

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS,)	CASE NO. CV-2016-09-3928
)	
Plaintiff,)	
)	JUDGE ALISON BREAUX
v.)	
)	
KISLING, NESTICO & REDICK, LLC, et al.,)	<u>DEFENDANT ALBERTO R. NESTICO'S</u>
)	<u>MOTION FOR JUDGMENT ON THE</u>
Defendants.)	<u>PLEADINGS REGARDING PLAINTIFF'S</u>
)	<u>FIRST AMENDED COMPLAINT</u>

Pursuant to Ohio R. Civ. P. 12(C), Defendant Alberto R. Nestico respectfully files this Motion for Judgment on the Pleadings and moves this Court for an order dismissing him from the lawsuit with prejudice.

Defendants previously filed a Motion for Judgment on the Pleadings to Plaintiff's original Complaint. In response, Plaintiff filed a Motion For Leave to File First Amended Complaint, which was granted. Based on the First Amended Complaint, Mr. Nestico files this Motion for Judgment on the Pleadings. Mr. Nestico seeks legal fees and expenses in having to defend this frivolous lawsuit. A memorandum in support of this motion and proposed judgment entry and order are attached.

Respectfully submitted,

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KISLING, NESTICO & REDICK, LLC,)	<u>MEMORANDUM IN SUPPORT OF</u>
et al.,)	<u>DEFENDANT ALBERTO NESTICO'S</u>
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Defendants.)	<u>FIRST AMENDED COMPLAINT</u>

I. **INTRODUCTION**

Plaintiff's Amended Complaint is a poorly written diatribe that is legally insufficient in both form and substance. There are absolutely no factual allegations in Plaintiff's First Amended Class Action Complaint ("Amended Complaint") to support her fraud and unjust enrichment claims against Defendant Alberto R. Nestico. As such, Plaintiff's claims against Mr. Nestico should be dismissed with prejudice.

Plaintiff's allegations are based on only Kisling, Nestico & Redick, LLC's ("KNR") conduct relating to Plaintiff and charging Plaintiff a pass through third-party investigation fee. Plaintiff has not alleged that Mr. Nestico was a party to the contingency fee agreement or personally was involved in Plaintiff's matter. Plaintiff has not alleged that Mr. Nestico personally made any representations, let alone fraudulent representations, to Plaintiff. Plaintiff has not made any allegation that Mr. Nestico personally was unjustly enriched. There are simply no facts in the Amended Complaint to support these claims against Mr. Nestico. Therefore, these claims against Mr. Nestico should be dismissed with prejudice.

II. **ALLEGED FACTUAL BACKGROUND**

Plaintiff has filed a putative class action lawsuit against KNR for breach of contract, fraud, and unjust enrichment and against Mr. Nestico for fraud and unjust enrichment. Plaintiff's

lawsuit is based on whether KNR's investigation fee charged to Plaintiff was valid and lawful.¹ KNR represented Plaintiff in an automobile matter. (Amended Complaint, ¶ 5.) Prior to the representation, Plaintiff entered into a contingency fee agreement with KNR in which purportedly the agreement, implicitly or expressly, allowed KNR to "deduct only reasonable expenses from a client's share of" a settlement or judgment. (*Id.*, ¶¶ 5; 10-12.) Allegedly, Plaintiff understood that "KNR would not incur expenses unreasonably and would not charge them for unreasonable expenses." (*Id.*, ¶ 12, emphasis added.) KNR obtained a settlement for Plaintiff. (*Id.*, ¶ 5.)

As part of that settlement and as required by Ohio law, Plaintiff voluntarily signed a Settlement Memorandum that outlined the settlement amount and the fees and expenses that were deducted from that amount to be paid to KNR, with the remaining paid to Plaintiff. (Amended Complaint, ¶¶ 14; 29.) The first expense on the Settlement Memorandum was \$50 that was paid to MRS Investigations, Inc. for an investigation fee. (*Id.*, ¶ 29 and Ex. C to the original Complaint.) Plaintiff, however, contends that "KNR never advised Plaintiff as to the purpose of the charge to MRS Investigations, Inc., and never obtained Plaintiff's consent for the charge." (*Id.*, ¶ 29, emphasis added.) Plaintiff further alleges that she never interacted with anyone from MRS Investigations and that "[n]o services were ever provided to Plaintiff in connection with the \$50 payment to MRS Investigations, Inc." (*Id.*)

Based on these allegations against KNR, Plaintiff sued KNR for breach of contract, fraud, and unjust enrichment and Mr. Nestico for fraud and unjust enrichment. The Amended Complaint, however, has no factual allegations to support her claims against Mr. Nestico. Rather she offers the following legal conclusion: Mr. Nestico "is an Ohio resident who, at all relevant times, owned and controlled KNR and KLG and caused these corporations to engaged

¹ By reciting the allegations of the First Amended Complaint in this Motion for Judgment on the Pleadings, Mr. Nestico does not admit or agree to those allegations. In fact, Mr. Nestico incorporates by reference herein his Answer.

in the conduct alleged in this Complaint.” (*Id.*, ¶ 6.) Plaintiff offers no facts to support this conclusion, which as argued below, requires dismissal of the claims against Mr. Nestico.

III. LEGAL ANALYSIS AND ARGUMENT

A. Plaintiff’s claims against Mr. Nestico and her request for declaratory and injunctive relief cannot survive this Civ. R. 12(C) Motion.

Civ. R. 12(C) provides that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Civ. R. 12(B)(6) and 12(C) motions are similar, with Civ. R. 12(C) motions used for resolving questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459 (citing to *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166). “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.*

In other words, Civ. R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Id.*, at 570. *See also Ohio Ass’n of Public School Employees (OAPSE)/AFSCME LOCAL 4, AFL-CIO v. Madison Local School Dist. Bd. of Ed.*, 190 Ohio App.3d 254, 2010-Ohio-4942, ¶ 17 (11th Dist.). A claim is doomed by law when, taking the factual allegations in the complaint as true and disregarding unsupported conclusions, it appears that the plaintiff can prove no set of facts that would justify a court granting relief. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324 (1989); *O’Brien v. Univ. Comm.Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975). Plaintiff’s fraud and unjust enrichment claims against Mr. Nestico do not survive this standard.

B. As a matter of law, Plaintiff has not asserted claims against Mr. Nestico for fraud and unjust enrichment.

The Amended Complaint, including the fraud and unjust enrichment claims, is focused on the alleged conduct of KNR. (Amended Complaint, ¶¶ 9-31.) For example, the Amended Complaint alleges:

- “Since its founding in 2005, **KNR** has entered into contingency-fee agreements with its clients...”
- “**KNR’s** contingency-fee agreements expressly or impliedly provided that **KNR** could deduct only reasonable expenses from a client’s share of proceeds....”
- “In all cases where **KNR** recovered money for a client in a judgment or settlement, **KNR** followed the standard practice of requiring client to execute a ‘Settlement Memorandum’ that the firm prepared before distribution.”
- “**KNR’s** Settlement Memoranda purport to set forth the expenses that **KNR** and [sic] incurred or advanced on each client’s behalf and the corresponding amounts that **KNR** deducted and retained from each client’s recovery to pay for those expenses.”
- “When itemizing the amounts deducted and retained from the recovery amount, **KNR** represented to its clients on each Settlement Memorandum that the deductions were only for reasonable expenses....”
- “**KNR**, as a matter of policy, deducted and retained from clients’ recoveries as a case expense in this investigation fee that **KNR** never disclosed to client in **KNR’s** promotional materials, clients’ contingency-fee agreements, nor in any other way.”
- “**KNR** deducted an investigation fee from the settlement it obtained on behalf of Plaintiff as a \$50 expense payable to MRS Investigations, Inc., as reflected on the Settlement Memorandum....”
- “**KNR** never advised Plaintiff as to the purpose of the charge to MRS Investigations, Inc., and never obtained Plaintiff’s consent for the charge.”

(*Id.*, ¶¶ 9, 11-14, 19, 28, emphasis added.) **None of these allegations reference Mr. Nestico.**

Nor does the Amended Complaint satisfy the elements necessary for fraud and unjust enrichment claims against Mr. Nestico.

1. Plaintiff has asserted no facts that Mr. Nestico committed any fraud.

Plaintiff does not allege that she had any dealings or interactions with Mr. Nestico, let alone that Mr. Nestico made misrepresentations to her or that he personally withheld information. There is absolutely nothing in the Amended Complaint that ties Mr. Nestico to the alleged fraud. Without an allegation that Mr. Nestico personally made a fraudulent representation or withheld information, Plaintiff’s fraud claim against him should be dismissed with prejudice. See *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-119, ¶ 47 (2006) (setting forth the elements of a fraud claim).

Nevertheless, Plaintiff contends that under Ohio law an officer of a corporation can be held personally liable for a corporation's purported fraud. (Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings, p. 2.) Plaintiff misconstrues Ohio law that requires dismissal of the fraud claim against Mr. Nestico.

Plaintiff ignores Ohio law that R.C. 1705.48 specifically states that a member, manager, or officer of a limited liability company is not personally responsible for the liabilities, debts, and obligations of the limited liability company. R.C. 1705.48(B). Only the limited liability company is responsible for its liabilities. R.C. 1705.49(A). Therefore, the general rule is that a member or officer is immune from personal liability for the company's liabilities. Both Ohio statutory and common law, however, allow a member, manager, or officer of a limited liability company to be personally liable for *his own actions or omissions*. R.C. 1705.48(D); *Cincinnati Bible Seminary v. Griffiths*, 1st Dist. No. C-830867, 1984 Ohio App. LEXIS 11028, *6 ("Corporate directors and officers may also be personally liable for corporate debts on the ground of fraud."). The case on which Plaintiff relies, *Centennial Insurance*, follows this general rule and exception: "An officer of a corporation is not personally liable on contracts or on express or implied warranties, for which his corporate principal is liable, *unless he intentionally or inadvertently binds himself as an individual.*" *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142 (6th Dist. 1975) (emphasis added).

The key to the law that Plaintiff disregards is that she must show that: (1) Mr. Nestico personally made the false statement, (2) he personally knew that it was a false statement, (3) he personally intended for her to act in reliance upon it, and (4) she in fact acted and was injured. *Griffiths*, 1984 Ohio App. LEXIS 11028 at *6 (citing *Centennial*). This personal involvement requirement is fatal to Plaintiff's fraud claim against Mr. Nestico.

There are no facts in the Amended Complaint that Mr. Nestico personally was involved with Plaintiff's matter, that he personally made any representations to her, let alone that those representations were false or that he intended for her to rely on them. All of the allegations

relate to KNR as a limited liability company. The only reference to Mr. Nestico is the legal conclusion that he allegedly “controlled KNR and caused the corporation to engage in the conduct alleged in this Complaint.” (Amended Complaint, ¶ 6.) Plaintiff offers no facts to support this legal conclusion. Furthermore, this legal conclusion is not sufficient to establish that Mr. Nestico personally made the alleged representations or had any personal involvement with Plaintiff’s matter or representation.² The law clearly requires **personal involvement** in order for Mr. Nestico to be held liable, and the facts in this case are void of any.

Simply put, Plaintiff is trying to do an end run around R.C. 1705.48 and the general rule that officers and members are not responsible for the company’s liabilities. Plaintiff also is trying to avoid the requirements of piercing the corporate veil, which Plaintiff has conceded in her Opposition to Defendants’ Motion for Judgment on the Pleadings and in her Amended Complaint does not apply to the facts of this case. To allow Plaintiff to proceed on her fraud claim against Mr. Nestico would turn Ohio law on corporate law upside down – every director or officer would be exposed to personal liability for the corporation’s actions. Plaintiff’s theory should be rejected and her fraud claim should be dismissed with prejudice.

2. Plaintiff has asserted no facts that Mr. Nestico was unjustly enriched.

Similarly, there are no factual allegations that Mr. Nestico personally was unjustly enriched. The Amended Complaint alleges that KNR deducted the investigation fee from the settlement proceeds. (Amended Complaint, ¶ 28.) Plaintiff does not allege that she paid Mr. Nestico personally. Nor does she allege that Mr. Nestico received a direct benefit from her. Rather, as the Settlement Statement outlines, KNR charged as an expense \$50 against the settlement to cover the investigation fee. (Ex. C to Complaint.)

² Indeed, Plaintiff’s allegations against Mr. Nestico fail to satisfy the heightened pleading requirements of Civ. R. 9(b) that require Plaintiff to specifically allege the representations that Mr. Nestico allegedly made, to whom he made those representations, and the date on which he made those representations. Plaintiff has not made those specific allegations because she cannot, as he never made any representations to her.

Therefore, Plaintiff cannot establish the elements (e.g., Plaintiff conferred a benefit on Mr. Nestico) necessary to support an unjust enrichment claim against Mr. Nestico as a matter of law. See *Metz v. Am. Elec. Power Co.*, 172 Ohio App. 3d 800, 2007-Ohio-3520, ¶ 43 (10th Dist.) (the requirements for an unjust enrichment claim are: (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); *Acquisition Services, Inc. v. Zeller*, 2nd Dist. No. 25486, 2013-Ohio-3455, ¶ 61 (dismissing unjust enrichment claim because “there is no evidence that Zeller and Smith derived any benefit from the sale.”). Again, Plaintiff is trying to overturn years of precedent in corporate law because under Plaintiff’s theory every member and officer of KNR or any limited liability company could be held personally liable for unjust enrichment for benefits conferred directly on the company rather than the individual. Plaintiff should be denied and her unjust enrichment claim should be dismissed with prejudice.

IV. CONCLUSION

Plaintiff’s Amended Complaint did not offer the requisite facts to assert claims against Mr. Nestico for fraud and unjust enrichment. Plaintiff’s sole legal conclusion in the Amended Complaint is not sufficient. Therefore, all claims against Mr. Nestico should be dismissed with prejudice. In addition, because of the frivolous nature of the claims against Mr. Nestico, he is entitled to recover his legal fees and expenses in this matter.

Respectfully submitted,

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et al.,)	<u>GRANTING DEFENDANT ALBERTO</u>
)	<u>NESTICO'S MOTION FOR JUDGMENT ON</u>
)	<u>THE PLEADINGS REGARDING</u>
Defendants.)	<u>PLAINTIFF'S FIRST AMENDED</u>
)	<u>COMPLAINT</u>

Based on Defendant Alberto Nestico's Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint, and after having fully reviewed and analyzed all briefs on this Motion, Defendant Alberto Nestico's Motion is well taken and granted in its entirety. Therefore, it is ordered and decreed that the fraud and unjust enrichment claims against Defendant Alberto Nestico are hereby dismissed with prejudice. He is no longer a defendant in this lawsuit. It is further ordered and decreed that Defendant Alberton Nestico is entitled to recover his legal fees and expenses in having to defend against these frivolous claims.

SO ORDERED:

Judge Alison Breaux

CERTIFICATE OF SERVICE

A copy of the foregoing Defendant Alberto R. Nestico's Motion For Judgment On The Pleadings Regarding Plaintiff's First Amended Complaint was filed electronically with the Court on this 21st day of February, 2017. The parties may access this document through the Court's electronic docket system.

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