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

JOHN KASSAY, ET AL
Plaintiff

Case No: CV-17-885671

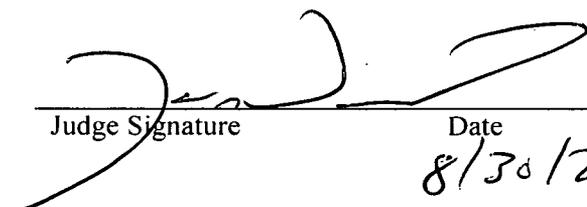
Judge: JOHN P O'DONNELL

NIEDERST MANAGEMENT GROUP, LTD, ET AL
Defendant

JOURNAL ENTRY

JUDGMENT ENTRY GRANTING THE KOHRMAN JACKSON DEFENDANTS MOTION TO DISMISS PLAINTIFF PACAK'S CLAIMS AGAINST THEM AND DENYING THE PLAINTIFFS' ALTERNATIVE MOTION FOR A LEAVE TO FILE A SECOND AMENDED COMPLAINT.

O.S.J.

	Date
Judge Signature	8/30/2018

FILED

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CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOHN KASSAY, *et al.*

Plaintiffs,

vs.

NIEDERST MANAGEMENT
GROUP LTD., *et al.*

Defendants.

John P. O'Donnell, J.:

) CASE NO. CV 17 885671
)

) JUDGE JOHN P. O'DONNELL
)

) JUDGMENT ENTRY GRANTING
) THE MOTION OF THE KOHRMAN
) JACKSON DEFENDANTS TO DISMISS
) PLAINTIFF PACAK'S CLAIMS
) AGAINST THEM AND DENYING THE
) PLAINTIFFS' MOTION FOR LEAVE
) TO FILE A SECOND AMENDED
) COMPLAINT

This litigation has its genesis in a prior lawsuit by plaintiff John Kassay alleging employment discrimination against Niederst Management, Ltd. and its employees Lisa Weth and Denise Pacak. That case ended in a jury verdict against all three defendants and in favor of Kassay.

Weth and Pacak have now teamed up with Kassay as plaintiffs. The amended complaint here runs to 401 numbered paragraphs¹ over 39 pages and alleges various causes of action that will be discussed in greater detail in this opinion, but the gist of the claims by Weth and Pacak is that the lawyers Niederst² hired to defend them against Kassay's lawsuit were controlled by Niederst and not acting as independent counsel for Weth and Pacak, eventually leading to judgments against them. Kassay's claims are for employment discrimination and fraudulent conveyance.

¹ The amended complaint has paragraphs consecutively numbered 1 through 345 on pages 1 to 32, then 16 paragraphs consecutively numbered 196 through 211 on pages 32 to 34, then paragraphs consecutively numbered from 346 through 385 on pages 34 through 39. The total of numbered paragraphs is 401.

² For clarity, defendant Niederst Management, Ltd. will be referred to here as Niederst, defendant Niederst Management Group, Ltd. will be referred to as Niederst Group, and defendant Adrina Niederst will be referred to by her full name.

The three plaintiffs are all represented by Brian Spitz, Esq., who represented Kassay in the first case from its inception through trial, post-verdict proceedings and appeal. The purpose of this opinion is to address the motion of defendants Kohrman, Jackson & Krantz, LLP, Robert Gilmore, Esq., and Sean Malone, Esq. to dismiss Pacak's amended complaint against them and the plaintiffs' motion to file a second amended complaint.

Kassay's first lawsuit

A summary of the first case is useful to a discussion of the claims and pending motions here. Most of the following paragraphs are taken from the opinion of the Eighth District Court of Appeals in *Kassay v. Niederst Mgt., Ltd.*, Cuyahoga App. No. 106016, 2018-Ohio-2057, the defendants' appeal of the trial result which was decided in Kassay's favor on May 24, 2018.

Kassay's complaint against Niederst, Weth and Pacak alleged wrongful termination based on disability discrimination, failure to provide reasonable accommodation, unlawful retaliation and intentional infliction of emotional distress.

Niederst is a property management company that owns a number of apartment buildings. Niederst hires and trains people as pest control technicians to exterminate bed bugs in its buildings. The technicians' responsibilities include lifting heavy equipment, including 35-pound fans, 75-pound power cords and 240-pound furnaces. Two technicians are needed to move a furnace, which must be carried up stairs in buildings without elevators.

Kassay was hired by Niederst as a pest control technician in August 2012. Weth was his supervisor. On October 24, 2013, Kassay showed up to work wearing a brace on his left wrist. He had worn the brace to work on occasions because of a chronic wrist problem resulting from an injury at a previous job. When Weth became aware that Kassay was using a brace she told him she would have to speak with Pacak, the director of the human resources department, about his

brace because of her concern that his injury may put him or others in danger while carrying the heavy equipment.

Weth returned to Kassay and informed him that Pacak said he would have to complete Family and Medical Leave Act paperwork and would then be able to work without any limitations. According to Weth the paperwork didn't pertain to him as far as she was concerned, so she told him to go to Pacak with any questions. Kassay tried to communicate with Pacak but never got a call back. As a result, he continued to work without filling out the forms until October 29. On that date Weth sent him a text message saying he was being taken off of the work schedule until he completed the FMLA paperwork. Additionally, according to instructions from Pacak and Sean Whiteman, Niederst's vice president, he could not come back to work until completing the FMLA paperwork and getting a return-to-work note from a doctor. Ultimately, Pacak testified at trial that Niederst had a policy that employees must be able to work full time, full duty, with absolutely no restrictions in order to work there.

Because he had been suspended, Kassay did not show for work over the next several days. When he finally called Pacak to tell her he had the documentation he needed, she told him he was considered to have voluntarily resigned by violating Niederst's policy against failing to appear for work without excuse for at least two straight days.

The jury found that Kassay had been discriminated against on the basis of a disability and awarded compensatory damages against Niederst of \$281,229, Pacak of \$1,000 and Weth of \$100, and punitive damages against each of \$250,000, \$1,000 and one cent, respectively. Finally, the jury found Niederst, Pacak and Weth jointly and severally liable for Kassay's attorney's fees of \$201,854.84, one year of front pay and prejudgment interest. Weth and Pacak have since satisfied

the compensatory and punitive judgments but the other elements of the judgment – attorney’s fees, front pay and interest – remain unpaid.

The amended complaint in this case

Besides summarizing the facts leading to the underlying disability discrimination claim and the course of that litigation, the plaintiffs’ amended complaint in this case makes additional allegations about the dealings and communications among Niederst, Weth, Pacak and their respective trial attorneys. They assert that “[w]ithout any input or say from Weth or Pacak, [Niederst] retained” Lester Armstrong, Esq. and his law firm Meyers, Roman, Friedberg & Lewis, LLP and Robert Gilmore, Esq., Sean Malone, Esq., and their law firm Kohrman, Jackson & Krantz, LLP “to provide a joint defense for Niederst, Weth and Pacak.”³ Then, according to the amended complaint: Armstrong never spoke to Weth and Pacak before filing an answer for them; Armstrong got a written summary of events from Pacak, his client, and then turned that privileged material over to Kassay’s counsel; Armstrong not only did not consult with Weth and Pacak before answering written discovery directed to them, he never even told them the discovery had been propounded; neither the lawyers nor anyone from Niederst told Pacak she was a named defendant until just before she was deposed; Niederst’s management pressured Weth and Pacak to lie; Niederst and the lawyers did not produce exculpatory information in discovery tending to show that Weth and Pacak had no control over Kassay’s employment and hid the Niederst managers’ own role in Kassay’s termination, thus putting “all blame for Kassay’s termination squarely on Weth and Pacak”;⁴ Kassay offered to settle with Weth and Pacak for a consent judgment with a condition that he would not attempt to execute on the judgment and Armstrong told Niederst’s

³ Amended complaint, ¶115.

⁴ *Id.*, ¶132.

managers about the offer but didn't inform Weth or Pacak; ultimately, settlement offers were rejected based, in part, on Niederst's legally unenforceable promises to indemnify Weth and Pacak for any judgment and threats to Weth that she would be fired if she settled; and Armstrong, after the trial verdict, admitted to Weth and Pacak that he committed legal malpractice.

The pleading goes on to assert various forms of post-verdict misconduct that will be described in detail only as necessary in the ensuing portion of this opinion.

Based on the factual allegations in the amended complaint, the plaintiffs set forth 15 "counts" in the amended complaint.⁵ These include Kassay's claims at counts one through four against Niederst, Niederst Group, Whiteman and defendant EcoTreat, LLC for disability discrimination, failure to provide reasonable accommodation to disability, unlawful retaliation, and coercing discrimination. Count five on Kassay's behalf alleges a civil conspiracy to discriminate by the same four defendants plus a civil conspiracy to fraudulently transfer against the same four defendants and the Kohrman Jackson firm and its lawyers. Count eight for Weth and Pacak alleges legal malpractice against both law firm defendants and their lawyers. Counts nine and ten are Weth and Pacak's claims against all defendants for fraud and civil conspiracy to defraud. Counts eleven, twelve and thirteen claim breach of contract, unjust enrichment and promissory estoppel for Weth and Pacak against the Niederst corporate entities and managers. Count fourteen (labeled in the amended complaint as Count XIX) on behalf of Kassay alleges fraudulent transfer against the Niederst defendants and the Kohrman Jackson firm and its lawyers.

Count six for "alter ego," count seven to "pierce the corporate veil" and count fifteen (labeled in the amended complaint as Count XX) for "successor liability" are not separate causes

⁵ The plaintiffs use Roman numerals to label their causes of action. The first 13 are identified as counts I through XIII and the last two are denominated as XIX and XX. There are no counts labeled as XV through XVIII.

of action, but simply put the individual defendants – including Nied Capital, allegedly the corporate successor to Niederst Group’s assets and liabilities – on notice that Kassay seeks to hold them personally liable for corporate actions.

The Kohrman Jackson defendants’ motion to dismiss and the plaintiffs’ alternative motion for leave to file an amended complaint

The Kohrman Jackson firm and its lawyers have moved to dismiss the amended complaint against them pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure on the grounds that it fails to state a cause of action against them. Pacak has opposed the motion to dismiss her claims against Kohrman Jackson and its attorneys. With her brief in opposition she included an alternative motion for leave to file a second amended complaint. On the same day, Weth filed a Civil Rule 41(A)(1)(a) notice of dismissal of all of her claims against Kohrman Jackson and its lawyers and Kassay voluntarily dismissed his only claim against the Kohrman Jackson defendants, count 14 for fraudulent transfer. This leaves for a decision only the motion to dismiss Pacak’s claims against the Kohrman Jackson firm and its lawyers: legal malpractice, fraud and civil conspiracy.

As the basis for their motion to dismiss, the Kohrman Jackson defendants – citing to the amended complaint’s allegations and exhibits – argue that Pacak has offered only “rank speculation”⁶ insufficient to allege the existence of a legal duty, a breach of duty and damages proximately caused by the breach. Moreover, to the extent the text of the amended complaint alleges these elements, the exhibits negate them. For her part, Pacak argues that the amended complaint’s allegations are sufficient to state a claim especially given the low bar set by Civil Rule 12(B)(6).

⁶ Motion to dismiss, page 5.

To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St. 3d 421 (1997), syllabus. For her amended complaint to be sufficient, Pacak is thus required to allege facts which, taken as true, prove each of these elements.

For the initial element, the Kohrman Jackson defendants owe a duty to Pacak only if the firm and its lawyers had an attorney-client relationship with her. An attorney-client relationship is consensual in nature and dependent upon a mutual confidence and understanding between the attorney and client. *A.G. Fin., Inc. v. Lasalla*, Cuyahoga App. No. 84880, 2005-Ohio-1504, ¶29. In other words, the relationship exists only when each side is aware of and consents to it. The amended complaint alleges that around December 12, 2016, Whiteman advised Pacak by email that Niederst had just hired Kohrman Jackson to represent her on post-verdict matters in Kassay's first lawsuit, but that, until then, "Kohrman Jackson had been participating in the . . . litigation behind the scenes,"⁷ *i.e.* without Pacak's knowledge. Since both sides to an attorney-client relationship must know about it, and since Pacak's knowledge of the relationship – based on her own allegations and exhibits in the amended complaint – came no sooner than mid-December 2016, she has sufficiently alleged the first element of a malpractice claim, namely the existence of an attorney-client relationship. But because the relationship could not have started before then, only factual assertions in the amended complaint that allege conduct by Kohrman Jackson after

⁷ Am. complaint, ¶255.

that date can be considered in determining whether Pacak has adequately alleged the breach and causation elements of a malpractice claim.

To support the element of breach, Pacak's amended complaint alleges the following actions by Kohrman Jackson after the earliest possible date an attorney-client relationship was established: 1) including Pacak as a movant in a May 2017 motion for judgment notwithstanding the verdict that was also filed for the Niederst defendants; 2) filing a July 14, 2017, notice of appeal for her and Niederst without her permission; 3) withdrawing as her appellate counsel on September 12, 2017, four days after they found out Pacak had filed this lawsuit through Spitz; and 4) thereafter refusing to give Pacak her client file.

As for filing the motion for JNOV and then the appeal, those allegations, without more, do not demonstrate a deviation from the applicable standard of care for an attorney. And the withdrawal as appellate counsel came when Kohrman Jackson found out Pacak was represented by opposing counsel Spitz. In that context the mere fact of withdrawal does not sufficiently allege a breach by Kohrman Jackson of a duty owed to Pacak. As for refusing to give Pacak her file, that happened after this lawsuit was filed, calling into question whether it can be considered as conduct giving rise to the legal malpractice claim in the first place. Moreover, the failure to give over the file may violate a lawyer's duty to a client but, of course, to be actionable the conduct must result in damage to the client.

That leads to whether Pacak's amended complaint against Kohrman Jackson sufficiently alleges the tort elements of causation and damages. According to the amended complaint, "Pacak

sustained damages as a direct and proximate cause of the malpractice committed”⁸ by Kohrman Jackson. The pleading, however, is otherwise silent about what those damages are.

Civil Rule 8(A) obligates Pacak’s amended complaint only to contain a short and plain statement of the claim showing that she is entitled to relief. This means that the amended complaint must allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. *Tuleta v. Medical Mut. of Ohio*, Cuyahoga App. No. 10050, 2014-Ohio-396, ¶12. The defendants’ motion to dismiss under Civil Rule 12(B)(6) is a challenge to the legal sufficiency of Pacak’s claim. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). When a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*, 57 Ohio St.3d 56, 60 (1991). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

Yet Pacak’s malpractice claim against Kohrman Jackson cannot survive a motion to dismiss through the mere incantation of an abstract legal standard. *Gallo v. Westfield Nat’l Ins. Co.*, Cuyahoga App. No. 91893, 2009-Ohio-1094, ¶9. The claims set forth in the complaint must be plausible, rather than conceivable. *Id.* Pacak must demonstrate the grounds of her entitlement to relief with more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Id.* Her factual allegations must be enough to raise a right to relief above the speculative level. *Id.*

⁸ *Id.*, ¶203, p. 33.

Considering the entirety of the amended complaint's legal malpractice claim against Kohrman Jackson, Gilmore and Malone after accepting the truth of its factual allegations and making all reasonable inferences in her favor, Pacak has failed to raise her claim beyond the speculative level and dismissal is warranted because it is not even conceivable, much less plausible, that she incurred damages as a result of any of the misconduct alleged.

First, the entire record, including Exhibit D to the amended complaint and the docket in Kassay's first lawsuit (case number CV 14 834274), makes it clear that not only did Pacak consent to being included with Niederst as a movant on the May 24, 2017, motion for JNOV, but the motion was prepared and filed for Pacak by Armstrong, not by any Kohrman Jackson lawyer. And even assuming that a Kohrman Jackson lawyer drafted the motion for Armstrong, and that those efforts are enough to impose on Kohrman Jackson a duty to Pacak, it is neither plausible nor conceivable that Pacak incurred damages as a result, because 1) the trial judgment had already been entered and 2) Kassay's subsequent motion to make Pacak pay his attorney's fees in connection with opposing the JNOV motion was denied.⁹

Second, it is not plausible that Pacak incurred damages by Kohrman Jackson's conduct in including her on the notice of appeal and then withdrawing as her counsel. The only effect the July 14, 2017, filing of the notice of appeal had on Pacak was to preserve her ability to appeal. Since she doesn't allege that she had to pay for that work even though she didn't authorize it, there is no conceivable possibility of damage to her as a result of the mere filing of the notice of appeal. Then Kohrman Jackson withdrew as her appellate counsel when there was still more than a month to file the appellant's brief and Pacak was represented by Spitz and David Waltz, Esq.¹⁰ How, in

⁹ Case No. CV 14 834274, July 11, 2017, judgment entry.

¹⁰ See Exhibit D to the amended complaint, describing David Waltz, Esq. as Pacak's personal counsel.

those circumstances, is it plausibly possible that Kohrman Jackson's withdrawal proximately resulted in damage to Pacak? The amended complaint doesn't provide an answer – nor does the imagination – and Pacak has thus failed to state a legal malpractice claim against defendants Kohrman, Jackson & Krantz, LLP, Robert Gilmore, Esq. and Sean Malone, Esq.

And this same analysis applies even if it is taken as true that the interests of Niederst and Pacak conflicted to the point that Kohrman Jackson shouldn't have represented both of them because Pacak still can't plausibly allege damages proximately caused by the post-trial dual representation.

Apparently recognizing the likelihood that her legal malpractice claim in the amended complaint against the Kohrman Jackson defendants is deficient, Pacak filed the alternative motion for leave to file a second amended complaint. According to her, the receipt in discovery of over 15,000 documents since the filing of the amended complaint permits her to allege additional facts in support of her claim.

Although it is hard to tell from reading the proposed second amended complaint, it does not appear that any of these 15,000 documents are used to support the only new factual allegations concerning Kohrman Jackson, Gilmore and Malone. Those allegations are that Pacak reasonably believed since the end of the jury trial that she was represented by Kohrman Jackson because Whiteman told her she was represented by Kohrman Jackson.¹¹ But Pacak completely fails to allege how it is that Whiteman had the authority to impose a legally enforceable duty on the Kohrman Jackson firm and its lawyers, and that failure would cause the proposed second amended complaint to fail the sufficiency test.

¹¹ Proposed second amended complaint, filed 2/28/2018 as a supplement to the motion for leave to amend, ¶246.

Accordingly, Pacak's motion for leave to file a second amended complaint alleging legal malpractice against the Kehrman Jackson firm and its lawyers is denied, and the motion by the Kehrman Jackson firm and its lawyers to dismiss the amended complaint's legal malpractice cause of action against them is granted.

This leaves Pacak's claims against Kehrman Jackson, Gilmore and Malone for fraud and civil conspiracy. The fraud claim is labeled as Count IX and it alleges that the defendants falsely represented to Pacak the extent of her "liability exposure"¹² in Kassay's lawsuit and the ability of Niederst to indemnify her for a judgment on Kassay's intentional tort claim. She goes on to allege that she justifiably relied on these assurances by refusing to settle with Kassay. According to Pacak, this constituted a breach of fiduciary duty owed to her by the Kehrman Jackson firm and its lawyers to "disclose information to [her] about [her] liability exposure."¹³

This claim fails for two reasons. First, nowhere in the amended complaint does she describe any pre-verdict advice or counsel given to her by any lawyer from Kehrman Jackson. The opposite is true: she alleges the Kehrman Jackson lawyers did not begin to represent her until after the verdict. As a result, any duty the Kehrman Jackson defendants might have owed to Pacak arose well after her liability exposure blossomed into a non-indemnifiable judgment, thus negating the possibility that those damages were caused by justifiable reliance on something a Kehrman Jackson lawyer told her. Second, even if the contradictory allegations in the complaint were generously construed to get over the Civil Rule 12(B)(6) hurdle, Pacak is talking about bad advice received from a lawyer, *i.e.* a legal malpractice claim, and as already discussed here her amended

¹² Am. complaint, page 33, ¶205.

¹³ *Id.*, p. 34, ¶209.

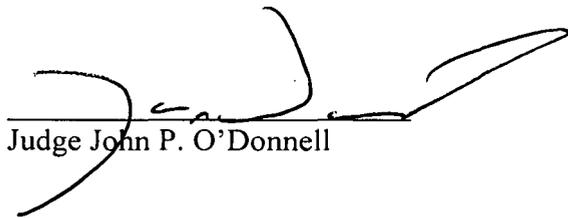
complaint fails to state a claim for legal malpractice against the Kohrman Jackson firm and its individual lawyers.

The same deficiencies render Count X for civil conspiracy to defraud suitable to dismissal under Civil Rule 12(B)(6).

Conclusion

For the reasons given here, the motion of defendants Kohrman, Jackson & Krantz, LLP, Robert Gilmore, Esq. and Sean Malone, Esq. to dismiss Pacak's amended complaint against them is granted, and the plaintiffs' motion for leave to file a second amended complaint is denied.

IT IS SO ORDERED:



Judge John P. O'Donnell

August 30, 2018
Date

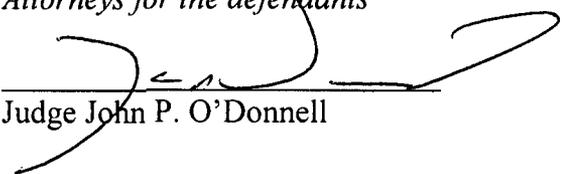
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A copy of this judgment entry was sent by email on August 30, 2018, to the following:

Brian D. Spitz, Esq.
brian.spitz@spitzlawfirm.com
Christopher P. Wido, Esq.
CHRIS.WIDO@SPITZLAWFIRM.COM
Attorneys for the plaintiffs

Jon J. Pinney, Esq.
JJP@KJK.COM
Kyle A. Hutnicky, Esq.
KAH@KJK.COM
Justine L. Konicki, Esq.
JLK@KJK.COM
Andrew J. Dorman, Esq.
ADORMAN@REMININGER.COM
Holly M. Wilson, Esq.
HWILSON@REMININGER.COM

Julie L. Juergens, Esq.
JJUERGENS@GALLAGHERSHARP.COM
Timothy T. Brick, Esq.
TBRICK@GALLAGHERSHARP.COM
Attorneys for the defendants



Judge John P. O'Donnell