

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS)	
)	CASE NO. CV-2016-09-3928
Plaintiff,)	
)	JUDGE ALISON BREAUX
vs.)	
)	
KISLING, NESTICO & REDICK, LLC, et al.)	
)	
Defendants.)	<u>BRIEF IN OPPOSITION TO PLAINTIFF'S</u>
)	<u>MOTION FOR RECONSIDERATION OF</u>
)	<u>THE COURT'S MARCH 16, 2017 ORDER</u>
)	<u>REGARDING DISMISSAL OF CLAIMS</u>
)	<u>AGAINST DEFENDANT NESTICO</u>

I. INTRODUCTION

Because neither the facts nor the law support Plaintiff's Motion for Reconsideration ("Motion"), Plaintiff and her attorneys are left with the ol' "pound on the table" adage in arguing that the Court should reconsider its dismissal of Mr. Nestico with prejudice. Pounding the table and dissatisfaction with the ruling are not sufficient to garner reconsideration. Rather, only obvious alleged errors can be grounds for reconsideration of a trial court's decision.¹ However, the alleged errors raised by Plaintiff in her Motion are, in fact, not errors at all, but rather simple dissatisfaction with the Court's ruling. Plaintiff has completely failed to establish that the dismissal of her unsupported fraud and unjust enrichment claims against Mr. Nestico was an obvious error.

In reality, the Court applied the proper law in determining whether Mr. Nestico is liable for fraud and unjust enrichment (i.e., was Mr. Nestico personally involved in the fraud and unjust enrichment) and rightfully concluded that the Amended Complaint did not have any facts to support Mr. Nestico's personal involvement and therefore liability. As such, the Court properly

¹ This Court has recently stricken from the record Plaintiff's Motion for Leave to File Second Amended Complaint and the proposed Second Amended Complaint with exhibits. As a result, Plaintiffs' reference to and reliance on these materials in their Motion for Reconsideration should similarly be stricken and ignored.

granted Mr. Nestico's Motion for Judgment on the Pleadings and dismissed with prejudice Mr. Nestico. Plaintiff's request for reconsideration should be denied.

Additionally, based on the dearth of facts about Mr. Nestico's personal involvement with Plaintiff, the Court was correct in deciding to hold a hearing on Mr. Nestico's request for sanctions (i.e., attorney's fees). Plaintiff will have an opportunity to be heard on the sanctions at the April 5, 2017 hearing. The request for reconsideration on the sanctions hearing should likewise be denied.

II. LEGAL ANALYSIS AND ARGUMENT

There is no recognized standard of review in Ohio for ruling on a motion to reconsider an interlocutory order under Civ.R. 54(B). Rather, some trial courts apply the standard articulated by appellate courts in reviewing an application for reconsideration.² See, e.g. *Burk v. Evans*, Franklin C.P. No. 08CVA12-17793, 2012 Ohio Misc. LEXIS 6569 at *2 (June 13, 2012), citing *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278, 282 (10th Dist. 1982). As the *Matthews* court found:

The test generally applied [upon the filing of a motion for reconsideration in a court of appeals, pursuant to App.R. 26(A)] is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.

Id.

Plaintiff, however, has not established any errors, obvious or otherwise, in the Court's Order. Instead, she has only expressed her dissatisfaction with this Court's ruling, which cannot serve as the basis for reconsideration. In *In re: Guardianships of: I.T.A. and A.A.*, 7th Dist. Belmont Nos. 11 BE 27 and 11 BE 29, 2012-Ohio-2438, the Court denied an application for

² Plaintiff also apparently seeks relief under Civ.R. 60(B) concerning final judgments. (Motion, p. 6-7.) To the extent that Plaintiff believes this Court's order was, in fact, a final judgment, her Motion for "Reconsideration" is not recognized by Ohio courts and is a nullity and should be stricken. See, e.g. *Pitts v. Ohio Dep't of Transp.*, 67 Ohio St.2d 378, 379 (1981) (finding that "motions for reconsideration of a final judgment in the trial court are a nullity.").

reconsideration holding that dissatisfaction with the court's conclusion and/or logic cannot act as a basis for moving for reconsideration:

The purpose of reconsideration is not to reargue one's appeal *based on dissatisfaction* with the logic used and conclusions reached by an appellate court. *Victory White Metal Co. v. N.P. Motel Syst*, 7th Dist. No. 04MA245, 2005 Ohio 3828, ¶2. 'An application for reconsideration may not be filed simply on the basis that *a party disagrees* with the prior appellate court decision.' *Hampton v. Ahmed*, 7th Dist. No. 02BE66, 2005 Ohio 1766, ¶16.

In re: Guardianships at ¶5, emphasis added. See also, *Mindlin v. Zell*, 10th Dist. Franklin No. 11AP-983, 2012 Ohio App. Lexis 5420, ¶6 (Dec. 31, 2012) (denying a motion for reconsideration because dissatisfaction with the Court's ruling cannot act as a basis for reconsideration). That is exactly what Plaintiff is doing here, and it should be rejected.

A. This Court did not err in concluding that Plaintiff's Amended Complaint failed to state a valid claim for fraud and unjust enrichment against Mr. Nestico under Ohio law.

1. Plaintiff's Amended Complaint alleges no facts that Mr. Nestico personally was involved in the alleged fraud against her.

Plaintiff's Motion dedicates pages to a compendium of Ohio law regarding the personal liability of corporate officers for their own actions or inactions separate from officer liability under a veil piercing theory (Motion, p. 7-10). Indeed, the cases cited by Plaintiff require "personal participation" and/or "active engagement" by the officer in the fraud alleged in the complaint. See, e.g., *State ex. rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15 MA 0115, 15 MA 0116, 2016-Ohio-7038, ¶19 ("a corporate officer is liable for the violation of an ordinance where he actively engages in the behavior regulated or knew of the violation or proposed violation, was authorized to prevent it, but failed to prevent it") (citation omitted); *Mohme v. Deaton*, 12th Dist. Warren No. CA2005-12-133, 2006-Ohio-7042, ¶28 ("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) (citations omitted). Plaintiff, however, ignores that Mr. Nestico made a similar statement of the law in his Motion for Judgment on the Pleadings, (Motion, pg. 6), while the Court's Opinion did as well by citing to R.C. 1705.48(D) and *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App.2d 137 (6th Dist. 1975), which was relied on by both parties.³ (Opinion, p. 3.) Plaintiff's dissatisfaction with the Court's Opinion is that, as the Court concluded, Plaintiff's Amended Complaint did not state any facts suggestive of Mr. Nestico's personal involvement in either making false misrepresentations to, or withholding information:

In the case at bar, Plaintiff has asserted no facts indicative that: Defendant Nestico was **personally** involved with Plaintiff's contingency fee arrangement; 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.

(Order, p. 4, emphasis added). This dissatisfaction is on Plaintiff; not the Court.

It is crystal clear from the Order that, contrary to Plaintiff's claim, this Court indeed considered whether Plaintiff's Amended Complaint stated any facts to support a valid cause of action for fraud **personally** against Mr. Nestico and not simply based upon his status as a member, manager, or officer of KNR. Nevertheless to address any potential arguments regarding piercing the corporate veil, the Court went a step further and found that Plaintiff failed to state a cause of action against Mr. Nestico under a veil piercing theory for the alleged conduct of KNR.⁴

³ In addition to applying personal involvement for breach of contract and warranty, Centennial also requires personal involvement of the officer in fraud: "To fasten personal liability upon a corporate officer for fraud, it must be shown that *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*, 46 Ohio App.2d at 141 (emphasis added).

⁴ Plaintiff readily admits in her Motion that she has no veil piercing claim. (Motion, p. 2, 7.)

2. Civ.R. 9(B) bars Plaintiff's fraud claim.

Additionally, as the Court recognized in its Order, Plaintiff's fraud claim against Mr. Nestico personally did not meet the heightened pleading standard of Civ.R. 9(B), which requires that allegations of fraud be stated with sufficient particularity, including:

'(1) a representation, or where there is a duty to disclose, a concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the misrepresentation or concealment, and (6) a resulting injury.'

Universal Coach, Inc. v. New York City Transit Auth., 90 Ohio App.3d 284, 291-292, 629 N.E.2d 28 (8th Dist. 1993), *quoting Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987). Failure to plead the elements of fraud with particularity results in a defective claim that cannot withstand a motion for judgment on the pleadings. *Id.*

As recognized by the Court, the Amended Complaint only alleged in a conclusory fashion that Mr. Nestico "is an Ohio resident who, at all relevant times, owned and controlled KNR and KLG and caused these corporations to engage in the conduct alleged in the Complaint." (Amended Complaint, ¶6). While Plaintiff complains that the heightened Civ.R. 9(B) standard does not require her to allege knowledge or intent with particularity, the Amended Complaint simply fails to allege or describe, at the very least, the circumstances surrounding the alleged knowledge and intent held by Mr. Nestico and the "who, what, where, or how" of such claim for it to survive. See, e.g. *Jeff Ford v. Brooks*, Franklin C.P. No. 10CVC09-14156, 2011 Ohio Misc. LEXIS 17088 (July 5, 2011) (dismissing fraud claim under Civ.R. 9(B) based upon conclusory allegations in the complaint). And while Plaintiff claims the Court failed to consider that she need not allege that Mr. Nestico made any affirmative representation to her and that concealment of a material fact is sufficient, Plaintiff has failed to set forth any facts in the Amended Complaint supporting her claim that Mr. Nestico had any such duty to speak, especially viewing that Plaintiff has not alleged that Mr. Nestico was a party to the contingency-

fee arrangement between Plaintiff and KNR, that Mr. Nestico was personally involved in Plaintiff's matter, or that Mr. Nestico had any dealings with Plaintiff whatsoever.

3. Plaintiff has failed to allege any personal involvement in the purported unjust enrichment.

In addition, and once again contrary to Plaintiff's assertions, the Court found that the Amended Complaint failed to support any set of facts that Mr. Nestico was **personally** enriched from the benefit Plaintiff alleges she conferred upon KNR to support her unjust enrichment claim:

This Court finds that 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.

(Order, p. 4, emphasis added).

Quite simply, the Court's Order precisely addressed the complaints raised by Plaintiff in her Motion and found that the Amended Complaint failed to sufficiently state a claim against Mr. Nestico. Plaintiff now asks that the Court reconsider its Order because she disagrees with the decision. Unfortunately for Plaintiff, as discussed above, disagreement with a court's decision is not grounds for reconsideration. Since Plaintiff has failed to set forth any obvious errors in the Court's decision, which is the basis for reconsideration, Plaintiff's Motion should be denied.

B. Plaintiff's lack of any factual allegations to support her claims against Mr. Nestico supports the Court scheduling a sanctions hearing.

Plaintiff lastly takes issue with the Court's scheduling a hearing on Mr. Nestico's request for sanctions. Civ.R. 11, R.C. 2323.51, and the Court's inherent authority allow for the imposition of sanctions against a party for frivolous conduct or abuse of the legal process. See, e.g., *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs.*, 8th Dist. Cuyahoga No. 93058, 2009-Ohio-5573, ¶10-33. While Plaintiff again cites a plethora of case law regarding "the American rule" and the imposition of sanctions for frivolous or bad-faith conduct, none of these cases support Plaintiff's request that the Court **should not schedule** such a hearing at Mr.

Nestico's request. Indeed, R.C. 2323.51(B)(2)(a) expressly states that such a hearing will "determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award." Plaintiff puts the cart before the horse, as she will surely be able to present argument against the imposition of sanctions, as will Mr. Nestico present argument and evidence of Plaintiff's frivolous and malicious claims against Mr. Nestico personally as a result of this lawsuit. However, there is no error by the Court in simply scheduling such a hearing. Accordingly, Plaintiff's Motion requesting that the Court reconsider scheduling the sanctions hearing should also be denied.

III. CONCLUSION

Based on the foregoing, Defendants respectfully requests that Plaintiff's Motion for Reconsideration be overruled and denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court and the parties were served via electronic mail on this 3rd day of April, 2017.

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