

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, <i>et al.</i> , Defendants.	Case No. CV-2016-09-3928 Judge Alison Breax
PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS	

I. Issues Presented

1. Corporate officers who knowingly participate in fraudulent transactions are liable for damages caused by their participation in a corporation's fraud. Here, Plaintiff has alleged that Defendant Nestico, the managing partner of Defendant KNR, knew about and directed the fraudulent "investigator fee" scheme at issue in this case. Are these allegations sufficient to withstand Defendants' Civ. R. 12(C) motion on Plaintiff's fraud claim against Nestico?
2. A plaintiff prevails on a claim of unjust enrichment when she proves that the defendant knowingly retained a benefit under circumstances where it would be unjust to do so without repayment. Here, Plaintiff has alleged that Defendant Nestico, the managing partner of KNR, directed and benefited from the fraudulent "investigator fee" scheme at issue in this case. Are these allegations sufficient to withstand Defendants' Civ. R. 12(C) motion on Plaintiff's unjust enrichment claim against Nestico?
3. Ohio trial courts retain the discretion to enter declaratory and injunctive relief where such relief is necessary to the preservation of rights which may otherwise be impaired or lost. Is there any reason for this Court to divest itself of this discretion at this early stage in the proceedings?

II. Introduction

Defendants have moved for judgment on the pleadings under Civ. R. 12(C) on the fraud and unjust enrichment claims asserted against Defendant Alberto R. Nestico, and the claims for declaratory and injunctive relief against Defendants Nestico and KNR. As explained fully below, Defendants' motions misrepresent the law and the First Amended Complaint, and should be denied. Additionally, Plaintiff's counsel is currently in the process of drafting a Second Amended Complaint pertaining to newly discovered evidence that will further support Defendant Nestico's liability on the claims at issue.

III. Law and Argument

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

Defendant Nestico asserts that Plaintiff has not sufficiently alleged a claim for fraud against him, wrongly claiming that Plaintiff is required to allege that "Mr. Nestico personally made ... fraudulent representations to Plaintiff." Nestico Mot. at 2; *See also Id.* at 6 ("Plaintiff must show that ... Mr. Nestico personally made the false statement."). But the Supreme Court of Ohio has made clear that a direct statement from Nestico to Plaintiff is unnecessary to hold Nestico liable for fraud, having stated that "it should be axiomatic that parties who directly benefit from and knowingly participate in a transaction tainted with fraud or deceit, who are under a duty to disclose their knowledge and fail to do so, are liable for damages directly and proximately resulting from their silence." *Miles v. McSwegin*, 58 Ohio St. 2d 97, 99-100, 388 N.E.2d 1367 (1979). In other words, it is axiomatic that "corporate officers may be held personally liable for actions of the company if the officers take part in the commission of the act or if they specifically directed the particular act to be done, or participated or cooperated therein." *Mohme v. Deaton*, 12th Dist. Warren No. CA 2005-12-133, 2006-Ohio-7042, ¶ 28 quoting *Young v. Featherstone Motors, Inc.*, 97 Ohio App. 158, 171-172, 124 N.E.2d 158 (10th Dist. 1983). Thus, it doesn't matter whether Nestico made the fraudulent

statement himself, or whether he did so through his employees, when “he knew the statement[s] w[ere] false, that he intended [them] to be acted upon by the parties seeking redress, and that [they] w[ere] 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 First Amended Complaint (¶¶ 6, 9-28, 36-48). Additionally, Plaintiff has alleged that Nestico owns and completely controls KNR, received the benefit of the fraudulent investigation fees, and was thus unjustly enriched as a result of the scheme (¶¶ 6, 36-48, 54-57). *See Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) (“[T]he elements of [an unjust enrichment claim] are as follows: (1) a benefit has been conferred by the plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit under circumstances where it would be unjust to do so without payment.”)

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.

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

While the First Amended 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' arguments in their motion to dismiss Plaintiff's prayer for declaratory and injunctive relief, there is no reason for the Court to dismiss this possibility out of hand at this early stage of the proceedings.

IV. Conclusion

Plaintiff has pleaded sufficient facts to entitle her to discovery on the role that Nestico played in the fraudulent billing scheme perpetrated through the firm that he owns and controls, and there is no reason for the Court to divest itself of its discretion to grant declaratory and injunctive relief if and when necessary. Additionally, Plaintiff's counsel is currently in the process of drafting a Second Amended Complaint pertaining to newly discovered evidence that will further support Defendant Nestico's liability on the claims at issue. But irrespective of the impending Second Amended Complaint, Defendants' motions for judgment on the pleadings are unsupported by Ohio law and should be denied.

Dated: March 6, 2017

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 March 6, 2017.

/s/ Peter Pattakos

One of the Attorneys for Plaintiff