

[Cite as *Cord v. Victory Solutions, L.L.C.*, 2018-Ohio-590.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106006

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**EDITH M. CORD**

PLAINTIFF-APPELLANT

vs.

**VICTORY SOLUTIONS, L.L.C., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-16-871054

**BEFORE:** Boyle, J., McCormack, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** February 15, 2018

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MARY J. BOYLE, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Plaintiff-appellant, Edith M. Cord, appeals the trial court's order dismissing her fraud claim against defendant-appellee, Shannon Burns. On appeal, she raises one assignment of error for our review:

The trial court erred when it dismissed Appellant Edith Cord's fraud claim.

{¶3} Finding no merit to her assignment of error, we affirm.

#### **I. Procedural History and Factual Background**

{¶4} In 2009, Cord's son asked her to provide financial assistance to Victory Solutions, L.L.C., which he co-founded with Burns. Cord agreed, and on February 13, 2009, Cord and Burns, as the chief executive officer of Victory Solutions, L.L.C., executed a promissory note under which Cord agreed to lend \$15,000 to the corporation. In 2012, Cord's son passed away after being diagnosed with brain cancer, leaving the management of Victory Solutions, L.L.C. solely to Burns.

{¶5} On October 27, 2016, after not receiving any form of repayment from Victory Solutions for approximately eight years, Cord filed a complaint against the corporation and Burns. She alleged three causes of action, including breach of contract, promissory estoppel (as an alternative cause of action), and fraud. Cord's actions for breach of contract and promissory estoppel were based on Victory Solutions's alleged

failure to pay the principal and interest owed to Cord under the promissory note. Cord's fraud claim was based on alleged misrepresentations by Burns made after the promissory note's execution concerning the corporation's ability to pay.

{¶6} On December 20, 2016, Cord moved for default judgment after Victory Solutions and Burns failed to respond to her complaint. The trial court, however, granted Victory Solutions and Burns leave to respond to the complaint.

{¶7} On January 19, 2017, Burns moved to dismiss Cord's action for fraud under Civ.R. 12(B)(6). On April 28, 2017, the trial court granted Cord's motion for default judgment against Victory Solutions on her counts for breach of contract and promissory estoppel. But on June 16, 2017, the trial court granted Burns's motion to dismiss Cord's action for fraud.

{¶8} It is from that judgment that Cord now appeals.

## **II. Law and Analysis**

{¶9} In her sole assignment of error, Cord argues that the trial court improperly dismissed her fraud claim against Burns.

{¶10} We review the trial court's order dismissing Cord's action for fraud de novo. *Chinese Merchants Assn. v. Chin*, 159 Ohio App.3d 292, 2004-Ohio-6424, 823 N.E.2d 900, ¶ 4 (8th Dist.).

{¶11} To prevail on a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [her] to recover." *Id.* A court is confined to the allegations in the complaint and cannot consider outside

evidentiary materials. *Id.*, citing *Greeley v. Miami Valley Maintenance Contrs. Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). In addition, a court must presume that all the allegations in the complaint are true and “make all reasonable inferences in favor of the nonmoving party.” *Id.*, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988).

{¶12} A claim for fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, omission of a 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. *Russ v. TRW, Inc.*, 59 Ohio St.3d 42, 49, 570 N.E.2d 1076 (1991).

{¶13} The officer of a corporation may be held liable for fraud. *R.J. Martin Elec. Contr. v. N. Am. Wire Prods. Corp.*, 8th Dist. Cuyahoga No. 83850, 2004-Ohio-5971, ¶ 16. To prove a corporate officer’s liability, a plaintiff must show “(1) the officer knew his [or her] statement to be false, (2) the officer intended the plaintiff to act upon it, and (3) the plaintiff acted on the statement and, as a result, suffered injury.” *Id.*

{¶14} A plaintiff must state the circumstances constituting fraud with particularity. Civ.R. 9(B). This means that a plaintiff must state “the time, place, and content of the false representation, the fact misrepresented, and the nature of what was obtained or

given as a consequence of the fraud.” *Carter-Jones Lumber Co. v. Denune*, 132 Ohio App.3d 430, 433, 725 N.E.2d 330 (10th Dist.1999), quoting *Baker v. Conlan*, 66 Ohio App.3d 454, 585 N.E.2d 543 (1st Dist.1990). Particularity in pleading serves three purposes: (1) protecting defendants’ reputations from ill-defined accusations of deceitful conduct, (2) notifying defendants of the challenged conduct, and (3) discouraging plaintiffs’ fishing expeditions for undiscovered fraudulent conduct. *Reinglass v. Morgan Stanley Dean Witter*, 8th Dist. Cuyahoga No. 86407, 2006-Ohio-1542, ¶ 20, citing *Carter-Jones*.

{¶15} “[P]romises or representations concerning future actions or conduct cannot serve as a basis for fraud. \* \* \* Such statements are merely opinions or predictions, not fraudulent misrepresentations.” *Deitrick v. Am. Mtge. Solutions, Inc.*, 10th Dist. Franklin No. 05AP-154, 2007-Ohio-839, ¶ 16, citing *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 742 N.E.2d 1198 (10th Dist.2000). There is an exception to this rule, however, which allows a plaintiff to maintain a claim for fraud “‘where an individual makes a promise concerning a future action, occurrence, or conduct and, at the time he makes it, has no intention of keeping the promise.’” *RAE Assocs. v. Nexus Communications, Inc.*, 10th Dist. Franklin No. 14AP-482, 2015-Ohio-2166, ¶ 16, quoting *Williams v. Edwards*, 129 Ohio App.3d 116, 717 N.E.2d 368 (1st Dist.1989).

{¶16} Nevertheless, “the existence of a contract action excludes the opportunity to present the same case as a tort claim.” *Stancik v. Deutsche Natl. Bank*, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 40, citing *Textron Fin. Corp. v. Nationwide*

*Mut. Ins. Co.*, 115 Ohio App.3d 137, 684 N.E.2d 1261 (9th Dist.1996). “Where the causes of action in tort and contract are ‘factually intertwined,’ a plaintiff must show that the tort claims derive from the breach of duties that are independent of the contract and that would exist notwithstanding the contract.” *Id.*, quoting *Cuthbert v. Trucklease Corp.*, 10th Dist. Franklin No. 03AP-662, 2004-Ohio-4417.

{¶17} Consequently, it is well settled that a plaintiff “‘must include actual damages attributable to the wrongful acts of the alleged tortfeasor which are in addition to those attributable to the breach of contract.’” *EverStaff, L.L.C. v. Sansai Environmental Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 96108, 2011-Ohio-4824, ¶ 28, quoting *Textron*; see also *RAE Assocs.* at ¶ 19 (“[W]e affirm the trial court’s dismissal on the grounds that the tort claim asserts no additional ground for recovery beyond that expressed in the claim for breach of contract.”); *Strategy Group for Media v. Lowden*, 5th Dist. Delaware No. 12 CAE 03 0016, 2013-Ohio-1330, ¶ 33 (affirming the trial court’s grant of summary judgment because the plaintiff’s claims for breach of contract and fraud were “based upon the same outstanding invoices”).

{¶18} In *EverStaff*, the trial court granted the plaintiff’s motion for summary judgment as to its claim for breach of contract but summarily dismissed its fraud claim. On review, we found that the plaintiff “failed to allege actual damages beyond the breach of contract” and that its “only additional damages stemmed from claims for punitive damages.” *Id.* at ¶ 29. As a result, we concluded that the plaintiff insufficiently pleaded her claim for fraud. *Id.*

{¶19} After review of Cord’s complaint, we reach the same conclusion. Here, Cord alleged the same damages, \$44,341.75, for her breach of contract and fraud claims. In fact, like *EverStaff*, the only difference in her prayer for relief for the fraud claim was the additional \$45,000 in alleged punitive damages. Cord’s complaint contains no independent damages or injury that resulted from Burns’s alleged promises to pay. Therefore, we conclude that Cord has failed to assert damages for fraud separate from those resulting from Burns’s breach of contract. Accordingly, we find that the trial court properly granted Burns’s motion to dismiss and overrule Cord’s assignment of error.

{¶20} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and  
SEAN C. GALLAGHER, J., CONCUR