

ERIC ZEBROSKI,	:	
	:	
Plaintiff,	:	C.A. No. 8816-VCP
	:	
v.	:	
	:	
PROGRESSIVE DIRECT INSURANCE	:	
COMPANY,	:	
	:	
Defendant.	:	
	:	

Date Submitted: January 9, 2014
Date Decided: April 30, 2014

Donald M. Ransom, Esq., Lauren M. McCrery, Esq., CASARINO CHRISTMAN
SHALK RANSOM & DOSS, P.A., Wilmington, Delaware; *Attorneys for*
Defendant.

PARSONS, Vice Chancellor.

In this action, an insured individual seeks to have the Court rescind an agreement that he executed with his insurance company releasing, in exchange for a nominal amount of money, all of his claims, including those for personal injury, arising out of an automobile accident with another, unidentified motorist. The insured claims that, at the time he executed the agreement, he believed, based on representations made to him by the defendant insurer's representatives, that he was releasing claims for damages to his vehicle only. The text of the release indicates, however, that he released *all* claims.

Since executing the agreement, the plaintiff has continued to experience pain and has been diagnosed as having a more serious injury than he originally understood. The plaintiff now seeks to avoid the agreement so he may pursue claims for personal injury. Specifically, the plaintiff claims that the release is invalid on two grounds: first, at the time he executed the agreement, both he and the defendant were mistaken as to the extent of his injuries, and, second, notwithstanding the parties' mutual mistake, the defendant misrepresented the scope of the release for the purpose of inducing the plaintiff to sign it.

The defendant has moved to dismiss the complaint in its entirety on the grounds that this Court lacks subject matter jurisdiction over the plaintiff's claims and that, in any event, the plaintiff has failed to state a claim upon which relief can be granted.

Having considered the parties' briefs and having heard argument on the motion, I conclude that this action should be dismissed, subject to the plaintiff's ability to transfer his case to a court of law.

I. BACKGROUND¹

A. The Parties

Plaintiff, Eric Zebroski, is a citizen of Delaware. At all relevant times, Zebroski has been an insured of Defendant, Progressive Direct Insurance Co. ("Progressive"), under an automobile insurance policy (the "Policy"), which provides Zebroski personal injury protection and uninsured motorist coverage ("UM").

Progressive is an insurance company incorporated outside Delaware that engages in the insurance business in Delaware.

B. Facts

On January 22, 2013, Zebroski was driving northbound on Route 13 when another driver, proceeding eastbound on Old State Road, drove into the intersection where the two roads meet at the same time as Zebroski. To avoid colliding with the other vehicle, Zebroski swerved to his right, causing his vehicle

¹ Unless otherwise noted, the facts set forth in this Memorandum Opinion are drawn from the operative complaint and from the documents integrated to or incorporated by reference in the complaint.

to crash into a ditch (the “Accident”). The other driver fled the scene and has not been identified.

After the Accident, Sharon Portier, or another Progressive representative, contacted Zebroski about the possibility of terminating, for \$750, any UM claims that he might assert. Thereafter, on February 4, 2013, Zebroski executed the “Release and Trust Agreement” (the “Release Agreement”), through which he agreed to the following:

Received from [Progressive], [] the sum of seven hundred fifty Dollars (\$750) in full settlement and final discharge of all claims, including claims under the above-numbered policy, for bodily injuries to Eric Zebroski arising out of the ownership, operation, maintenance or use of a [sic] uninsured automobile by an unknown driver that occurred on or about 1-22-13, at or near Townsend Delaware.²

The Release Agreement also provided that:

For the consideration aforesaid, and to the extent of any payment made hereunder, the undersigned agrees to hold in trust for the benefit of [Progressive] all rights of recovery which he, she, they or it shall have against any person or organization legally liable for such bodily injuries, and assigns to [Progressive] the proceeds of any settlement with or judgment against any such person or organization.

[Progressive] is authorized to take any action which may be necessary either in law or equity in the name of the under-signed [sic] against any such person or

² Compl. Ex. 1.

organization, and the undersigned covenants and agrees to cooperate fully with [Progressive] in the presentation of such claims or lawsuits and to furnish all papers and documents necessary in such pro-ceedings [sic] and to attend and testify in court if [Progressive] deems such to be necessary.³

Zebroski alleges that, when the Progressive representative presented him with this Release Agreement, she explained that the \$750 related to the damage to his vehicle only.

Before he executed the Release Agreement, Zebroski had received emergency medical care, but he alleges that he continued to experience pain in his neck and lower back, which radiated down through his limbs. On March 13, 2013, Zebroski underwent MRI testing, which revealed multiple spinal injuries, including “an acute cervical sprain [and] an acute lumbar sprain with moderate L3-4 right paracentral and L4-5 central herniation with compression.”⁴ After the MRI testing, Zebroski consulted with Ali Kalamchi, M.D., an orthopedic surgeon. Dr. Kalamchi prescribed medications and has indicated that Zebroski requires further treatment, including epidural injections and, perhaps, surgery. Since visiting Dr. Kalamchi, Zebroski has obtained physical therapy and pain management for his injuries and has experienced periods of total disability.

³ *Id.*

⁴ *Id.* Ex. 3.

Because the other driver involved in the Accident remains unidentified, Zebroski has sought further UM benefits under the Policy.⁵ In a letter dated April 9, 2014, however, Portier notified Zebroski's counsel that Zebroski settled his UM claims under the Policy by way of the Release Agreement.⁶ Thereafter, counsel for Zebroski asked Progressive to rescind the Release Agreement and permit Zebroski to pursue his UM claims.⁷ Progressive has declined that request.

C. Procedural History

On August 13, 2013, Zebroski filed the Complaint in this action. In the Complaint, Zebroski seeks rescission of the Release Agreement either as an equitable remedy based on a mutual mistake of the parties as to the nature and extent of his injuries (Count I), or, alternatively, based on a claim of equitable fraud, *i.e.*, that he justifiably relied on Progressive's misrepresentation concerning the scope of the Release Agreement before he executed it (Count II).

On October 10, Progressive moved to dismiss the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim (the "Motion to Dismiss"). I heard argument on the Motion to Dismiss on January 9, 2014.

⁵ *Id.* Ex. 2.

⁶ *Id.*

⁷ *Id.* Ex. 3.

D. Parties' Contentions

Progressive has moved to dismiss the Complaint on two grounds. First, it contends that this Court lacks subject matter jurisdiction over this action because Zebroski can obtain the relief he seeks in a court of law. And, second, Progressive contends that, in any event, Zebroski has failed to state a claim based on equitable fraud or any other equitable right. In support of its first argument, Progressive relies on a number of cases from the Superior Court, discussed more fully *infra* in Section II, in which the court ruled on the validity of a general release and whether such release barred any related personal injury claims.

For his part, Zebroski asserts that rescission of the Release Agreement is the only sufficient remedy because ultimately he seeks to have the Court restore his ability to pursue personal injury claims. In that regard, Zebroski emphasizes that he “has not asked this Court to award any kind of monetary relief or even to address the substance of the personal injury claims; that is for another day.”⁸ Zebroski also relies on this Court’s decision in *Obaitan v. State Farm*,⁹ for the proposition that the Court of Chancery previously has resolved issues similar to the ones presented in this case. Indeed, he argues that this Court *must* adjudicate cases

⁸ Pl.’s Opp’n Br. 7–8.

⁹ 1997 WL 208959, at *1 (Del. Ch. Apr. 17, 1997).

such as this case, where, as here, equitable causes of action (*e.g.*, equitable fraud) are at issue.

II. ANALYSIS

A. The Motion to Dismiss Under Rule 12(b)(1)

1. Standard

The Court of Chancery will dismiss an action under Rule 12(b)(1) “if it appears from the record that the Court does not have subject matter jurisdiction over the claim.”¹⁰ “The burden of establishing the court’s subject matter jurisdiction rests with the party seeking the Court’s intervention,”¹¹ although “[w]hen a challenge to subject matter jurisdiction is directed to the face of a complaint, the court accepts the plaintiff’s allegations of fact.”¹²

This Court is one of limited jurisdiction.¹³ As Delaware’s constitutional court of equity, the Court of Chancery acquires subject matter jurisdiction over a

¹⁰ *Envo, Inc. v. Walters*, 2009 WL 5173807, at *4 (Del. Ch. Dec. 30, 2009) (quoting *Pitts v. City of Wilm.*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009)).

¹¹ *Id.* (quoting *Maloney-Refaie v. Bridge at Sch., Inc.*, 2008 WL 2679792, at *7 (Del. Ch. July 9, 2008)) (internal quotation marks omitted).

¹² *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 588 (Del. 1970).

¹³ *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008).

case in only three ways:¹⁴ (1) the invocation of an equitable right;¹⁵ (2) the request for an equitable remedy where there is no adequate remedy at law;¹⁶ or (3) a statutory delegation of subject matter jurisdiction.¹⁷ “[T]he Court of Chancery will not exercise subject matter jurisdiction where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic ‘open sesame’ to the Court of Chancery.”¹⁸

“In deciding whether [] equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her

¹⁴ See *Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

¹⁵ 10 Del. C. § 341 (“The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity.”); *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 738 (Del. 1983).

¹⁶ 10 Del. C. § 342 (“The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.”); *Heathergreen Commons Condo. Ass’n v. Paul*, 503 A.2d 636, 642 (Del. Ch. 1985).

¹⁷ See *Candlewood Timber Gp.*, 859 A.2d at 997.

¹⁸ *Medek*, 2008 WL 4261017, at *3 (quoting *Christiana Town Ctr. v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003)) (internal quotation marks omitted).

claim.”¹⁹ Put another way, “the court must address the nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate.”²⁰ “It is a fundamental principle governing the conduct of litigation in this Court that it has no jurisdiction of a cause of action as to which the party seeking relief has an adequate remedy at law.”²¹

Here, as noted, Zebroski asks this Court to rescind, *i.e.*, set aside or cancel, the Release Agreement on two alternative grounds. In Delaware, rescissory relief can be granted both at law and in equity.²² I therefore must determine, as to

¹⁹ *Id.* (quoting *Candlewood Timber Gp.*, 859 A.2d at 997) (internal quotation marks omitted); see also *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987) (citation omitted) (“Chancery jurisdiction is not conferred by the incantation of magic words. Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will excuse the court . . . from a realistic assessment of the nature of the wrong alleged . . .”).

²⁰ *Medek*, 2008 WL 4261017, at *3 (quoting *IMO Indus., Inc. v. Sierra Int’l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001)) (quotation marks omitted).

²¹ *Hughes Tool Co. v. Fawcett Publ’ns, Inc.*, 297 A.2d 428, 431 (Del. Ch. 1972) (citing 10 Del. C. § 342), *rev’d on other grounds*, 315 A.2d 577 (Del. 1974). See also *Chateau Apartments Co. v. City of Wilm.*, 391 A.2d 205, 206 (Del. 1978).

²² See *E.I. duPont de Nemours & Co., v. HEM Research, Inc.*, 1989 WL 122053, at *3 (Del. Ch. Oct. 13, 1989). See also *Black’s Law Dictionary* 1333 (8th ed. 2004) (quoting Douglas Laycock, *Modern American Remedies* 627–28 (3d ed. 2002)) (internal quotation marks omitted) (“The modern

Zebroski's request for rescission based on mutual mistake, whether the nature of both the wrong alleged and the relief sought supports a finding that only equity can provide a remedy. In addition, I must determine whether Zebroski's claim for equitable fraud provides a basis for this Court to exercise subject matter jurisdiction over this case.

a. Mutual Mistake

As noted, in Count I, Zebroski seeks rescission of the Release Agreement based on the purported mutual mistake of the parties regarding the "nature and extent" of the injuries Zebroski suffered in the Accident.

As to this aspect of Zebroski's Complaint, I hold that he has an adequate remedy at law. Zebroski maintains that he seeks an order returning the parties to the *status quo ante*, i.e., cancelling the Release Agreement, so that he then may stand on his restored rights to pursue personal injury claims.²³ While Zebroski's

tendency is to treat rescission as equitable, but rescission was often available at law. If plaintiff had paid money, or had delivered goods, he could rescind by tendering whatever he had received from defendant and suing at law to recover his money or replevy his goods. But if he had delivered a promissory note or securities, or conveyed real estate, rescission required the court to cancel the instruments or compel defendant to reconvey. This relief was available only in equity.").

²³ Pl.'s Opp'n 5–6; Compl. ¶¶ 12, 17.

argument is tempting,²⁴ his request for a traditional equitable remedy here elevates form over substance and does not warrant this Court's exercise of subject matter jurisdiction over his claim.

Delaware's courts of law unquestionably have jurisdiction to adjudicate whether a release agreement bars a plaintiff from pursuing personal injury claims.²⁵ That is precisely what Zebroski seeks to accomplish here, although he has requested that this Court first pass on the validity of the Release Agreement.²⁶ Many of the cases in which the Superior Court ruled on the validity of a release

²⁴ I note, for example, that Delaware courts generally recognize rescission as an equitable remedy for mistake. *See Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982).

²⁵ *See, e.g., Patrick v. Ellis*, 2013 WL 5800908 (Del. Super. Oct. 18, 2013); *Bernal v. Feliciano*, 2013 WL 1871756 (Del. Super. May 1, 2013); *Alston v. Alexander*, 2011 WL 1225555 (Del. Super. Mar. 29, 2011), *aff'd*, 49 A.3d 1192 (Del. 2011) (TABLE); *Webb v. Dickerson*, 2002 WL 388121 (Del. Super. Mar. 11, 2002); *Hicks v. Doremus*, 1990 WL 9542 (Del. Super. Jan. 8, 1990); *Reasin v. Moore*, 1989 WL 41232 (Del. Super. Mar. 20, 1989); *Hicks v. Soroka*, 188 A.2d 133 (Del. Super. 1963). *Cf. McGuirk v. Ross*, 166 A.2d 429, 430 (Del. 1960) (affirming the Superior Court's invalidation, based on mutual mistake, of a release of personal injury claims). *See also Alltrista Plastics, LLC v. Rockline Indus. Inc.*, 2013 WL 5210255, at *12 (Del. Super. Sept. 4, 2013) ("Because [the defendant] only seeks to have the contract rescinded and to be restored to its original condition by the awarding of money damages, this Court does have jurisdiction to hear the affirmative defenses seeking rescission due to mutual mistake and fraud in the inducement. Therefore, [the plaintiff's] motion to dismiss [the defendant's] affirmative defenses seeking rescission is denied.").

²⁶ Compl. ¶ 12 (requesting that the Court set aside the Release Agreement so Zebroski may "pursue UM claims under the Policy.").

involved a plaintiff seeking to avoid the release, on mutual mistake or other grounds, to pursue personal injury claims directly against the tortfeasor.²⁷ In those cases, the tortfeasor defensively relied on a release that the plaintiff had executed with the tortfeasor's insurance carrier. Here, Zebroski intends to sue his own carrier based on UM coverage. Zebroski has not demonstrated, however, that this represents a material distinction between this case and the Superior Court cases cited above, especially in view of his ultimate objective to avoid the Release Agreement so that he may pursue financial benefits to which he contends he otherwise is legally entitled. In addition, Zebroski has not shown that, were this Court to cancel the Release Agreement, any further equitable relief would be required, such as restoring property rights.²⁸ On this basis, and because Zebroski has not demonstrated any way in which *legal* rescission would be inadequate, I

²⁷ See *supra* note 25 and accompanying text.

²⁸ *E.I. duPont de Nemours & Co.*, 1989 WL 122053, at *3 (“Equitable rescission . . . which is otherwise known as cancellation, is a form of remedy in which, in addition to a judicial declaration that a contract is invalid and a judicial award of money or property to restore plaintiff to his original condition is made, *further equitable relief is required* [, such as] reestablishing title or recovering possession of property.”) (emphasis added) (citations omitted).

conclude that his claim in Count I for rescission based on mutual mistake does not provide a basis for subject matter jurisdiction in this Court.²⁹

b. Equitable Fraud

Because Zebroski's cause of action for equitable fraud can be adjudicated only in a court of equity,³⁰ and because Zebroski seeks equitable rescission as a

²⁹ For similar reasons, I find unpersuasive Zebroski's citation to this Court's decision in *Obaitan v. State Farm*, 1997 WL 208959 (Del. Ch. Apr. 17, 1997), for the proposition that this Court can adjudicate claims for rescission based on mutual mistake that, ordinarily, might not invoke the special jurisdiction of this Court. The plaintiff in *Obaitan* sought rescission of a release agreement based on unilateral mistake, mutual mistake, and equitable fraud. *Id.* at *2. It is unclear from the Court's decision, however, whether the Court or any party raised the issue of the Court's subject matter jurisdiction in that action. Moreover, the *Obaitan* court granted the defendant's motion for summary judgment as to the unilateral mistake claim only, permitting the plaintiff to move forward on both equitable fraud and mutual mistake claims. *Id.* at *3. It is conceivable, therefore, that the *Obaitan* court concluded it had jurisdiction over the equitable fraud claim and exercised jurisdiction over the plaintiff's mutual mistake claim also under the equitable cleanup doctrine. Thus, I do not find my decision in this case that Zebroski's claim for rescission based on mutual mistake does not provide an independent basis for equitable jurisdiction to be inconsistent with the decision in *Obaitan*.

³⁰ See *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) ("Equity courts developed their own requirements for relief from fraud."); *Radius Servs., LLC v. Jack Corrozi Constr., Inc.*, 2009 WL 3273509, at *2 (Del. Super. Sept. 30, 2009) (dismissing plaintiff's equitable fraud claim for lack of subject matter jurisdiction); *Mark Fox Gp., Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, at *5 (Del. Ch. July 2, 2003) ("In addition to developing the concept of claims for [equitable fraud], the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action."); *Pepsi-Cola Bottling Co. of Salisbury, Md. v.*

remedy for the alleged equitable fraud,³¹ I deny Defendant's Motion to Dismiss Count II under Rule 12(b)(1). I next address whether Zebroski has stated a claim for equitable fraud.

B. The Motion to Dismiss Under Rule 12(b)(6)

1. Standard

As the Delaware Supreme Court has reaffirmed,³² “the governing pleading standard in Delaware to survive a motion to dismiss is reasonable ‘conceivability.’”³³ That is, when considering such a motion, a court must:

accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as “well-pleaded” if they provide the

Handy, 2000 WL 364199, at *6 (Del. Ch. Mar. 15, 2000) (holding that equitable fraud must be pursued exclusively in the Court of Chancery); *Biasotto, D.O. v. Spreen, D.O.*, 1997 WL 527956, at *8 n.8 (Del. Super. July 30, 1997) (“[The] common law provides a remedy only for intentional misrepresentations. That is its great distinction from equitable fraud, which allows the Court of Chancery to provide a remedy for negligent or innocent misrepresentations.”).

³¹ See *Clark v. Teeven Hldg. Co.*, 625 A.2d 869, 877 (Del. Ch. 1992) (citing *Hegarty v. Am. Commonwealths Power Corp.*, 163 A. 616, 618 (Del. Ch. 1932)) (“[A] defrauded purchaser may elect to disaffirm the contract and be restored to the *status quo ante*. In such a case, he would have an equitable action for rescission.”).

³² See *Winshall v. Viacom Int’l, Inc.*, 2013 WL 5526290, at *4 n.12 (Del. Oct. 7, 2013).

³³ *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.³⁴

This reasonable “conceivability” standard asks whether there is a “possibility” of recovery.³⁵ If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.³⁶ The court, however, need not “accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.”³⁷ Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.³⁸

Generally, the Court will consider only the pleadings on a motion to dismiss under Rule 12(b)(6). “A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff’s claim and incorporated in

³⁴ *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

³⁵ *Id.* at 537 & n.13.

³⁶ *Id.* at 536.

³⁷ *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

³⁸ *Crescent/Mach I P’rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

the complaint or (2) the document is not being relied upon to prove the truth of its contents.”³⁹

2. Equitable fraud

In Count II, Zebroski seeks an order from this Court equitably rescinding the Release Agreement as a remedy for his claim of equitable fraud.

The elements of equitable fraud are similar to those for common law fraud, except that “the claimant need not show that the respondent acted knowingly or recklessly—innocent or negligent misrepresentations or omissions suffice.”⁴⁰ Indeed, the concept of equitable fraud is more flexible and includes “all willful or intentional acts, omissions, and concealments which involve a breach in either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.”⁴¹ Despite this flexibility—and the lack of a *scienter* requirement—equitable fraud does not

³⁹ *Allen v. Encore Energy P’rs*, 72 A.3d 93, 96 n.2 (Del. 2013).

⁴⁰ *Envo, Inc. v. Walters*, 2009 WL 5173807, at *6 (Del. Ch. Dec. 30, 2009) (citing *Addy v. Piedmont*, 2009 WL 707641, at *18 (Del. Ch. Mar. 18, 2009)). *See also* *U.S. W., Inc. v. Time Warner Inc.*, 1996 WL 307445, at *26 (Del. Ch. June 6, 1996); *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28 (Del. Super. 1973) (“Although intent to defraud or deceive is an essential element to relief at law, it is not essential to equitable relief if a false statement has been made”).

⁴¹ 3 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 872, at 422 (5th ed. 2002).

encompass all claims that otherwise would amount to common law fraud. The reason is that equitable fraud only arises in two instances that support invoking the special jurisdiction of this Court.⁴² That is, a claim for equitable fraud can lie only where the claimant sufficiently pleads the existence of: (1) “a special relationship between the parties or other special equities, such as some form of fiduciary relationship”;⁴³ or (2) a “justification for a remedy that only equity can afford.”⁴⁴

Preliminarily, I note that Progressive argues that Zebroski has failed to satisfy the heightened pleading standard under Rule 9(b) for alleging fraud. Under that Rule, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”⁴⁵ “To satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person

⁴² *U.S. W., Inc.*, 1996 WL 307445, at *26.

⁴³ *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *13 (Del. Ch. Dec. 22, 2010); *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009) (“[Equitable fraud] requires special equities, typically the existence of some form of fiduciary relationship, such as that between a director and stockholder or a trustee and *cestui que trust*, although other circumstances might be cited.”).

⁴⁴ *Envo, Inc.*, 2009 WL 5173807, at *6 (citing *Wal-Mart Stores, Inc. v. AIG Ins. Co.*, 2006 WL 3742596, at *2 (Del. Ch. Dec. 12, 2006)).

⁴⁵ Ct. Ch. R. 9(b).

intended to gain by making the representations.”⁴⁶ “Essentially, the particularity requirement obligates plaintiffs to allege the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim.”⁴⁷ Having carefully reviewed the Complaint, I find that Zebroski has satisfied Rule 9(b). Specifically, in the Complaint, he pled the dates of his communications with Progressive, with whom he communicated, and the general contents of their communications, including the amount Progressive offered in settlement in exchange for his release. From the contents of the Complaint and Progressive’s briefing, I find that the Complaint adequately apprised Progressive of the basis for Zebroski’s claims.

As to the first requirement of a special or fiduciary relationship, generally, “[a] fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another.”⁴⁸ Put another way, “[a] fiduciary relationship implies a

⁴⁶ *Narrowstep, Inc.*, 2010 WL 5422405, at *12 (citing *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008); *Iotex Commc’ns, Inc. v. Defries*, 1998 WL 914265, at *2 (Del. Ch. Dec. 21, 1998)).

⁴⁷ *Narrowstep, Inc.*, 2010 WL 5422405, at *12 (quoting *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009)) (internal quotation marks omitted).

⁴⁸ *Cheese Shop Int’l, Inc. v. Steele*, 303 A.2d 689, 690 (Del. Ch. 1973), *rev’d on other grounds*, 311 A.2d 870 (1973).

dependence, and a condition of superiority, of one party to another.”⁴⁹ Delaware courts, however, have been reluctant to impute the exacting principles of fiduciary relationships to those engaged in normal commercial dealings.⁵⁰

Here, I find, as a threshold matter, that Zebroski has not pled adequately either the existence of a fiduciary or special relationship between him and Progressive that would give rise to jurisdiction in this Court, or that special circumstances exist such that only equity can afford a remedy. “It is settled law that an insurer does not generally owe a fiduciary duty to its insured because this relationship is usually an arm’s-length contractual relationship.”⁵¹ The Delaware Supreme Court also has explained that typical insurance contracts, including settlements, do not create fiduciary duties between insurers and their insureds because their interests are not perfectly aligned.⁵² In his Complaint, Zebroski has not alleged circumstances that support a reasonable inference that, at the time he

⁴⁹ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 624 (Del. Ch. 2005) (citing *Lank v. Steiner*, 213 A.2d 848, 852 (Del. Ch. 1965); *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 747 (Del. 1939)), *rev’d on other grounds*, 901 A.2d 106 (Del. 2006).

⁵⁰ *See Wal-Mart Stores, Inc.*, 901 A.2d at 114.

⁵¹ *Wal-Mart Stores, Inc.*, 872 A.2d at 626 (citing *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003)).

⁵² *Crosse*, 836 A.2d at 495 (citing *Corrado Bros. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1192 (Del. 1989)).

executed the Release Agreement, he otherwise was dependent on Progressive in executing the Release Agreement such that Progressive would be charged with protecting his interests. Nor has he pled facts or circumstances demonstrating that the Release Agreement he executed was negotiated on other than an arm's-length basis.⁵³ In addition, because I find that Zebroski can pursue a remedy at law by pursuing his claim for rescission based on the parties' mutual mistake, I also find that he has not pled circumstances demonstrating that only equity can afford him an adequate remedy. That is, because in a court of law Zebroski conceivably could pursue his personal injury claims and avoid any defense based on the Release

⁵³ The only conceivable basis for finding equitable fraud asserted by Plaintiff, other than an alleged special or fiduciary relationship, is a single passing reference to Zebroski's relative youth and lack of sophistication. The Complaint alleges that: "[t]he misrepresentation engaged in by [Progressive] was expressly directed at [Zebroski], *a young and unsophisticated* insured, and [Progressive] intentionally took advantage of the fact that [he] would not recognize or understand the legal ramifications of the [Release Agreement] it drafted." Compl. ¶ 16 (emphasis added). Zebroski, however, has pled neither his actual age (although the Court can infer from the Complaint that he was, at least, old enough to operate an automobile) nor specific facts or circumstances supporting his conclusory allegation concerning his relative lack of sophistication. In that respect, Zebroski also has not pled any facts or circumstances indicating that a representative from Progressive pressured or hurried him to execute the Release Agreement, which is a single-page document in relatively plain English. Nor has he pled specific facts indicating that Progressive otherwise procured his signature by obfuscating the actual contents or character of the Release Agreement or by hindering or discouraging him from reading it. Zebroski, therefore, has failed to plead sufficient specific facts to support a reasonable inference of actions that would give rise to equitable fraud.

Agreement, he has not demonstrated that only equity can afford him the remedy he seeks. Accordingly, I grant Progressive's Motion to Dismiss Count II under Rule 12(b)(6) for failure to state a claim for equitable fraud.

C. Cleanup Doctrine

As a final matter, I address whether this Court, under the cleanup doctrine, should retain jurisdiction over the remaining aspects of this case, that is, having concluded that this Court does have jurisdiction over Zebroski's equitable fraud claim for purposes of evaluating it under Rule 12(b)(6), I could exercise jurisdiction over his other claim (Count I), even though I ultimately determined that Zebroski failed to state a claim for equitable fraud and there is no independent basis for asserting equitable jurisdiction over Count I.

"The Court of Chancery . . . routinely decides controversies that encompass both equitable and legal claims."⁵⁴ "If a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to resolve the remaining portions of

⁵⁴ *Nicastro v. Rudegeair*, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007) (citing 1 Donald Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2-4 (supp. 2006)).

the controversy as well.”⁵⁵ “Once the Court determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine.”⁵⁶ “[O]btaining jurisdiction over additional parts of a controversy through the cleanup doctrine, regardless of whether those other counts are equitable in nature, can be appropriate for ‘any of several reasons, including to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law.’”⁵⁷

In the circumstances of this case, I find that it would be imprudent, and not conducive to judicial economy, or the administration of justice for this Court to exercise its discretion to retain jurisdiction under the cleanup doctrine over

⁵⁵ *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978).

⁵⁶ *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *11 (Del. Ch. May 27, 2005) (quoting *Beal Bank SSB v. Lucks*, 2000 WL 710194, at *2 (Del. Ch. May 23, 2000)) (internal quotation marks omitted).

⁵⁷ *Darby Emerging Mkts. Fund, L.P. v. Ryan*, 2013 WL 6401131, at *8 (Del. Ch. Nov. 27, 2013) (quoting *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008)).

Zebroski's claim for rescission based on mutual mistake. At this early stage of this proceeding, I have not made any factual determinations concerning the aspects of the dispute that would be central to a personal injury suit, including whether Zebroski can avoid the Release Agreement, and what, if any, representations Progressive's agent actually made regarding the scope of the Release Agreement. Moreover, because Zebroski does not seek in this action to pursue his legal claims to recover the UM benefits to which he claims to be entitled under the Policy, even if this Court were to set aside the Release Agreement, Zebroski still would need to pursue further relief based on those claims and, perhaps, revisit the same factual issues, in a court of law. For these reasons, I decline to exercise my discretion under the cleanup doctrine to assert jurisdiction over the aspects of this case remaining after my dismissal of Zebroski's claim for equitable fraud for failure to state a claim.

III. CONCLUSION

For all the reasons stated, Progressive's Motion to Dismiss is granted in its entirety. Zebroski may transfer this action to a court of law within 60 days of the date of this Memorandum Opinion, pursuant to 10 *Del. C.* § 1902. Absent such a transfer, this action will be dismissed after 60 days.

IT IS SO ORDERED.