W. Coast Roofing & Waterproofing*, 287 F. App'x at 86. To meet this standard, the Complaint needs to identify the precise statements, documents, or misrepresentations made; the time and place of, and the persons responsible for, the alleged statements; the content and manner in which the statements misled the plaintiff; and what the defendant gained through the alleged fraud. *Id.*

With these standards in mind, the Court turns to the Plaintiffs' Amended Complaint to see whether their claims are sufficiently alleged to withstand dismissal.

3. Legal Analysis

A. Count I: Florida's Deceptive and Unfair Trade Practices Act claim.

(1) *FDUTPA does not apply to Marriott Resorts Title Company under the insurance-entity exception.*

The Marriott Defendants first argue that the Plaintiffs' claim under FDUTPA fails, as a matter of law, because a FDUTPA claim cannot be based on regulated insurance activities. (Mot. Dismiss 7, ECF No. 12.) The Plaintiffs respond that a FDUTPA claim is permissible in this case because the activity that is being challenged is the Defendants' "misrepresentations regarding the value and necessity of title insurance in the first instance." (Resp. 11, ECF No. 17.)

FDUTPA does not apply to an entity involved in the business of insurance that knowingly misrepresents the benefits or advantages of an insurance policy. FDUTPA exists to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." *See* Fla. Stat. § 501.202(2) (2013). But FDUTPA "does not apply" to any "person or activity regulated under laws administered by [Florida's] Office of Insurance Regulation of the Financial Services Commission . . . [or] by the Department of Financial Services." Fla. Stat. § 501.212(4) (2013). The Department of Financial Services is charged with the enforcement of the provisions of Florida's Insurance Code. Fla. Stat. § 624.307(1) (2013). Under Florida's Insurance Code, "no person" may engage in "an unfair or deceptive act or practice involving the business of insurance." Fla. Stat. § 626.9521(1) (2013). In this context, an unfair or deceptive act or practice is defined as knowingly misrepresenting the "benefits, advantages, conditions, or terms of any insurance policy." Fla. Stat. § 626.9541(1)(a)(1) (2013). Within this part of the Insurance Code, a "person" is defined as "any entity involved in the business of insurance." Fla. Stat. § 626.9511(1) (2013).

FDUTPA does not apply to Marriott Resorts Title Company. Marriott Resorts Title Company obtained the title insurance for the Plaintiffs in its capacity as closing agent. (Am. Compl. ¶32, ECF No. 7.) By the Plaintiffs' own allegations, Marriott Resorts Title Company is an entity involved in the business of insurance. It therefore falls under the Florida Insurance Code's regulations against unfair or deceptive acts or practices. The Plaintiffs' argument that their claims only relate to misrepresentations regarding the

value and necessity of title insurance are not convincing because that is just the sort of activity that the Insurance Code regulates. *See* Fla. Stat. § 626.9541(1)(a)(1) (2013) (misrepresenting the "benefits, advantages, conditions, or terms of any insurance policy" is an unfair or deceptive act or practice under Florida's Insurance Code). Since the conduct alleged against Marriott Resorts Title Company is the type regulated by the Florida Department of Financial Services, Fla. Stat. § 624.307(1), the Plaintiffs' FDUTPA claim cannot stand, Fla. Stat. § 501.212(4). Count I will be dismissed against Marriott Resorts Title Company.[2]

(2) *FDUTPA's statutory exception for the sale of real estate by a licensed real estate entity bars this claim against Marriott Ownership Resorts.*

The remaining Defendant, Marriott Ownership Resorts, argues that FDUTPA does not apply to it under another exception of the Act that applies to acts or practices involving the sale of real estate by a licensed person. (Mot. Dismiss 9, ECF No. 12.) The Plaintiffs respond to this argument by arguing that FDUTPA's statutory carve-out of does not apply based on the allegations raised in their Amended Complaint. (Resp. 13, ECF No. 17.)[3]

FDUTPA "does not apply" to an act or practice "involving" the sale of real estate by a licensed real estate entity if the act or practice involves fraud or misrepresentation. Fla. Stat. § 501.212(6) (2013); Fla. Stat. § 475.25(1)(b) (2013). Although the Plaintiffs attempt to distinguish between the sale of the real estate (the timeshare) and the sale of the title insurance in their Response, the Amended Complaint plainly has them inextricably intertwined. For example, the Plaintiffs' allege: "When purchasing the Timeshare, the Marriott Defendants required that Plaintiffs procure title insurance in order for Plaintiffs to purchase the Timeshare itself . . . ." (Am. Compl. ¶ 29.) The Plaintiffs also cite to a portion of the real-estate contract that refers to the "title insurance

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[2] It is unclear whether Marriott Ownership Resorts is an entity involved in the business of insurance simply because it owns a subsidiary title insurance company. The parties have not fully briefed this argument and so the Court has not addressed it.

[3] The Plaintiffs also argue that since they have not alleged that Marriott Ownership Resorts is "licensed" under the meaning of the Act that this issue should not be addressed at this point. But Marriott Ownership Resorts has attached the license records from the Florida Department of Business and Professional Regulations demonstrating that Marriott Ownership Resorts was a licensed Real Estate Corporation at the time when the Plaintiffs purchased their timeshare. This is enough. *See Sea Shelter IV, LLC v. TRG Sunny Isles V, Ltd.*, No. 08-21767, 2009 WL 692469 at *7 (S.D. Fla. Mar. 17, 2009) (Jordan, J.) (explaining that licensee details such as those supplied by Marriott Ownership Resorts may be considered on a motion to dismiss since they are part of the public record).

premiums." (*Id.* ¶ 31.) This is the Plaintiffs' case, and as they have alleged it, they are seeking to hold Marriott Ownership Resorts liable for an alleged fraud or misrepresentation based upon an act or practice involving the sale of the timeshare property. Since Marriott Ownership Resorts is a licensed real estate entity, FDUTPA does not apply to this claim. Count I will be dismissed against Marriott Ownership Resorts.

B. Count II: Florida Vacation Plan and Timesharing Act claim.

(1) *The Plaintiffs' have a viable claim for this statutory violation.*

The Plaintiffs allege that the Marriott Defendants violated Florida's Vacation Plan and Timesharing Act Claim, Florida Statutes Sections 721.01-721.98. Specifically, the Plaintiffs allege that the Marriott Defendants made false or misleading statements regarding the promotion of the timeshare in violation of Florida Statue Section 721.11(4)(a).[4] The Marriott Defendants argue that this claim should be dismissed because the Statute only precludes misrepresentations regarding the "timeshare plan," which it argues should be narrowly construed as the plan in which the purchaser receivers ownership rights in the timeshare property. (Mot. Dismiss 14 (citing Fla. Stat. § 721.05(39) (2013)).) According to the Marriott Defendants, the purchase of the title insurance was not a part of the "timeshare plan."

The Marriott Defendants' argument here fails for the same reason it succeeded with respect to the FDUTPA claim. As framed by the Plaintiffs, the alleged wrongdoings here are the putative misrepresentations "regarding the necessary and required nature of title insurance for the Timeshare" made during the sales presentations for the Timeshare. (Am. Compl. ¶ 30.) The Plaintiffs have inextricably wrapped up the sale of the timeshare with required title insurance. As the Marriott Defendants correctly argued, the FDUTPA claims were dismissed consistent with the insurance-entity exception and the real-estate exception to that Act because the marketing and sale of the insurance and the timeshare could not be unbundled. In analyzing the Vacation Plan and Timesharing Act, that same analysis must apply. The Marriott Defendants' alleged misrepresentations about the necessity of purchasing title insurance as a component of purchasing the timeshare are fairly construed as a misrepresentation regarding the promotion of the timeshare plan. Count II will not be dismissed for this reason.

[4] A private cause of action exists for the violation of this Statute. Fla. Stat. § 721.21 (2013).

(2) *The Plaintiffs have not alleged the required level of particularity regarding this claim.*

The Marriott Defendants correctly argue that the Plaintiffs have not pleaded this claim with the level of particularity required under Rule 9(b). "In alleging fraud . . ., a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Rule 9(b) requires a plaintiff to allege "precisely what statements were made," and the time and place of each such statement and the person responsible for making" it. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (internal quotation/citation omitted).

Here, the Plaintiffs' allegations that verbal representations were made during sales presentations are not enough. The Plaintiffs must allege precisely what statements were made, and who made them. For this reason, Count II must be dismissed as well.

C. Count III: Unjust Enrichment Claim

The unjust enrichment claim may be pleaded in the alternative at this stage of the case. *Cf.* Fef. R. Civ. P. 8(d)(3).

4. Conclusion

The crux of the dispute here is whether the title insurance obtained in connection with the timeshare purchase is broader than the special warranty deed issued by Marriott Ownership Resorts. The ultimate issue in dispute is whether a lien, encumbrance, or claim brought against the condominium land or the other common elements appurtenant to the Plaintiffs' condominium unit and arising prior to Marriott's purchase of the property would impair the Plaintiffs' timeshare estate – and if so, whether the Plaintiffs' title insurance, purchased by Marriott Resorts Title Company, would cover such a claim.

For the reasons explained above, it is **ordered** that the Defendants' Motion to Dismiss (ECF No. 12) is **granted in part and denied in part**. Count I, for violation of Florida's Deceptive and Unfair Trade Practices Act, is dismissed with prejudice. Count II, for violation of Florida's Vacation Plan and Timesharing Act, is dismissed without prejudice. Count III, for unjust enrichment, remains. The Plaintiffs' may file a Second Amended Complaint by **December 27, 2013**.

Done and Ordered at Miami, Florida on December 9, 2013.

Robert N. Scola, Jr.
United States District Judge