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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Michael A. Heller, et al.,	)	**Case No. CV 16 860476**
	)	
Plaintiffs,	)	**Judge Pamela A. Barker**
	)	
v.	)	**OPINION AND JOURNAL ENTRY ON MOTION TO DISMISS COMPLAINT AND MOTION FOR DEFINITE STATEMENT**
	)	
Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA, et al.	)	
	)	
Defendants	)	
	)	

This matter is before the Court on the Motion To Dismiss Complaint And Motion For Definite Statement filed by Defendant, Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA, and its attorneys, Defendants Eric T. Deighton ("Deighton"), Richard J. Feuerman, James L. Sassano, William T. Rini and Herbert J. Kramer, attorneys with Carlisle (hereinafter individually and/or collectively referred to as "Defendants") ("Defendants' Motion"); Plaintiffs Michael A. Heller's and Mike Heller Law, LLC's (hereinafter collectively referred to as "Heller") Reply In Opposition to Defendants' Motion ("Heller's Reply); and Defendants' Response To Heller's Reply ("Defendants' Response").

The Complaint as to Defendants

In Heller's Complaint, Heller alleges that at all times relevant he represented Defendant County Med, Inc. and its principals/managers, Defendants Malik Dahdouh ("Dahdouh") and Rania Karsheh ("Karsheh"), had represented Dahdouh and Karsheh previously,[1] and that Defendants were aware or should have been aware of his prior and/or ongoing attorney-client

[1] Heller's Complaint, ¶¶11, 20, 21.

relationships with them.[2] Further, Heller alleges that: 1.) Dahdouh was the successful bidder and purchaser of a certain property, identified in Heller's Complaint as the "Maurer property",[3] which was the subject of a foreclosure action;[4] 2.) Defendants represented Talmer Bank in that foreclosure lawsuit;[5] 3.) Defendant Talmer Bank and/or Defendants contacted Dahdouh to convince him to relinquish his rights to the Maurer property,[6] after which Dahdouh retained Heller to represent him in negotiating a settlement with Defendant Talmer Bank, through Defendants;[7] 4.) Heller did negotiate a settlement on behalf of Dahdouh, through Defendants, as the attorneys for Talmer Bank;[8] 5.) because of a disagreement between Heller and Dahdouh that arose when Heller explained how the settlement proceeds would be paid and/or distributed, Dahdouh accused Heller of scheming to defraud him and retain and steal the settlement funds, disputed Heller's fee, refused to execute the settlement documents unless the check was made payable solely to him or County Med, and thereby anticipatorily repudiated the settlement agreement;[9] 6.) Heller advised Deighton of a possible problem, the potential frustration and possible repudiation of the settlement, and threat of termination by Dahdouh;[10] 7.) Dahdouh went to Deighton, falsely advised him that he had terminated Heller, and as proof of same, provided Deighton with a copy of a letter Dahdouh advised Deighton he had provided to Heller, but Heller had never been given or received that letter and had never

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[2] *Id.*, ¶22.
[3] *Id.*, ¶¶25, 34.
[4] *Id.*, *Talmer Bank And Trust Successor By Merger To First Place Bank v. Darren W. Schultz, et al.*, Case No. 15-CV-839515, filed in the Court of Common Pleas for Cuyahoga County, Ohio.
[5] *Id.*, ¶26.
[6] *Id.*, ¶44.
[7] *Id.*, ¶46.
[8] *Id.*, ¶47. According to paragraphs 48 and 49 of Heller's Complaint, it is alleged that pursuant to the settlement terms, Dahdouh was to receive $16,000 in cash in consideration for relinquishing his rights to the Maurer property to Talmer Bank and/or Defendants, as well as a full refund or buy-out of his $10,000 deposit.
[9] *Id.*, ¶¶50, 51, 52, 53, 54.
[10] *Id.*, ¶59.

received formal or clear notice of termination of his representation of Dahdouh;[11] 8.) Defendants did not inquire of Heller regarding the truthfulness of Dahdouh's representations, and consummated the settlement directly with Dahdouh and paid him the full settlement proceeds of $26,000, all without notice to, or knowledge by, Heller;[12] and, 9.) all this, despite the fact that Deighton knew that Dahdouh's insistence that the check be made payable directly and only to him was a problem and Heller expected, and Defendants knew or should have known that Heller expected, a legal fee out of the settlement proceeds.[13]

Causes of Action against Defendants

In Heller's Complaint, Heller alleges the following causes of action against Defendants: Count 1: Negligence; Count 2: Gross Negligence/Willful and Wanton Conduct; Count 3: Negligence Per Se; Count 4: Conversion; Counts 5 and 6: Tortious [*sic*] Interference with a Contractual Relationship/Tortious Interference with a Business Relationship; Count 7: Civil Conspiracy; Count 8: Fraud; and Count 11: Unjust enrichment.

In Defendants' Motion, Defendants ask this Court to dismiss each and every cause of action set forth against them in Heller's Complaint for "failure to state a claim upon which relief can be granted," pursuant to Civ.R. 12(B)(6).

Motion to Dismiss Standard

When evaluating a motion to dismiss for failure to state a claim, the court accepts all factual allegations contained in the complaint as true and draws all reasonable inferences from those factual allegations in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d

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[11] *Id.*, ¶¶ 60, 61, 62, 63.
[12] *Id.*, ¶¶ 68, 69, 70.
[13] *Id.*, ¶¶ 71, 72, 73, 74.

56, 565 N.E.2d 584. "'Dismissal of a claim for failure to state a claim upon which relief may be granted is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *** In construing a complaint on a motion to dismiss pursuant to Civ.R. 12(B)(6), a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *** However, a court need not presume the truth of conclusions unsupported by factual allegations. *Id.* at 193.'" *Mills v. Deehr*, 8th Dist. Cuyahoga No. 82799, 2004-Ohio-2410, ¶4, citing *Guess v. Wilkinson* (1997), 123 Ohio App.3d 430, 433-434, 704 N.E.2d 328, citations omitted. The claims set forth in the complaint must be plausible, rather than just conceivable. *Glazer v. Chase Home Fin. L.L.C.,* 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013 Ohio 5589, ¶33, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), paragraph two of the syllabus. While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need to allege detailed factual allegations, a plaintiff's obligation to provide the grounds for entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action is insufficient. *Glazer*, *supra*, citing *Twombly*, *supra*, at paragraph 1(b) of the syllabus.

Discussion

According to Defendants, Heller's cause of action alleging negligence must be dismissed because Heller failed to plead any factual allegations as to why or how they owed a duty to Heller. Defendants cite *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 77, and *Charles Gruenspan Co., LPA v. Thompson*, 8th Dist. Cuyahoga No. 80748, 2003-Ohio-3641, ¶¶26, 28, to support their argument that they owed no duty to Heller because they were "opposing

counsel" representing Talmer Bank in the foreclosure lawsuit and therefore owed the foremost duty and paramount concern to Talmer Bank and not to Heller to protect his fee or for any other purpose.

In *Simon v. Zipperstein*, involving a claim for legal malpractice, the Ohio Supreme Court reiterated its holding in the first paragraph of the syllabus of *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 10 OBR 426, 462 N.E.2d 158, also involving a claim for legal malpractice, to wit:

> An attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.

Indeed, the Court declared the "sole consideration presented by th[e] appeal was whether **in the absence of fraud, collusion or malice**, an attorney may be held liable **in a malpractice action** by a beneficiary or purported beneficiary of a will where privity is lacking" and answered that question in the negative. (Emphasis added.) *Simon v. Zipperstein*, 32 Ohio St.3d 74, 78.

Heller argues that he was in privity with Dahdouh and that Defendants acted maliciously so as to distinguish this case from *Simon v. Zipperstein*. Although Heller may have been in privity with Dahdouh given their alleged attorney-client relationship, Heller was not in privity with Defendants' client, Talmer Bank. And although, consistent with allegations set forth in the Complaint,[14] Heller asserts in Heller's Reply that Defendants acted maliciously, such alleged malicious conduct is the subject of other Counts in Heller's Complaint, and not Count 1 alleging

[14] In Heller's Complaint, it is alleged that Defendants acted "recklessly" (¶¶77, 79, 89); Count 2 includes allegations of Willful and Wanton Conduct and Gross Negligence; Counts 5 and 6 include allegations of willful, reckless, with malice, and/or deliberate actions by Defendants; and Counts 7 and 8 include allegations of malice.

simple negligence. But, more importantly, Heller's Complaint does not constitute an action, or include a claim, for legal malpractice

Defendants correctly cite ¶28 of the Eighth District Court of Appeals' decision in *Charles Gruenspan Co. v. Thompson*, 8th Dist. Cuyahoga No. 80748, 2003-Ohio-3641, for what the Court itself described as "a self-evident principle of ethics that an attorney owes the foremost duty to the client ***." Indeed, at ¶29, the Court quoted from *Mason v. Levy & Van Bourg* (1978), 77 Cal App. 3d 60, 143 Cal.Rptr. 389, 392, to wit:

> "It is fundamental to the attorney-client relationship that an attorney have an undivided loyalty to his clients (See ABA Code of Professional Responsibility, Canon 5.) This loyalty should not be diluted by a duty owed **to some other person**, such as an earlier attorney. While, as a practical matter, both the client and former attorney stand to benefit from any recovery in the client's action, their interests are not identical. *** It would be inconsistent with an attorney's duty to exercise independent professional judgment on behalf of his client to impose upon him an obligation to take into account the interests of predecessor attorneys***."

(Emphasis added.)

This Court acknowledges that whereas *Gruenspan* involved a co-counsel situation and this matter involves claims by an attorney against opposing counsel[15], nonetheless the principle enunciated by the Eighth District applies herein so as to require the conclusion that Defendants did not owe a fiduciary duty to Heller, the breach of which could be the subject of a cause of action for negligence.

[15] In Heller's Reply, Heller asserts that Heller was not "opposing counsel" to Defendants "in the subject case", i.e., *Talmer Bank v. Darren W. Schultz, supra*. Heller misses the point. At least up until the time that Dahdouh allegedly repudiated the settlement that Heller had allegedly negotiated on his behalf, Defendants were "opposing counsel" to Heller in the matter that is the subject of Heller's Complaint, i.e., negotiations and settlement between Dahdouh and Defendants' client, Talmer Bank.

Heller also argues that Rule 1.15(e) of the Ohio Rules of Professional Conduct[16] imposed a duty upon Defendants "to hold disputed funds in their IOLTA account pending resolution".[17] However, in *Bangor v. Amato*, 25 N.E.3d 386, 2014-Ohio-5503, ¶58, the Seventh District Court of Appeals rejected the argument that the Rules of Professional Conduct alone can create a duty the breach of which may give rise to a cause of action against an attorney, explaining as follows:

> "***[I]t is not the purpose of the Professional Rules to create a private cause of action. The Ohio Supreme Court has explained:
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> > The purpose of the disciplinary actions is to protect the public interest and to ensure that members of the bar are competent to practice a profession imbued with the public trust. *Disciplinary Counsel v. Trumbo* (1996), 76 Ohio St.3d 369, 667 N.E.2d 1186. These interests are different from the purposes underlying tort law, which provides a means of redress to individuals for damages suffered as a result of tortious conduct. Accordingly, violations of the Disciplinary Rules does not, in itself, create a private cause of action. *Am. Express Travel Related Servs. Co. v. Mandilakis* (1996), 111 Ohio App.3d 160, 675 N.E.2d 1279.
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> *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 178, 1999 Ohio 260, 707 N.E.2d 853 (1999).
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> Furthermore, the Preamble to the Professional Rules of Conduct states, "Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Prof.Cond.R. Preamble at [20]. Therefore, the rules alone cannot

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[16] Prof.Cond.Rule 1.15(e) reads: "When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute." Prof.Cond.Rule 1.15(a) reads in relevant part as follows: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title."

[17] Heller's Reply, at page 6.

give rise to a cause of action against an attorney. *Cargould v. Manning*, 10th Dist. No. 09AP-194, 2009-Ohio-5853, ¶ 10.

Accordingly, Defendants' Motion to Dismiss Count 1 is granted.

Defendants argue that since they owed no duty to Heller so as to allow a simple negligence claim against them, then Heller's Cause of Action for Gross Negligence/Willful and Wanton Misconduct also must be dismissed because such alleged willful, wanton and reckless misconduct presupposes a duty owed, citing and relying upon *Harsh v. Lorain Cty. Speedway, Inc.* (8th Dist. 1996), 111 Ohio App.3d 113, 118, and *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705.

More recently, the Ohio Supreme Court held as follows:

> Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. (*Tighe v. Diamond*, 149 Ohio St. 520, 80 N.E.2d 122 (1948), approved and followed.)
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> Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)
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> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

Anderson v. The City of Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraphs 2, 3, and 4 of the Syllabus.

Since willful and wanton misconduct involve the breach of a duty owed, and reckless conduct is substantially greater than negligent conduct, and this Court has concluded that Defendants owed no duty to Heller so as to support a simple negligence claim against

Defendants, then Heller cannot maintain a cause of action against Defendants for gross negligence, willful, wanton and/or reckless (mis)conduct. Accordingly, Defendants' Motion to Dismiss Count 2 is granted.

Defendants seek dismissal of Count 3 of Heller's Complaint alleging a cause of action for negligence per se on the basis that Heller has not set forth a violation of a specific requirement of law or ordinance and that Rules 1.15(e) and 4.2 of the Rules of Professional Conduct do not apply to the conduct alleged in Heller's Complaint. In Heller's Reply, Heller reiterates the position that Defendants violated the Rules of Professional Conduct by, e.g., "dispersing funds where there was reason to know that Plaintiff had a claim to them," and "communicating with a represented person without confirming that they terminated their counsel."[18]

In its discussion of Count 1 of Heller's Complaint, this Court has already concluded that violations of the Ohio Rules of Professional Conduct do not impose a duty the violation of which can give rise to a private cause of action. Accordingly, Defendants' Motion to Dismiss Count 3 of the Heller's Complaint is granted.

Defendants seek dismissal of Count 4 of Heller's Complaint alleging conversion[19] on the bases that: 1.) Heller's Complaint does not allege that he had a contingent fee agreement in compliance with Ohio Code of Professional Conduct Rule 1.5(c)(1)[20] and does not otherwise

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[18] Heller's Reply, at page 7.

[19] Defendants correctly cite *6750 BMS, L.L.C. v. Drentlau*, 8th Dist. Cuyahoga No. 103409, 2016-Ohio-1385, ¶ 28, citing to *Dream Makers v. Marshek*, 8th Dist. Cuyahoga No. 81249, 2002-Ohio-7069, ¶19), for the proposition that the elements of a conversion claim are: (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages.

[20] Code of Professional Conduct Rule 1.5(c)(1) reads: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law**(1)** Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue

allege Heller's ownership or right to possess any portion of the settlement proceeds; and 2.) Heller's Complaint does not allege that Defendants exercised dominion or had control over the settlement proceeds so as to convert such property.

Heller's failure to specifically allege the existence of a contingency agreement, or use that term is not fatal to his conversion claim against Defendants. Heller's Complaint does contain allegations that: Dahdouh owed him a fee for his representation of Dahdouh throughout the negotiations with Defendants;[21] it was because of the dispute associated with same that the alleged anticipatory repudiation of the settlement agreement negotiated by Heller on Dahdouh's behalf occurred;[22] Heller informed Defendants that Dahdouh was persistently insisting a check be made payable directly to him and that that was a problem;[23] and Defendants knew or should have known that Plaintiff expected a legal fee out of the settlement proceeds.[24] Accordingly, this Court finds that Heller's Complaint does allege ownership or a right to possess part of the settlement proceeds.

In support of their second argument in support of their motion to dismiss Heller's conversion claim, i.e., that Heller's Complaint fails to allege that Defendants exercised dominion or control over the settlement proceeds, Defendants cite to ¶ 69 of Heller's Complaint which reads: "Defendant(s)/Attorney(s), also hastily, released the full and entire sum of settlement proceeds directly to Dahdouh, also without Plaintiff's knowledge." Defendants' argument is

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to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party."

[21] Heller's Complaint, at ¶¶ 46, 50, 52.
[22] *Id.*, at ¶¶ 51-54.
[23] *Id.*, at ¶¶ 59, 71.
[24] *Id.*, at ¶ 73.

that this allegation means that "they simply delivered those funds to Malik Dahdouh."[25] However, Heller's Complaint also alleges that Defendants "paid $26,000 directly to Dahdouh"[26] and "tender[ed] ...funds directly to Dahdouh."[27] In this Court's opinion, the terms "released", "paid" and "tender[ed]" connote or presuppose dominion or control of the settlement proceeds or property. Accordingly, Defendants' Motion to Dismiss Count 4 of Heller's Complaint is denied.

Defendants seek dismissal of the Tortious Interference with a Contractual Relationship/Tortious Interference with a Business Relationship causes of action set forth in Counts 5 and 6 of Heller's Complaint on the basis that the allegations of Heller's Complaint demonstrate that Heller cannot meet the third element of such claims, i.e., an intentional interference causing a breach or termination of the relationship.[28] Defendants point to those parts of Heller's Complaint that allege that Dahdouh and Heller disagreed with regard to Heller's fee and the payment method of the settlement proceeds, and that it was Dahdouh, and not Defendants, who breached or terminated the business and/or contractual relationship that

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[25] Defendants' Motion, at page 7.
[26] Heller's Complaint, at ¶ 70.
[27] *Id.*, at ¶ 72.
[28] At page 8 of Defendants' Motion, Defendants correctly cite *Zappola v. Rock Capital Sound Corp.*, 8th Dist. Cuyahoga No. 100055, 2014-Ohio-2261, ¶ 42, citing to *Presser v. RCP Mayfield, L.L.C.*, 8th Dist. Cuyahoga No. 92073, 2009-Ohio-3380, for the propositions that: the elements essential to a recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages; and "[t]he torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." In *Charles Gruenspan Co. v. Thompson, supra*, at ¶ 24, the Eighth District Court of Appeals stated: "'The elements of the tort of tortious interference with contract are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages. See *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999 Ohio 260, 707 N.E.2d 853, paragraph one of the syllabus (internal citation omitted).'"

he had with Heller by going directly to Defendants and advising them of his termination of Heller and showing Defendants a copy of the letter terminating Heller.

Nowhere in the Complaint does Heller allege that Defendants solicited or in any way approached and convinced Dahdouh to terminate his relationship with Heller. Indeed, Heller's Complaint demonstrates that the disintegration of the attorney/client relationship began before Dahdouh ever approached Defendants, and it was Dahdouh's unhappiness with Heller and/or the amount and/or method of payment of his fee that prompted Dahdouh to approach Defendants and represent to them that he had terminated Heller as his attorney. And, given Heller's allegation that Heller had advised Defendants of his problems with Dahdouh in effectuating the settlement reached, it would not be unreasonable for Defendants to believe Dahdouh when he advised them that he had terminated Heller. Therefore, as a matter of law, Counts 5 and 6 do not state a cause of action upon which relief can be granted, and Counts 5 and 6 are dismissed. *See, Charles Gruenspan Co. v. Thompson, supra*, at ¶18.

Defendants seek dismissal of Count 7 of Heller's Complaint alleging Civil Conspiracy, arguing that Heller has not plead facts to support the fourth element of a cause of action for conspiracy, namely the existence of an unlawful act independent from the actual conspiracy.[29] This Court agrees.

Heller alleges that Defendants, with the co-defendants – including Dahdouh, conspired to expedite a settlement that was in their mutual interest, "while at once knowingly excluding

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[29] "A claim of civil conspiracy requires a showing of: (1) a malicious combination, (2) two or more persons, (3) injury to persons or property, and (4) the existence of an unlawful act independent from the actual conspiracy. *Charles Gruenspan Co. v. Thompson, supra*, at ¶ 34, citing *Geo-Pro Services, Inc. v. Solar Testing Laboratories, Inc.* (2001), 145 Ohio App.3d 514, 527, 763 N.E.2d 664.

Plaintiff from Plaintiff's rightful interests";[30] and "conspired and acted together to systematically and deliberately deprive Plaintiff of Plaintiff's appropriate fee."[31] However, as the Court explained in *Charles Gruenspan Co. v. Thompson, supra*, ¶35:

> "Assuming this to be true, there is nothing unlawful about it. Because Ohio is a code law state, only those acts for which there is a positive prohibition and specific penalty are considered to be criminal offenses. See R.C. 2901.03(A) and (B). The Revised Code contains no prohibition on the settlement of cases. It is important to understand that settling the...litigation, not the intent to deprive [the attorney] of his fee, was the relevant act for purposes of the conspiracy claim. No matter how malicious their motivation to settle, [the defendant attorney and client] could only be held liable for a conspiracy to commit an unlawful act, not simply committing a lawful act with malicious intent."

So, too, in the instant matter, settling the claim, not the intent to deprive Heller of his fee, was the relevant act for purposes of the conspiracy claim. There is nothing unlawful about settling a claim. Accordingly, Defendants' motion to dismiss Count 7 is granted.

Defendants seek dismissal of Count 8 of Heller's Complaint, alleging fraud. "The necessary elements of a fraud claim are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Charles Gruenspan Co. v. Thompson, supra*, ¶ 20, citing *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 97 Ohio St.3d 69, 2002 Ohio 5312, 776 N.E.2d 92, at P24.

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[30] Heller's Complaint, ¶ 120.
[31] *Id.*, ¶ 121.

Defendants argue that Heller's Complaint does not include any allegation that Defendants made a false representation, but only intimidating representations of legal actions that would be taken to vacate the Sheriff's Sale, citing to paragraph 132 of Heller's Complaint;[32] and that given the facts as alleged in Heller's Complaint,[33] Defendants not only had no duty to disclose the terms of the settlement reached with Dahdouh, but were prohibited from making such disclosure. In other words, per Defendants, facts needed to support the first element of a fraud claim are not pled in Heller's Complaint.

Defendants are correct in asserting that Heller's Complaint does not include the allegation that they made a false representation to Heller. The more difficult issue is whether or not, under the facts as alleged by Heller in Heller's Complaint, Defendants had a duty to disclose to Heller the consummation of the settlement and payment/transmittal of settlement funds to Dahdouh. In *Charles Gruenspan Co. v. Thompson, supra*, ¶24, the Court considered whether or not the new attorney/defendant had a duty to disclose to the former attorney/plaintiff the existence of settlement discussions, and concluded as follows: "Despite his equitable lien for attorney fees against the [former clients], that lien did not extend to [the

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[32] Paragraph 132 of Heller's Complaint does allege that Defendants made intimidating representations of legal actions "in order to induce settlement", but nowhere in that paragraph or anywhere else in Heller's Complaint is it alleged to whom such representations were made, i.e., to Heller or to Dahdouh? The use of the words "in order to induce settlement" can be construed as meaning that such representations were made to Dahdouh.

[33] Defendants interpret those allegations to be, or they are, that: the settlement that Heller negotiated was repudiated by Dahdouh , citing ¶ 134, but specifically the allegation is that "Dahdouh thus **anticipatorily** repudiated the settlement agreement (emphasis added)"; Heller negotiated a new settlement with Carlisle and the Attorneys only after Heller and his former client had a falling out over fees, citing ¶¶ 51, 52, but those paragraphs of Heller's Complaint specifically allege that Dahdouh accused Heller of scheming to defraud him and retain and steal the settlement monies and that Daddouh disputed Heller's fees, and that Dahdouh believed that he could impose a fee of his own discretion, at a grossly reduced fee, and more importantly, actually Heller's Complaint does **NOT** allege that Defendants negotiated a new settlement with Dahdouh, but that they "consummated" the settlement already reached through negotiations with Heller (¶ 68); Dahdouh repudiated the settlement which Heller negotiated, citing ¶ 54, but again, that paragraph includes the word "anticipatorily" repudiated that settlement; Heller advised Defendants that [Dahdouh] w[as] threatening to terminate him as counsel, citing ¶ 59; and Dahdouh went to Defendants and told them that he had terminated Heller and as proof of such termination, showed them a termination letter that he sent to Heller, citing ¶¶ 60 and 61.

new attorney/defendant]. In short, the former attorney/plaintiff was not in privity with [defendant-attorney] to that extent that any duty to disclose the negotiations would arise." [34] So, too, in this matter, Heller was not in privity with Defendants to the extent that any duty to disclose Dahdouh's representation that he had terminated Heller and the consummation of the settlement by Defendants directly with Dahdouh would arise. Therefore, Defendants' motion to dismiss Count 8 is granted.

Defendants also seek dismissal of Count 11 of Heller's Complaint, asserting a claim for unjust enrichment. "In the absence of a contractual relationship a party may seek compensation when a person 'has and retains money or benefits which in justice and equity belong to another[.]' *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 14 N.E.2d 923. To establish a claim of unjust enrichment, the plaintiff must establish the following elements: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *L & H Leasing Co. v. Dutton* (1992), 82 Ohio App.3d 528, 534, 612 N.E.2d 787, citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 12

[34] As relates to the fraud claim, this court recognizes that this case is distinguishable from *Charles Gruenspan Co. v. Thompson, supra*, in the following respect. Therein, the new attorney/defendant's negotiations did not begin until after he had sent a letter to the former attorney/plaintiff memorializing the former attorney/plaintiff's termination. *Id.*, ¶21. The Court concluded that "[i]t follows that for purposes of the fraud claim, [the former attorney/plaintiff's] representation had terminated as a matter of law such that [the new attorney/defendant], not [the former attorney/plaintiff], had been the sole attorney representing the [clients] in settlement negotiations...." Here, and according to Heller's Complaint, Defendants, on behalf of their client, Talmer Bank, consummated the settlement already negotiated by Heller on behalf of Dahdouh, without notifying Heller or memorializing the fact that Dahdouh had represented to them that he had terminated Heller and was in effect, representing himself to consummate the settlement. However, in *Charles Gruenspan Co. v. Thompson, supra*, the new attorney/defendant and the former attorney/plaintiff had both represented the clients as co-counsel, whereas in this case, Heller and Defendants were opposing counsel, and Dahdouh did not approach Defendants and secure or retain them as new counsel to replace Heller.

Ohio B. 246, 465 N.E.2d 1298." *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 424, 2011-Ohio-6167.

Defendants argue that Heller's unjust enrichment claim must fail because Heller's Complaint does not include any allegation that a benefit was conferred upon Defendants by Heller. This Court agrees. Any benefit conferred by Heller through his work in negotiating the settlement that Defendants ultimately consummated with Dahdouh, was upon Defendants' client, Talmer Bank, and not Defendants. Therefore, Defendants' Motion to Dismiss the unjust enrichment claim set forth in Count 11 is granted.

Although Defendants' Motion seeks dismissal of Counts 9, 10 and 12 of Heller's Complaint, asserting claims for breach of contract and Promissory Estoppel/Detrimental Reliance, and as Heller acknowledges in Heller's Reply, those claims or counts do not apply to Defendants.

That portion of Defendants' Motion seeking a more definite statement is denied as moot.

Accordingly, Defendants' Motion To Dismiss to granted in part and denied in part. Counts 1, 2, 3, 5, 6, 7, 8, and 11 are dismissed as to Defendants. Count 4, alleging conversion, remains pending against Defendants.

IT IS SO ORDERED.

Pamela A. Barker 6-24-16

Judge Pamela A. Barker **Dated**