

**IN THE COURT OF COMMON PLEAS**

**COUNTY OF SUMMIT**

MEMBER WILLIAMS	)	CASE NO. CV-2016-09-3928
	)	
Plaintiff	)	JUDGE ALISON BREAUX
-vs-	)	
	)	
KISLING NESTICO & REDICK LLC, et	)	<b><u>ORDER</u></b>
al.	)	
	)	
Defendants	)	
	)	
	- - -	

This matter comes before the Court on the Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint filed by Plaintiff, Defendant Alberto R. Nestico on February 21, 2017. Defendants, Kisling, Nestico & Redick, LLC; Alberto R. Nestico; and Kisling Legal Group, LLC, (Defendants), filed their Response to Plaintiff's Motion for Leave to File First Amended Complaint on October 20, 2016. Plaintiff filed her First Amended Complaint (Amended Complaint) on February 10, 2017. Defendant Nestico filed his Separate Answer to Plaintiff's First Amended Complaint on February 21, 2017. This matter now comes before the Court on Defendant Nestico's Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint. The matter has been fully briefed and is ripe for consideration.

Upon due consideration of the evidence presented, the facts of this case, Civil Rules 9(B) and 12(C), and applicable law, this Court finds that Defendant Nestico's motion is well-taken and must be GRANTED.

**ANALYSIS**

**A. FACTS AND ARGUMENTS PRESENTED**

Plaintiff alleges Defendants, Kisling, Nestico & Redick (KNR), and Alberto R. Nestico (Nestico), have engaged, and continue to engage, in a deliberate scheme to defraud their clients by charging them expenses for investigations that are never actually performed. Plaintiff has also asserted claims of fraud and unjust enrichment against Defendant Nestico.

Specifically, Plaintiff alleges she entered into a contingency fee agreement with KNR allowing KNR to "deduct only reasonable expenses from a client's share of" a settlement or judgment. (Amended Complaint, ¶¶5; 10-12.) During the course of

representation, KNR obtained a settlement for Plaintiff. According to Plaintiff, she signed a Settlement Memorandum outlining the settlement amount along with the fees and expenses that were deducted from that amount to be paid to KNR, with the remainder paid to Plaintiff. (Amended Complaint, ¶¶14; 29.) Included in the fees and expenses to be paid to KNR was a \$50.00 fee paid to MRS Investigations, Inc. (*Id.* at 29.) Plaintiff asserts KNR never advised her of the purpose of the charge to MRS Investigations, Inc. and never obtained her consent to same. Plaintiff contends “[n]o services were ever provided to Plaintiff in connection with the \$50 payment to MRS Investigations, Inc.” (*Id.*)

Plaintiff contends Defendant Nestico “is an Ohio resident who, at all relevant times, owned and controlled KNR and KLG and caused these corporations to engaged [sic] in the conduct alleged in this Complaint” (*Id.* at ¶6.), and therefore he is individually liable for Plaintiff’s fraud and unjust enrichment claims against him.

Defendant Nestico asserts Plaintiff offers no factual allegations in her First Amended Complaint to support her fraud and unjust enrichment claims against him.

#### **B. CIV. R. 12(C) STANDARD**

Civ. R. 12(C) deals with whether or not a party is entitled to judgment as a matter of law. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113, 1973 Ohio LEXIS 364 (9<sup>th</sup> Dist., 1973). “Under Civ. R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *Id.* See also, *Whaley v. Franklin County Bd. of Comm’rs*, 92 Ohio St.3d 574, 2001 Ohio 1287, 752 N.E.2d 267, 2001 Ohio LEXIS 2152 (Ohio, 2001); *Smith v. Nagel*, 2007 Ohio 2894, 2007 Ohio App. LEXIS 3678 (Ohio, 2007). The Court must grant a motion for judgment on the pleadings if, after taking the factual allegations in the complaint as true and disregarding unsupported conclusions, it finds Plaintiff can prove no set of facts that would justify granting relief. *King v. Semi Valley Sound, LLC*, 2011 Ohio 3567, 2011 Ohio App. LEXIS 3014 (9<sup>th</sup> Dist., 2011); *Traylor v. Timber Top, Inc.*, 2016-Ohio-283, 2016 Ohio App. LEXIS 246 (9<sup>th</sup> Dist., 2016); *Sacksteder v. Senney*, 2012-Ohio-4452, 2012 Ohio App. LEXIS 3914, (2<sup>nd</sup> Dist., 2012).

C. PLAINTIFF'S FRAUD CLAIM AGAINST DEFENDANT NESTICO

Plaintiff asserts Defendant Nestico should be personally liable for KNR's purported fraud. Plaintiff's argument rests on her assertion that Defendant Nestico "controlled KNR and caused the corporation to engage in the conduct alleged" in her complaint. (Amended Complaint, ¶6.) Defendant Nestico asserts he is not personally responsible for the liability of KNR under O.R.C. §1705.48. Defendant Nestico also asserts Plaintiff has made a legal conclusion that is unsupported by factual allegations.

O.R.C. §1705.48(B) provides in pertinent part:

No member, manager or officer of a limited liability company is personally liable to satisfy any judgment, decree, or order of a court for, or is personally liable to satisfy in any other manner, a debt, obligation, or liability of the company **solely by reason of being a member, manager, or officer** of the limited liability company. (Emphasis added).

\* \* \*

O.R.C. §1705.48(D) provides in pertinent part:

Nothing in this chapter affects any personal liability of any member, any manager, or any officer of a limited liability company for the member's, manager's, or officer's **own actions or omissions**. (Emphasis added).

\* \* \*

Civ.R. 9(B) provides in pertinent part:

**Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, **the circumstances constituting fraud or mistake shall be stated with particularity.** Malice, intent, knowledge, and other condition of mind of a person may be averred generally. (Emphasis added).

\* \* \*

Both Plaintiff and Defendant Nestico rely upon the holding in *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142 (6<sup>th</sup> Dist. 1975). In *Centennial*, the 6<sup>th</sup> District Court of Appeals held that for an officer of a corporation to be held personally liable for the same conduct for which his corporate principal is liable, the officer

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must have “intentionally or inadvertently [bound] himself as an individual.” *Id.* Ohio Courts have long been reluctant to disregard a corporate entity in favor of holding an officer personally liable. *North v. Higbee Co.*, 131 Ohio St. 507, 3 N.E.2d 391, (Ohio, 1936); *E.S. Preston Associates, Inc. v. Preston*, 24 Ohio St. 3d 7, 492 N.E.2d 441 (Ohio, 1986). Ohio Courts have consistently been willing to disregard the corporate entity “only where the corporation has been used as a cloak for fraud or illegality or where the sole owner has exercised such excessive control over the corporation that it no longer has a separate existence.” *E.S. Preston*, at 11, citing *North v. Higbee Co.* The Supreme Court of Ohio has held a corporate entity should not be disregarded unless justice cannot be served otherwise. *Auglaize Box Board Co. v. Hinton*, 100 Ohio St. 505, 518-519, 126 N.E. 881 (Ohio, 1919).

In the case at bar, Plaintiff has asserted no facts indicative that: Defendant Nestico was personally involved with Plaintiff’s contingency fee agreement; that he personally made any representations to Plaintiff, false or otherwise; or that he personally intended for Plaintiff to act in reliance upon his representations to Plaintiff. This Court finds Plaintiff has failed to plead with particularity the specific representations Defendant Nestico allegedly made, to whom he made said representations, and to what end, in accordance with Civ.R. 9(B). This Court also finds Plaintiff has failed to state any facts justifying holding Defendant Nestico personally liable for the alleged actions of KNR. Based on the forgoing, this Court determines Defendant Nestico’s Motion for Judgment on the Pleadings Regarding Plaintiff’s First Amended Complaint is well-taken with respect to Plaintiff’s fraud claim.

**D. PLAINTIFF’S UNJUST ENRICHMENT CLAIM AGAINST DEFENDANT NESTICO**

Plaintiff asserts Defendant Nestico was personally unjustly enriched as a result of her contract with KNR. In order to prevail on an unjust enrichment claim, the Plaintiff must show: 1) plaintiff conferred a benefit on defendant; 2) defendant knew of such benefit; 3) defendant retained the benefit under circumstances where it would be unjust to do so without payment. *Metz v. Am. Elec. Power Co.*, 172 Ohio App. 3d 800, 2007-Ohio-3520 (10<sup>th</sup> Dist., 2007); *Chestnut v. Progressive Cas. Inc. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, (8<sup>th</sup> Dist., 2006); *Acquisition Services, Inc. v. Zeller*, 2013-Ohio-3455 (2<sup>nd</sup> Dist., 2013). This Court finds Plaintiff has presented no facts regarding her unjust enrichment claim against Defendant Nestico that supports he was personally enriched by the alleged benefits she conferred upon KNR. Based on the forgoing, this Court determines Defendant Nestico’s Motion for Judgment on the Pleadings Regarding Plaintiff’s First Amended Complaint is well-taken with respect to Plaintiff’s unjust enrichment claim.

**COURT ORDERS**

Based on the foregoing, this Court determines Defendant Nestico's Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint is well-taken and must be GRANTED.

The Plaintiff's First Amended Complaint with respect to the claims of fraud and unjust enrichment against Defendant Nestico is hereby DISMISSED WITH PREJUDICE.

This Court further orders Plaintiff to pay Defendant Nestico's attorneys' fees with regard to the research and preparation of Defendant Nestico's Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint only.

It is so ORDERED.

A handwritten signature in blue ink that reads "Al Breaux". The signature is written in a cursive style and is positioned above a horizontal line.

JUDGE ALISON BREAUX

CC: ATTORNEY PETER PATTAKOS  
ATTORNEY BRIAN E. ROOF

CML:KAS  
16-3928MFJG