

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 Breaux
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT ON MATTHEW JOHNSON'S CLAIMS	

Having failed to obtain dismissal on the pleadings of Plaintiff Matthew Johnson's claims for unjust enrichment and breach of fiduciary duty, Defendants are now asking for the same relief yet again, but by different means—dismissal of Johnson's claims on a premature summary judgment motion, before Johnson has the chance to conduct any meaningful discovery.

Defendants' motion to file a premature motion for summary judgment is in direct violation of this Court's 10-16-2017 order providing that "no further motions, including but not limited to Motions for Summary Judgment, may be filed without prior leave of court."¹ It also blatantly disregards that the Court stated at the October 16, 2017 status conference that it would "hold off" on summary judgment proceedings after observing that "we [are] still in the discovery process." 10-16-2017 Hr. Tr. at 8:12–14, 7:11–17, 6:4–9, attached as **Exhibit A**.

¹ The Court further clarified by an October 24, 2017 email from staff attorney Catherine Loya that its October 16 order was "intended to require the parties to notify the Court by email or phone if the need to file a motion arises" to "determine whether the Court can help the parties resolve the issue without motion practice." Defendants have nevertheless filed their motion without any consultation with the Court or Plaintiffs' counsel, even after the Court stated at the October 16, 2017 status conference that it would "hold off" on summary judgment proceedings. **Ex. A**, 10-16-2017 Hr. Tr. at 8:12–14, 7:11–17, 6:4–9.

As the Court has already ruled in rejecting Defendants' request for dismissal of Johnson's claims on the pleadings (*See* 09-28-2017 Order), Johnson is entitled to discovery as to whether Defendants were receiving kickbacks from or retained an ownership interest in Liberty Capital. That discovery must be complete before Johnson is required to respond to Defendants' motion and the self-serving and conclusory affidavits attached to it. *See, e.g., Tucker v. Webb Corp.*, 4 Ohio St.3d 121, 122, 447 N.E.2d 100 (1983) (reversing appellate court's affirmation of summary judgment and remanding to trial court where the plaintiff "was allotted insufficient time to discover the essential facts"); *Lamtman v. Ward*, 9th Dist. Summit No. 26156, 2012-Ohio-4801, ¶ 35 ("It is within a court's discretion to refuse to consider a motion for summary judgment until sufficient discovery may be had"); *Moore v. Warren Ohio Hosps. Co., LLC*, 2016-Ohio-1366, 62 N.E.3d 994, ¶ 25 (11th Dist.) ("Before a court may rule on summary judgment, it must allow the parties adequate opportunity to complete discovery."). *See also* Civ.R. 56(F).

Defendants' lawless approach here is in keeping with their motion to strike Plaintiffs' class allegations as an apparent effort to avoid facing facts and to deny Plaintiffs the opportunity to conduct discovery on the amply pleaded claims at issue in this lawsuit. The motion to file a premature summary judgment motion is a frivolous waste of the Court's and Plaintiffs' time, and should be denied, with this case to proceed on a regular schedule, with summary judgment proceedings to take place after discovery is complete.

Dated: November 8, 2017

Respectfully submitted,

/s/ Peter Pattakos

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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 November 8, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

MEMBER WILLIAMS,)	CASE NO. CV2016-09-3928
)	
Plaintiff,)	
)	JUDGE ALISON BREAU
vs.)	
)	
KISLING, NESTICO &)	
REDICK, LLC, ET AL.,)	
)	
Defendant.)	

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

PETER PATTAKOS, Attorney at Law
DANIEL FRECH, Attorney at Law
JOSHUA R. COHEN, Attorney at Law

ON BEHALF OF THE DEFENDANTS:

JAMES M. POPSON, Attorney at Law
R. ERIC KENNEDY, Attorney at Law
THOMAS P. MANNION, Attorney at Law
BRIAN E. ROOF, Attorney at Law

BE IT REMEMBERED that upon the hearing of
the above-entitled matter in the Court of Common
Pleas, Summit County, Ohio, before the Honorable
Alison Breau, Judge Presiding, and commencing on
the 16th day of October, 2017, the following
proceedings were had, being a Transcript of
Proceedings:

BARBARA J. DAY, RPR
OFFICIAL COURT REPORTER
SUMMIT COUNTY COURTHOUSE
209 SOUTH HIGH STREET
AKRON, OH 44308

EXHIBIT A

- OFFICIAL COURT REPORTER - C.A.T.

1 There's just not common communications.
2 Everybody gets a loan for a different
3 reason, a different amount. So, that's
4 also a lack of commonality. We're also
5 going to file a motion for summary
6 judgment on that, attach the affidavits of
7 the folks at KNR.

8 THE COURT: Aren't we still
9 in the discovery process at this point?

10 MR. PATTAKOS: We haven't even
11 started discovery, Your Honor, because
12 they have refused to participate.

13 THE COURT: We'll get to that
14 in a minute.

15 Go ahead, Attorney Kennedy.

16 MR. KENNEDY: Under Rule 23,
17 the class action rule, it indicates that
18 the class action issue, as soon as
19 practical, should be addressed since it
20 has such influence over any cause of
21 action in any lawsuit. As soon as
22 practical, it should be addressed.

23 23(D)(4) allows the Court to strike
24 class allegations. And when you file such
25 a motion, the question for the Court is

1 will additional discovery change the facts
2 to allow this to be certified or not
3 certified.

4 Again, the fact that all 50,000
5 members have different investigative
6 services, that fact is not going to
7 change.

8 THE COURT: So, you're
9 intending to file a brief on that, and
10 that will be on Monday?

11 MR. KENNEDY: Yes, Your Honor.
12 And I think that the motion for summary
13 judgment on the secret kickback of the
14 loans will be Monday shortly thereafter.
15 It's just -- we just -- it's not a
16 dispute. We want to take care of that
17 right away.

18 MR. POPSON: Basically, we
19 have affidavits from the person that owns
20 Liberty Capital and the people at KNR to
21 say that there's no commonality of
22 ownership. There's no kickbacks. There's
23 no -- nobody at KNR is a part owner of
24 Liberty Capital. And, in fact, they don't
25 even allege it in their complaint. They

1 say it creates an appearance -- if you
2 look at the complaint very carefully.
3 It's simply just not true. And that is
4 something that can be established by
5 looking at the owner of the company, who
6 is the owner of the company and whatever
7 documents he has, you know.

8 The bottom line is KNR or its
9 employees have never owned any ownership
10 interest or received any kickback funds
11 from this. And that's just a factual one.

12 THE COURT: I'm going to hold
13 off on the motion for summary judgment at
14 this point.

15 Obviously, you're going to be
16 responding to their motion challenging the
17 classes. Am I right?

18 MR. PATTAKOS: Yes, Your Honor.

19 THE COURT: Now, on Friday
20 or Thursday -- Thursday or Friday --

21 MR. PATTAKOS: Thursday.

22 THE COURT: A third amended
23 complaint was filed. Are you folks aware
24 of that?

25 MR. POPSON: We are.

C E R T I F I C A T E

I, Barbara J. Day, Official.
Shorthand Reporter for the Court of Common Pleas,
Summit County, Ohio, duly appointed therein, do
hereby certify that I reported in Stenotypy the
proceedings had and testimony taken in the
foregoing-entitled matter consisting of 46 pages,
together with exhibits (if applicable), and I do
further certify that the foregoing-entitled
TRANSCRIPT OF PROCEEDINGS conducted before the
Honorable Alison Breau, Judge of said court, is
a complete, true, and accurate record of said
matter and TRANSCRIPT OF PROCEEDINGS.

BARBARA J. DAY, RPR
Official Court Reporter

Dated: NOVEMBER 2, 2017
AKRON, OHIO

- OFFICIAL COURT REPORTER - C.A.T.

Sandra Kurt, Summit County Clerk of Courts