IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Alison Breaux

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 16, 2017 ORDER REGARDING DISMISSAL OF CLAIMS AGAINST DEFENDANT NESTICO

Plaintiff Member Williams submits the following reply brief to address certain misleading arguments offered by Defendant Rob Nestico in his brief in opposition to Williams's Motion for Reconsideration of the Court's March 16, 2017 Order.

I. This Court has the authority to reconsider, vacate, and reverse its March 16 Order.

Defendants begin their opposition brief (at 2–3) by suggesting that the Court shouldn't consider Plaintiffs' Motion for Reconsideration at all, regardless of its merits. But Defendants' statement that Plaintiff "has not established any errors … in the Court's Order" and "has only expressed her dissatisfaction with the Court's ruling" (*id.* at 2) is belied by the plain allegations of error identified in Plaintiff's Motion. Under Civil Rules 54(B) and 60(B), this Court has every bit of discretion to reconsider and vacate orders made before final judgment is entered, and it should do so here, as in any case where it is shown that an order is contrary to controlling Ohio law.

II. The First Amended Complaint contains sufficient allegations of Defendant Nestico's personal liability for fraud.

In his opposition to Plaintiff's Motion for Reconsideration, Nestico does not even try to address the substance of the black-letter Ohio law that requires reversal of the Court's March 16, 2017 Order, because there is no legitimate argument that his dismissal is warranted on the proper legal standards. Thus, Nestico is forced to resort to repeating the same baseless arguments he used to mislead the Court into dismissing the claims against him in the first place. None of these arguments justify the erroneous March 16 Order.

A. Nestico's "personal involvement" argument is a red herring and contrary to well-established Ohio law on fraudulent concealment.

First, Nestico repeats that he should be dismissed at the pleadings stage of this lawsuit because, allegedly, "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." Nestico Opp. at 4.

With this argument, Nestico only highlights his failure to confront controlling Ohio law on fraudulent concealment holding that, "It is well established that an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak. 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) (citations omitted); *State v. Warner*, 55 Ohio St. 3d 31, 53, 564 N.E.2d 18 (1990) ("Ohio courts have recognized fraud to include: (1) representation, **or where there is a duty to disclose, concealment**, of a matter of 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 representation or concealment; and (6) a resulting injury proximately caused by the reliance.") (emphasis added); *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 684 N.E.2d 1261 (9th Dist. 1996) ("The tort of fraud contains an element of intent, either actual **or inferred**.") citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus (emphasis added).[1]

In an attempt to circumvent these controlling principles, Nestico asserts that he had no duty to disclose to his clients that his law firm was intentionally and systemically defrauding them. (Nestico Opp. at 5). This assertion is contrary to law and undeniable facts pertaining to Nestico's control of the KNR law firm. *Ivancic v. Enos*, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 51 (11th Dist.) ("There is no doubt that an attorney-client relationship imposes a fiduciary duty upon the attorney and that the attorney must conduct business in good faith."). And in any event, it presents a factual issue that cannot be resolved on a Rule 12(C) motion at this early stage of the litigation, where the Court is required to construe all reasonable inferences in *Plaintiff's* favor. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570, 664 N.E.2d 931 (1996) ("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

[1] *See also Layman v. Binns*, 35 Ohio St. 3d 176, 178, 519 N.E.2d 642 (1988) ("An action for fraud may be grounded upon failure to fully disclose facts of a material nature where there exists a duty to speak") citing 37 American Jurisprudence 2d (1968) 196-201, Fraud and Deceit, Sections 144 and 145; *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d 98, 101, 519 N.E.2d 363 (1988) ("Full disclosure may also be required of a party to a business transaction "where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts") *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 684 N.E.2d 1261, (9th Dist. 1996) ("[A] party is under a duty to speak, and therefore liable for [fraudulent] non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.").

beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.").

In other words, it avails Nestico of nothing to continue protesting that he had no "personal involvement" with Williams' and the putative class members' so-called "investigation fees" when Williams has clearly alleged that he knew about the scheme, and directed the firm to engage in it. And Nestico's misleading "personal involvement" argument misses another essential point of Plaintiffs' allegations, which is that he had a legal duty to be "involved" by disclosing and putting a stop to the unlawful scheme. Again, it would be manifestly unreasonable for the Court to infer, without evidence, that KNR could engage in such a widespread fraud against its clients without Managing Partner Nestico's knowledge and approval, and that Nestico wouldn't owe a duty to disclose knowledge of such conduct to KNR clients. On Nestico's 12(C) motion, the Court is required to infer exactly the opposite.

B. The First Amended Complaint's allegations are sufficiently particular under Civ.R. 9(B).

Nestico goes on in his opposition to repeat the false and misleading argument that Plaintiff Williams's allegations against him "did not meet the heightened pleading standard of Civ.R. 9(B)." Nestico Opp. at 5. In support of this argument, Nestico states that "the [First] 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. *Id.* This is plainly untrue, as the First Amended Complaint contains detailed allegations about KNR's fraudulent investigation-fee scheme that concerned every KNR client (¶¶ 6, 9–28, 36–48) (*i.e.*, "the what, where, and how"), and further alleges that Nestico owned and completely controlled KNR at all relevant times, and caused it to engage in the scheme for his own benefit (¶¶ 6, 36–48, 54–57) (*i.e.*, "the who"). Again, there is no reason to doubt Nestico's ownership and control of KNR, and in any event, under Civ.R. 12(C), the Court is *required* to accept this allegation

as true. Civ.R. 12(C) further requires the Court to construe all reasonable inferences in Plaintiff's favor, and one such inference is that a scheme of this nature and magnitude could not possibly occur at a law firm without the controlling partner knowing about it, approving of it, and financially benefiting from it. *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 33 ("The fact that [plaintiff] may have employed circumstantial evidence and inference in [proving an individual's personal participation in a corporation's unlawful conduct] does not equate to mere speculation. Circumstantial evidence has the same probative value as direct evidence. Moreover, rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference.").

Given Civ.R. 9(B)'s provision that a defendant's "intent, knowledge, and other condition of mind may be averred generally," the First Amended Complaint's allegations are more than sufficient to satisfy the Rule's particularity requirement.

III. The Second Amended Complaint leaves no doubt that it would be premature to dismiss Nestico as a Defendant at the pleadings stage of this lawsuit.

As much as Defendants' might want to wish away the additional details pleaded by Williams and her putative co-Plaintiffs in their Second Amended Complaint (Nestico Opp. at 1, *n.*1), the Court has granted Plaintiffs permission to refile their Second Amended Complaint by May 10, 2017, and these allegations should be considered on this Motion for Reconsideration. While the First Amended Complaint's allegations were sufficient to withstand Nestico's Civ.R. 12(C) motion, as explained above, Plaintiffs' impending Second Amended Complaint, a substantially similar version of which was filed on March 22, 2017, further makes clear that the March 16 Order should be vacated and reversed.

Specifically, the Second Amended Complaint quotes numerous internal KNR emails, on which Nestico was copied, showing the fraudulent nature of the investigation fee. Proposed Second

Amended Complaint at ¶¶ 86–97. These emails show that Nestico knew that the so-called "investigators" never actually performed any investigations, and that KNR nevertheless routinely paid them for so-called investigations that never happened, even those that, according to KNR's own documents, purportedly occurred on the same day up to 200 miles away from one another. *Id.* at ¶¶ 89–91. These emails also show that KNR attorneys routinely referred to the investigation fee as a "sign-up fee," and that investigation fee was really a way for KNR to fraudulently charge its clients for its high-pressure solicitation practice of sending representatives to meet potential clients to sign them to KNR fee agreements as quickly as possible. *Id.* at ¶¶ 86–97.

These new allegations—again, with every inference properly being made in favor of Plaintiff—leave no doubt that it would be premature and legal error to dismiss Nestico as a Defendant at this early stage of the litigation.

IV. Defendants do not—because they cannot—begin to argue that there is any indication that Plaintiff or her counsel have engaged bad-faith conduct so as to warrant a hearing on sanctions.

Finally, Defendants do not even attempt to argue that there is any indication that Plaintiff Williams or her counsel, in filing the claims against Nestico, engaged in bad-faith conduct sufficient to warrant a hearing on sanctions. Because there is no factual basis for setting a sanctions hearing, as Nestico effectively concedes in his opposition brief (at 6–7), the Court should vacate and reverse the portion of the March 16 order regarding the sanctions hearing. The bottom line is that no plaintiff or plaintiff's counsel should be chilled by the continuous threat of sanctions for simply alleging facts and making legal arguments in good faith.

V. Conclusion

The Court has already granted Plaintiff leave to file a Second Amended Complaint, along with new Plaintiffs, alleging claims against Nestico, personally. For Williams's and putative Class A's claims against Nestico be permitted to stand in this new pleading, the Court should vacate and

reverse its March 16 Order to avoid any argument by Defendant Nestico about res judicata or any other claim-preclusive effect.

Dated: April 13, 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 April 13, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff