UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TWIN CITY FIRE INSURANCE CO.,	:	CIVIL ACTION NO.
Plaintiff,	:	3:02cv2110 (DJS)
	:	
vs.	:	
	:	
SCOTT ERIC SANDERS, ET AL.	:	
Defendants.	:	

DEFENDANT'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS

INTRODUCTION

In opposition to defendant Thomas Bevilacque's ("Bevilacque") Motion to Dismiss, plaintiff makes numerous assertions of fact that are absent from the complaint. The Court should grant defendant's motion to dismiss because plaintiff cannot, by asserting new facts in its brief, correct the defects in its complaint, which does not allege the facts necessary to support, even by inference, plaintiff's conclusory claim that Bevilacque engaged in a conspiracy to defraud plaintiff.

First, as explained in defendant's Motion to Dismiss, plaintiff has failed to allege that defendant knew of the alleged co-conspirator's unlawful scheme, and that he acted with the specific intent to purse the unlawful scheme. While plaintiff claims in its brief that it has "specifically alleged" that Bevilacque "authorized . . . Lou-Son, Twin-D and Brokks to use the Amenia motors address and telephone line to create a business 'front'", and that he did so "in furtherance of the conspiracy," the complaint itself is devoid of any such allegation. Def. Br., pp.3, 5. Rather, the complaint merely alleges that Bevilacque agreed to allow Sanders to use the telephone and mailing address - it does not allege that Bevilacque knew of any illegal purpose

for Sanders' request, much less of Sanders' alleged intent to create a "business front" to mislead the plaintiff and obtain lower insurance rates, and agreed to assist Sanders in this effort.[1] Moreover, the conclusory allegation that all of the defendants "entered into a combination, agreement or conspiracy" "for the purpose of committing fraud on the plaintiff" is insufficient to withstand a motion to dismiss. Def. Br., pp.4, 6; See Sundwell v. Leuba, 2001 U.S.Dist.LEXIS 737 at * 24 (D.Conn. January 23, 2001); Warden v. Pataki, 35 F.Supp.2d 354, 365-366.

Second, the complaint does not allege a single fact to support even an inference that Bevilacque knew of the other defendants' alleged scheme to defraud plaintiff or that he intended to further that scheme. Again, the complaint only alleges that Bevilacque allowed Sanders to use a telephone and his business address, without any allegation that Bevilacque knew that defendant's were making any representation to plaintiff, much less misrepresentations.; contrary to plaintiff's brief, the complaint does not alleges that "Bevilacque allowed the defendant shell companies to misrepresent that they were operating out of Bevilacque's business location." Def. Br., pp.6, 8. Further, while plaintiff asserts certain facts that it "expects to prove at trial" from which a jury may supposedly infer knowledge and intent, these facts are not part of the complaint and have no bearing on the motion to dismiss. Def. Br., pp.7-8.

Third, as in Marshak v. Marshak, 226 Conn. 652, 628 A.2d 964 (1993), plaintiff cannot prevail on its conspiracy claim against Bevilacque because there is no allegation that there was anything unlawful in Bevilacque's allowing Sanders to use his telephone and mailing address at

[1] Indeed, plaintiff later seems to acknowledge this fact to argue that the court should *infer* such knowledge and intent. Id., at 6-7.

the time that Bevilacque agreed to allow Sanders to do so. Under Marshak, Bevilacque cannot be held liable for his conduct simply because it allegedly enabled Sanders to subsequently commit a tort. See also Litchfield Asset Management Corp. v. Howell, 70 Conn.App.133, 141-142, 799 A.2d 298 (2002).

Fourth, the Motion to Dismiss is not premature. As plaintiff acknowledges, the "inquiry is whether the Twin City's allegations as stated in the Complaint comply with pleading requirements," not whether Twin City will ultimately be able to prove Bevilacque's knowledge and participation in a conspiracy. The Court should grant defendant's motion to dismiss because, regardless of what plaintiff "intents to prove," the Complaint is deficient.

Finally, at minimum, the Court should dismiss the negligent misrepresentation claim as to Bevilacque because, as explained in defendant's Motion, there can be no conspiracy liability for negligence. United States v. Mitloff, 165 F.Supp.2d 558, 564 (S.D.N.Y. 2001); State v. Montgomery, 22 Conn.App. 340, 344-345, 578 A.2d 130 (1990). Plaintiff has not even attempted to defend this count in its opposition.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the court dismiss all counts against him.