

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

KAREN HOFFMAN,	:	APPEAL NO. C-090242
	:	TRIAL NO. A-0700162
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
INVENT HELP/I.S.C.,	:	
	:	
Defendant-Appellee,	:	
	:	
and	:	
RICHARD HOLDERNESS,	:	
	:	
Defendant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant, Karen Hoffman, filed a complaint against defendant-appellee, Invent Help/ISC (“ISC”), alleging breach of contract and fraud. ICS filed a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim for which relief could be granted. The trial court granted ISC’s motion. Hoffman has appealed from that judgment. We find no merit in her assignment of error, and we affirm the trial court’s judgment.

In her complaint, Hoffman alleged that, in 1991, she had entered into a contract with ISC through its agent, Richard Holderness. In the contract, the parties had agreed that “ISC would explore marketing of a concept related to a bird house” that Hoffman had invented. They had also agreed that the transaction was confidential and that ISC could not use the concept to its advantage and to

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Hoffman's detriment. Subsequently, Hoffman and ISC entered into a second agreement labeled "Submission Agreement."

As part of the initial discussions, Hoffman had told Holderness that she had three titles for her birdhouse invention, which were "My Secret Birdhouse," "Peek-a-Boo Birdhouse," and "Sneak-a-Peak Birdhouse." She had also provided ICS with drawings that showed the construction of her invention.

In 2001, Hoffman filled out a form that asked for the title of her invention. ISC led her to believe that it would be marketed under one of the three names she had submitted. She contended that ISC had instructed her not to use all three titles and that she was allowed to use only one title.

Hoffman also alleged in her complaint that, in 1992, Intromark and Universal Financing Company ("Intromark") had become contractually involved with her and ISC. She said that ISC, through Intromark, had repeatedly asked her to send more money as part of the submission process. But ISC had also told Hoffman that she could make payments as small as \$20 per month. She also contended that Holderness had called her, "looking for various payment amounts," and had made additional promises about the marketing of her invention.

In 1993, Hoffman decided to withdraw her invention from ISC. She requested her complete file, a refund of funds she had paid, and a confirmation of confidentiality about her invention. ISC did not comply with her requests.

Hoffman further alleged that, in 1997, in a Walgreen's store in Covington, Kentucky, she had seen her concept and design being marketed under the name "Peek-a-Boo Birdhouse." The manufacturer was listed as K-Tel International, Inc. After some research, Hoffman learned that the purported inventor was Leslie Wexelman of Montreal, Canada.

In 1999, K-Tel divulged that the name of the company that had created the product was Sneak-a-Peak Manufacturing Company, one of the names that Hoffman alleged that she had provided to ISC in 1991. Hoffman contacted Wexelman, who responded hostilely when asked about the invention, and Hoffman was advised to cease contact with her.

In her sole assignment of error, Hoffman contends that the trial court erred in granting ISC's Civ.R. 12(B)(6) motion to dismiss for failure to state a claim for which relief could be granted. She argues that she presented sufficient facts to assert causes of action for fraud and breach of contract. This assignment of error is not well taken.

We first note that Hoffman, who is acting pro se, has tried to present to this court numerous documents that were not before the trial court. We appreciate that she has put a great deal of time and effort into composing these documents, but we regret that we cannot consider them.

The appealing party bears the burden to show error by reference to matters in the record before the trial court.² A reviewing court cannot add to the record anything that was not part of the trial court's proceedings and then decide the appeal on the basis of that new matter.³ Even though Hoffman was not aware of this rule, pro se litigants are bound by the same rules as litigants who retain counsel. We cannot afford them greater rights, and they must accept the results of their own mistakes.⁴

We turn now to the merits of the assignment of error. A Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of the complaint. In ruling on the motion, the trial court must take all the allegations of the complaint as true and draw all

² *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; *Maseck v. Lindav Properties*, 1st Dist. No. C-050528, 2006-Ohio-3721, ¶10.

³ *In re Contested Election of November 2, 1993*, 72 Ohio St.3d 411, 413, 1995-Ohio-16, 650 N.E.2d 859; *Lassiter v. Lassiter*, 1st Dist. Nos. C-020494, C-020370, and C-020128, 2003-Ohio-2333, ¶2.

⁴ *Arkwright Mut. Ins. Co. v. Toler*, 1st Dist. No. C-020589, 2003-Ohio-2202, ¶15.

reasonable inferences in favor of the nonmoving party.⁵ The court may dismiss a complaint on a Civ.R. 12(B)(6) motion only when the plaintiff can prove no set of facts that would entitle the plaintiff to relief.⁶ The plaintiff need not allege every fact he or she intends to prove, but unsupported general allegations are insufficient to withstand a motion to dismiss.⁷

To show breach of contract, a party must demonstrate (1) that a contract existed, (2) that the party claiming the breach fulfilled his or her obligations, (3) that the other party failed to fulfill his or her obligations, and (4) that damages resulted from that failure.⁸ None of the allegations in Hoffman's complaint, even construed in her favor, support the inference that ISC did not fulfill its obligations under the contract.

Hoffman's most specific allegation was that ISC had failed to return her file and to refund her money when she sought to terminate the contract. Nothing in the contract gave Hoffman the right to terminate the contract in 1993, several months after signing it. The "Submission Agreement" only provided for a seven-day cancellation period.

Hoffman also alleged that ISC had breached the contract by failing to adhere to the confidentiality agreement. A "Statement of Confidentiality and Non-Use" provided that "ISC hereby agrees that the idea, invention, or product that you are disclosing and which you believe to be your own original creation shall not be used,

⁵ *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753; *Cincinnati ex rel. Zimmer v. Cincinnati*, 176 Ohio App.3d 588, 2008-Ohio-3156, 892 N.E.2d 987, ¶8.

⁶ *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus; *Zimmer*, supra, at ¶8.

⁷ *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549, 1992-Ohio-73, 605 N.E.2d 378; *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 544 N.E.2d 639; *Coors v. Fifth Third Bank*, 1st Dist. No. C-050297, 2006-Ohio-4505, ¶12.

⁸ *Stephen Business Ent., Inc. v. Lamar Outdoor Advertising, Inc.*, 1st Dist. No. C-070373, 2008-Ohio-954, ¶16; *Blake Homes, Ltd. v. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4606, 877 N.E.2d 1041, ¶77.

sold, assigned, or disclosed to any other person, organization, or corporation without your permission, and further, that none of the employees, agents, officers, directors of ISC shall utilize the same in any manner unless specifically agreed to by both parties in a Submission Agreement which may be entered into at a later date.”

The Submission Agreement provided that ISC would submit the marketing concept and trade names to specific companies that showed interest in the product or the product category. The submission would be done on a confidential basis.

Hoffman did not plead operative facts that showed that ISC had violated the agreement’s confidentiality provisions. She alleged that in 1997 she had seen her invention being sold by K-Tel International and/or Sneak-a-Peek Manufacturing Company. She did not allege any facts supporting the inference that those companies had access to her birdhouse concept or that ISC had any contact with those companies. Consequently, the trial court did not err in granting ISC’s motion to dismiss as to the breach-of-contract claim.

Hoffman’s complaint also alleged fraud. The elements of civil fraud are (1) a representation, (2) material to the transaction, (3) made falsely, knowingly, or recklessly, (4) with the intention of misleading another into justifiable reliance on those facts, (5) that causes the other party injury.⁹

Civ.R. 9(B) provides that allegations of fraud must be stated with particularity.¹⁰ This rule mandates that fraud claims “receive intense scrutiny from the beginning.”¹¹ It means that (1) the plaintiff must specify the statements claimed to be false; (2) the complaint must state the time and place where the statements

⁹ *State ex rel. Illuminating Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶24; *Curran v. Vincent*, 175 Ohio App.3d 146, 2007-Ohio-3680, 885 N.E.2d 964, ¶18.

¹⁰ *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994, ¶15; *Karodi v. Minot* (1987), 40 Ohio App.3d 1, 4, 531 N.E.2d 318.

¹¹ *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

were made; and (3) the plaintiff must identify the defendant claimed to have made the statements.¹² The purpose of these requirements is to give notice to potential defendants of the precise statements that the plaintiff alleges to be fraudulent.¹³

The basis of Hoffman’s fraud claim was three-fold. She alleged that Holderness had “deliberately misrepresented that his first name was Richard instead of Ralph and specifically instructed [Hoffman] not to place all of the trade names into the contractual agreements and finally by proceeding to violate the non-use and confidentiality agreement in forwarding the marketing concept and trade name to others.”

First, the trial court correctly pointed out that Hoffman had “failed to indicate how Richard Holderness’ misrepresentation of his name specifically caused injury” to her. As to the instruction to place only one of her three trade names on the agreement, the trial court also correctly pointed out that she did not allege “that his statement was false or that Richard Holderness had any reason to believe that [ISC] would accept alternative names in the contractual agreements.” Also, she did not “plead any injury caused by the failure to include alternative names in her submission materials.”

As for the claim that Holderness had violated the confidentiality and non-use agreements, improper or defective contractual performance does not create a cause of action in tort.¹⁴ To establish tort liability, the plaintiff must establish a breach of duty that would have existed even if no contract had existed. She must also establish

¹² *Karodi*, supra, at 4.

¹³ *Id.*

¹⁴ *Corsaro v. ARC Westlake Village, Inc.*, 8th Dist. No. 84858, 2005-Ohio-1982, ¶27; *Horen v. Summit Homes*, 6th Dist. No. WD-04-001, 2004-Ohio-6656, ¶13.

actual damages attributable to the defendant's wrongful acts that are separate from those attributable to the breach of contract.¹⁵

Hoffman failed to allege operative facts showing a breach of duty separate from any breach of the duties in the contract. Further, she failed to plead any operative facts showing that Holderness or ISC had any contact with the companies that marketed the similar product, or that Holderness had disclosed her concept to those companies. Consequently, she failed to plead operative facts to support her claim of fraud.

Even construing all reasonable inferences in Hoffman's favor, we hold that she failed to state a cause of action for breach of contract or fraud. The trial court did not err in granting ISC's Civ.R. 12(B)(6) motion to dismiss. Therefore, we overrule Hoffman's assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 10, 2010

per order of the Court _____
Presiding Judge

¹⁵ *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151, 684 N.E.2d 1261; *Nationwide Mut. Ins. Co. v. Sonitrol, Inc.* (1996), 109 Ohio App.3d 474, 485, 672 N.E.2d 687.