

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

<p>MEMBER WILLIAMS,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CV-2016-09-3928</p> <p>Judge Todd McKenney</p>
<p>PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS</p>	

I. Introduction

Defendants have moved for judgment on the pleadings under Civ. R. 12(C) on all of Plaintiff's claims asserted against Defendants Alberto R. Nestico and Kisling Legal Group ("KLG"), and also the claims for declaratory and injunctive relief against all Defendants.

To the extent that Defendants' Motion for Judgment on the Pleadings is not moot based on Plaintiffs' proposed First Amended Complaint (filed concurrently with this brief), it is based on a misreading of the Complaint and Ohio law and should be denied.

II. Law and Argument

A. Defendants' Motion is largely moot due to Plaintiff's proposed First Amended Complaint.

As a preliminary matter, Plaintiff accepts Defendants' representation that "KLG is no longer a legal entity [and] changed its name to KNR" (Defs' Mot. at 6, n.2.), and has removed KLG as a

Defendant in the First Amended Complaint. Should discovery reveal this representation to be false, Plaintiff should be permitted to amend her claims accordingly.

Additionally, Plaintiff has removed Defendant Nestico as a Defendant on the claim for breach of contract, thus mooted Defendants' Motion on this issue as well.¹

B. Plaintiff's fraud and unjust enrichment claims are properly asserted against Defendant Nestico.

Defendants wrongly assert that Plaintiff has not sufficiently alleged claims for fraud and unjust enrichment against Nestico, and has not asserted facts sufficient to "pierce the corporate veil." Defs' Mot. at 5–10. But at this stage of the litigation, veil-piercing has nothing to do with the fraud and unjust-enrichment claims, which are properly asserted against Nestico individually.

Contrary to Defendants' representation, Plaintiff has not alleged that Nestico should be held responsible for KNR's fraud on a veil-piercing theory, but rather that Nestico was in fact responsible for the fraud so as to be jointly and severally liable with KNR for it. A corporate representative is jointly and severally liable with a corporation for fraud when that representative causes the corporation to perpetrate a fraud —i.e., when "he knew the statement was false, that he intended it to be acted upon by the parties seeking redress, and that it was acted upon to the injury of the party." *Centennial Ins. Co. v. Vic Tanny International, Inc.*, 46 Ohio App. 2d 137, 141, 346 N.E.2d 330, (6th Dist, 1975) citing, *inter alia*, *Bartholomew v. Bentley*, 15 Ohio 659, 1846 Ohio LEXIS 227, (1846), 12 Ohio Jurisprudence 2d 669, Corporations, Sections 545-46. Here, Plaintiff has alleged sufficient facts about Nestico's knowledge and intent regarding the fraudulent scheme, which itself is described in great detail in the Complaint (¶¶ 6, 10-29, 37-49). Additionally, Plaintiff has alleged that

¹ Plaintiff's proposed First Amended Complaint is identical to the original Complaint except for the removal of KLG from the caption, the deletion of ¶ 7 referencing KLG as a party, the deletion of ¶ 54 alleging Nestico's individual responsibility for the alleged breach of contract, edits to ¶ 50 to reflect that the breach of contract claim is alleged only against Defendant KNR, and edits to ¶ 8 to reflect that this case has been transferred to Summit County from Cuyahoga County where it was originally filed.

Nestico owns and completely controls KNR, and was unjustly enriched as a result of the fraudulent scheme (¶¶ 6, 37-49, 56-59).

Dismissal under Civ. R. 12(C) is only 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.” *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570, 664 N.E.2d 931 (1996). On this standard, Plaintiff’s allegations are sufficient to support the fraud and unjust-enrichment claims against Defendant Nestico

C. The Court has discretion to award declaratory and injunctive relief when appropriate.

While the Complaint does not include a specific claim for declaratory or injunctive relief, Plaintiff has included in her Prayer for Relief (at page 12) a request that the Court provide “declaratory judgment and injunctive relief against Defendants’ unlawful conduct.” This request is to account for the likelihood that such relief will be necessary in this case to protect class members, particularly those who remain Defendants’ clients, as Defendants’ conduct is proven unlawful. *See Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 217, 586 N.E.2d 1020 (1992) (“[D]eclaratory [relief] may be entertained by a court, in the exercise of its sound discretion, where the action is within the spirit of the Declaratory Judgment Act, a justiciable controversy exists between adverse parties, and speedy relief is necessary to the preservation of rights which may otherwise be impaired or lost.”). Contrary to Defendants’ argument at pages 10–12 of their motion, there is no reason for the Court to dismiss this possibility out of hand at this or at any stage of the proceedings.

III. Conclusion

To the extent that Defendants’ Motion for Judgment on the Pleadings is not mooted by Plaintiff’s proposed First Amended Complaint, it is unsupported by Ohio law and should be denied.

Dated: October 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on October 13, 2016.

/s/ Peter Pattakos

One of the Attorneys for Plaintiff