

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GREGORY M. MAKOZY,)	CASE NO. CV 13 803617
)	
Plaintiff,)	
)	JUDGE BRENDAN J. SHEEHAN
v.)	
)	
CHAD TRUSH, <i>et al.</i> ,)	
)	OPINION AND JUDGMENT
Defendants.)	ENTRY
)	

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on Defendants Chad Trush, Daniel Trush, and America's Lending Solutions, LTD Motion to Dismiss and Defendant Jennifer Work's Motion to Dismiss. Both motions are brought pursuant to Civ. R. 12(B)(6). The issues have been fully briefed to the Court.

Plaintiff's claims arise from a business transaction in which Plaintiff purchased a 51% share in America's Lending Solutions, Ltd. for \$150,000.00. Plaintiff alleges that, during a March 2009 meeting, individual defendants Chad Trush, Daniel Trush, Jennifer A. Work and Eric Konopinski materially misrepresented the status of America's Lending Solutions, Ltd.'s state mortgage broker licenses and/or mortgage loan originator licenses. Plaintiff claims that various state mortgage broker and/or mortgage loan originator licenses were either revoked, cancelled, or in the process of being revoked or cancelled. Plaintiff contends that the Defendants' collective actions amounted to fraud and civil conspiracy and that individual liability may be imposed by piercing the corporate veil.

The moving Defendants seek dismissal of Plaintiff's claims on the grounds that Plaintiff's claims are brought beyond the statute of limitations and that Plaintiff cannot demonstrate justifiable reliance on any of the Defendant's statements.

II. LAW AND ANALYSIS.

A. Standard of Review.

A motion to dismiss brought pursuant to Civ.R. 12(B)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). All factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Further, the court is confined to the allegations of the complaint. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991); *AAA American Const., Inc. v. Alpha Graphic*, 8th Dist. Case No. 84320, 2005 Ohio 2822.

"While a complaint attacked by a * * * motion to dismiss does not need detailed factual allegations, the [plaintiffs'] obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Parsons v. Greater Cleveland Reg'l Transit Auth.*, 8th Dist. Case No. 93523, 2010 Ohio 266 at ¶ 11, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Conclusory statements in a complaint not supported by facts are not afforded the presumption of veracity and are insufficient to withstand a motion to

dismiss. *Id.*; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988). See also *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

B. Plaintiff's Access to Public Records.

To prove his claim of fraud, Plaintiff must demonstrate: "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." *Russ v. TRW, Inc.*, 59 Ohio St. 3d 42, 49, 570 N.E.2d 1076 (1991).

As to Plaintiff's claim of civil conspiracy: "[a] claim for conspiracy cannot be made [the] subject of a civil action unless something is done which, in the absence of the conspiracy allegations, would give rise to an independent cause of action. Thus, the applicable statute of limitations for the underlying cause of action applies to the civil conspiracy charge." *Ford Motor Credit Co. v. Jones*, 8th Dist. No. 92428, 2009 Ohio 3298, P24, quoting *Cully v. St. Augustine Manor*, 8th Dist. No. 67601, 1995 Ohio App. LEXIS 1643 (Apr. 20, 1995). Thus Plaintiff's civil conspiracy claim is dependent upon the underlying fraud claim and is controlled by the same statute of limitations. *Id.*

Defendants' grounds for dismissal both center on Plaintiff's access to a public information concerning Plaintiff's licensure. According to Defendants', Plaintiff had constructive notice of Plaintiff's licensure status and should have, through the exercise of due diligence in a business transaction, discovered any issues with Plaintiff's licensure prior to entering into the business transaction at issue. Because the Demand Judgment Note was

executed on March 24, 2009 and, according to Defendants, Plaintiff knew or should have known of licensure problems before that date, they assert that the Complaint was filed beyond the applicable four year statute of limitations for the current claims pursuant to R.C. 2305.09.

Additionally, Defendants argue that Plaintiff's access to public records detailing licensure statutes negates the requisite element of justifiable reliance. The Eighth District Court of Appeals has stated:

This Court has held that in determining whether reliance is justifiable "*** courts consider the various circumstances involved, such as the nature of the transaction, the form and the materiality of the representation, the relationship of the parties, *** and their respective knowledge and means of knowledge." *Finomore v. Epstein* (1984), 18 Ohio App. 3d 88, 89, 481 N.E.2d 1193, citing *Feliciano v. Moore* (1979), 64 Ohio App. 2d 236, 241, 412 N.E.2d 427. A plaintiff cannot allege an action for fraud where the true facts are equally open to both parties. *Finomore*, supra, at 90; *LaVeck v. Al's Mustang Stable* (1991), 73 Ohio App. 3d 700, 704, 598 N.E.2d 154; *Higgenbottom v. Manhattan Life Ins.* (Feb. 3, 1994), Cuyahoga App. No. 64633, unreported; *Renner v. Derin Acquisition Corp.* (May 2, 1996), 1996 Ohio App. LEXIS 1803, Cuyahoga App. No. 69181, unreported at 23, 25.

Kovacic v. All States Freight Sys., 8th Dist. No. 69926, 1996 Ohio App. LEXIS 3474, 18-19 (Aug. 15, 1996).

If Defendants' assertions are proven—that Plaintiff had access to public records detailing the current status of Plaintiff's licensure—prior to March 24, 2009 when the business transaction was completed, the Plaintiff's claims may well fail as a matter of law. Critically, facts relating to when Plaintiff's licenses were no longer valid and when that information was available in public databases are not apparent from the Complaint or subject to judicial notice. This Court may not construe suppositions in favor of the moving party in reviewing a motion under Civ.R. 12(B)(6).

Accordingly, Defendants' Motion must fail as to both statute of limitations and lack of justifiable reliance.

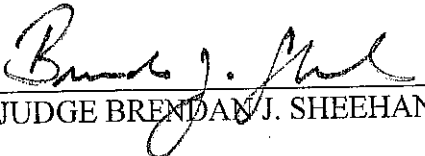
C. Subject Matter Jurisdiction and Failure to Join Necessary Parties.

Defendant Jennifer Work has also argued that Plaintiff's Complaint is subject to dismissal pursuant to Civ.R.12(B)(1) and (7). Defendant does not provide any support for either contention. The current claims appear to fall squarely within the subject matter jurisdiction of this Court and no additional parties have yet been identified as necessary to this action. Accordingly, Defendant's motion is denied.

III. CONCLUSION.

FOR THE FOREGOING REASONS, DEFENDANTS CHAD TRUSH, DANIEL TRUSH, AND AMERICA'S LENDING SOLUTIONS, LTD MOTION TO DISMISS AND DEFENDANT JENNIFER WORK'S MOTION TO DISMISS ARE DENIED.

Dated: 7/23/13


JUDGE BRENDAN J. SHEEHAN

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 23rd day of July, 2013:

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