

[Cite as *Cramer v. Javid*, 2010-Ohio-5967.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Philip Cramer,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-199
v.	:	(C.P.C. No. 09CVH-11-17235)
	:	
Shirin Javid et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 7, 2010

Philip Wayne Cramer, for appellant.

Omar Tarazi, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Philip Cramer ("Cramer"), appeals the Franklin County Court of Common Pleas' dismissal of his complaint against defendants-appellees, Shirin Javid, Frank DeWindt, Glenn Henry, Mitzi Terrell, and Aeon Group LLC ("Aeon") (collectively, "appellees"), for failure to state a claim upon which relief can be granted. For the following reasons, we affirm.

{¶2} On November 18, 2009, Cramer initiated this action by filing a complaint against appellees in the Franklin County Court of Common Pleas. In his complaint, which contains limited factual allegations, Cramer alleged that he was an employee of Aeon, a California Limited Liability Corporation, until January 13, 2006, and that Aeon paid him a severance payment of \$33,800, from which it withheld a total of \$14,150.92 for federal, state, and local taxes, including FICA and Medicare contributions. Although he did not contest that Aeon was legally required to deduct the withheld amounts from his severance pay, Cramer alleged that appellees failed to remit those amounts to the applicable government agencies and, instead, converted those amounts into their separate corporate accounts. With respect to the individual appellees' relationships to Aeon, Cramer alleged only that they transacted business in Ohio on Aeon's behalf.

{¶3} Based on those limited facts, Cramer purports to assert 14 causes of action against appellees, including breach of fiduciary duties, conversion, failure to supervise, conspiracy, and violations of various state and federal statutes. At the heart of all of Cramer's claims, however, is Aeon's alleged failure to remit the withholdings from his severance pay to the appropriate entities. As relief, Cramer requested compensatory damages of \$14,150.92, plus the amount of Aeon's matching share of Social Security and Medicare contributions on his severance pay, punitive and exemplary damages, attorney fees, and costs, as well as references from the trial court to the Attorney General, Franklin County Prosecutor, and the Internal Revenue Service Criminal Investigation Services for criminal proceedings against appellees.

{¶4} On December 17, 2009, appellees, Shirin Javid, Frank DeWindt, Mitzi Terrell, and Aeon, filed an answer and a Civ.R. 12(B)(6) motion to dismiss Cramer's complaint for failure to a state claim upon which relief could be granted. Appellees primarily argued that Cramer lacked standing to bring claims based on Aeon's alleged failure to remit tax withholdings. They specifically argued that Cramer failed to allege that he suffered any harm as a result of the facts alleged in his complaint. Appellees also asserted that there exists no private right of action for the alleged violations of 26 U.S.C. 7202 and 7206, and R.C. 1775.64(E), 1775.14(C)(2), 1703.28, and 1703.30.

{¶5} The trial court issued a decision on February 5, 2010, granting appellees' motion to dismiss, and entered a final judgment of dismissal on March 22, 2010. The trial court concluded that Aeon, not Cramer, would be responsible for the failure to remit the withheld taxes and that Cramer failed to allege any adverse action against him based on Aeon's alleged failure to remit.

{¶6} Cramer now asserts the following assignments of error:

First Assignment of Error

THE TRIAL COURT ERRED TO THE PREJUDICE OF [CRAMER] BY DISMISSING THE COMPLAINT UNDER CIV. R. 12(B)(6) IGNORING NUMEROUS THEORIES IN SUPPORT OF THE COMPLAINT.

Second Assignment of Error

THE TRIAL COURT IGNORED THE DEFENDANT AEON'S ADMISSION THAT IT HAD BREACHED ITS CONTRACT TO PAY [CRAMER] \$33,800.00 AND HAD CONVERTED \$14,150.92 TO THE BENEFIT OF THE LIMITED LIABILITY CORPORATION PARTNERS.

Third Assignment of Error

THE TRIAL COURT ERRONEOUS[LY] CONCLUDED THAT PROOF OF DAMAGES WAS REQUIRED TO BE PART OF THE COMPLAINT.

Fourth Assignment of Error

THE TRIAL COURT ERRONEOUSLY RELIED ON 26 USC 3403 IN DISMISSING [CRAMER'S] COMPLAINT.

{¶7} A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Comms.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. Rather, the trial court may only review the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. A court need not, however, presume the truth of conclusions not supported by factual allegations. *Schulman v. Cleveland* (1972), 30 Ohio St.2d 196, 198. We review de novo a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5.

{¶8} We first address Cramer's second assignment of error, by which he asserts that the trial court erroneously ignored Aeon's purported admissions that it breached a contract to pay Cramer a severance and that it converted the tax withholdings deducted from the severance pay. Cramer contends that, by not responding to requests for admissions purportedly served on Aeon's California statutory agent within 28 days, Aeon is deemed to have admitted the matters upon which Cramer requested admission. Even were those matters deemed admitted under Civ.R. 36(A)(1), a trial court's review of a motion to dismiss for failure to state a claim upon which relief can be granted is limited to the allegations of the complaint. *Fuqua* at 207; *Kelley v. Pickaway Correctional Inst.*, 10th Dist. No. 02AP-1149, 2003-Ohio-4675, ¶6. When ruling on a motion to dismiss, pursuant to Civ.R. 12(B)(6), documents and evidence outside the complaint are irrelevant. *Keenan v. Adecco Emp. Servs., Inc.*, 3d Dist. No. 1-06-10, 2006-Ohio-3633, ¶14. Accordingly, the trial court properly ignored any evidence outside the allegations of Cramer's complaint, including Aeon's purported admissions, in deciding the motion to dismiss. Therefore, we overrule Cramer's second assignment of error.

{¶9} Because Cramer's remaining assignments of error all stem from the trial court's conclusion that Cramer's complaint failed to state a claim upon which relief could be granted, we review those assignments of error together. In granting appellees' motion, the trial court essentially concluded that Cramer failed to demonstrate standing to maintain his claims. The trial court stated as follows:

[26 U.S.C. 3403] makes it clear that Aeon would be responsible for the failure to remit withheld taxes, not [Cramer]. In fact, [Cramer] never once alleges that he has had to pay anything to or has suffered any adverse action from any taxing authority for Aeon's alleged failure to remit. [Cramer's] Memorandum Contra does nothing to illuminate the Court as to what harm he has actually suffered. All of [Cramer's] claims are not actually between him and [appellees], but rather reside with the respective taxing authorities that Aeon allegedly failed to remit taxes to. The Court is unable to determine what harm [Cramer] has suffered from the face of his Complaint. As such, [appellees'] motion must be granted.

(Footnote omitted.)

{¶10} Lack of standing challenges a party's capacity to bring an action and is properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶4. It is well-established that, before an Ohio court may consider the merits of a claim, the party seeking relief must establish standing to sue. *Id.* at ¶6, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999-Ohio-123. Elements of standing are an indispensable part of a plaintiff's case. *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, ¶10.

{¶11} To establish standing, the plaintiff must have suffered an injury in fact that is causally related to the challenged action of the defendant, and it must be likely that a favorable decision will redress the injury. *Id.*, citing *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136. An injury in fact is defined as "an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or conjectural." *Bourke* at ¶10, citing *Lujan* at 560,

112 S.Ct. at 2136. With respect to declaratory relief, a party lacks standing to sue unless the party is affected by or has a material interest in the contested subject matter of the suit. *Murr v. Ebin* (May 6, 1997), 10th Dist. No. 96APE10-1406. Where a plaintiff fails to allege that he has suffered an injury in fact, dismissal under Civ.R. 12(B)(6) is appropriate. See *Brown*.

{¶12} While Cramer argues that the trial court erroneously concluded that proof of damages was required to be pleaded in the complaint, Cramer misreads the basis for the trial court's decision. The trial court aptly noted the general rule that a party need not prove his or her claim at the pleading stage, and the trial court did not dismiss Cramer's complaint based on a failure to prove damages. Instead, the trial court dismissed Cramer's complaint based on Cramer's failure to allege any facts from which it can be established that Cramer has suffered any injury in fact as a result of Aeon's alleged failure to remit the withholdings from Cramer's severance pay. The trial court's determination that Cramer alleged no injury and that the asserted claims appropriately lay with the taxing authorities, not with Cramer, demonstrates the trial court's essential conclusion that Cramer lacks standing to maintain his claims against appellees. We agree that Cramer failed to allege facts to establish standing to maintain the claims alleged in his complaint.

{¶13} The trial court cited a federal tax provision, 26 U.S.C. 3403, in support of its conclusion that Cramer lacked standing. The Internal Revenue Code requires employers to deduct from wages paid to employees the employees' share of FICA taxes and individual income taxes. See 26 U.S.C. 3102(a) and 3402(a). Those withholdings

are considered to be held in "a special fund in trust for the United States." 26 U.S.C. 7501(a). The employer is liable for the withheld portion of the employees' wages and must pay over the full amount to the government each quarter. See *United States v. Farr* (C.A.10, 2008), 536 F.3d 1174. Pursuant to 26 U.S.C. 3403, "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment." Based on that statute, the trial court stated that Aeon, not Cramer, would be responsible for the unremitted withholdings.

{¶14} Cramer takes issue with the trial court's reliance on 26 U.S.C. 3403, arguing that it does not preclude his claims because, under the implementing regulation, that statute applies to shield the employer from liability to others only where the employer has remitted the withheld funds to the government. The applicable federal regulation, 26 C.F.R. 31.3403-1, provides as follows:

Every employer required to deduct and withhold the tax under [26 U.S.C.] 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. * * *
The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depository of the United States.

Cramer argues that, because Aeon failed to remit the withheld funds to the government, it is not relieved of liability to other persons for the amounts withheld.

{¶15} The United States Supreme Court's discussion of 26 U.S.C. 3403 in *Slodov v. United States*, 436 U.S. 238, 98 S.Ct. 1778, discredits Cramer's readings of the statute and the implementing regulation. An employer who fails to remit taxes withheld from its employees' wages is liable for the taxes it should have paid, and the IRS has means at its disposal to effect remittance, including imposing a penalty equal to the amount of the delinquent taxes against officers or employees of the employer responsible for effectuating the collection and payment of taxes who willfully fail to do so. *Id.* at 243-45, 98 S.Ct. at 1783-84. "Once net wages are paid to the employee, the taxes withheld are credited to the employee regardless of whether they are paid by the employer, so that the IRS has recourse only against the employer for their payment." *Id.* at 243, 98 S.Ct. at 1783; 26 U.S.C. 1462; *Chandler v. Perini Power Constructors, Inc.* (D.N.H.1981), 520 F.Supp. 1152, 1153 ("[t]he employee is automatically given credit on its individual federal tax liability for the amount of taxes so withheld, even though the employer may not have turned over such sums to the Government"). As the *Chandler* court recognized, at 1156, "the employer may be penalized by [the] IRS for failure to pay the tax to it, [but] suits against it by employees for taxes withheld from the pay of such employees are statutorily barred."

{¶16} Because the IRS has no recourse against Cramer for the funds withheld from Cramer's severance pay for federal taxes, Cramer has suffered no injury in fact as a result of Aeon's alleged failure to remit those funds to the federal government. Rather, it is the government that is "out of pocket" and injured. See *In re H.L. Sanderson* (Mar. 7, 2000), Bankr.E.D.N.C. No. 90-03920-8-JRL.

{¶17} Ohio's tax statutes contain similar provisions regarding employer liability for withheld taxes. For example, R.C. 5747.06 and 5747.07(B) require employers to withhold state income taxes and school district income taxes from employees' wages and pay them to the state. R.C. 5747.07(E)(2) states, "[e]ach employer required to deduct and withhold any tax is liable for the payment of that amount required to be deducted and withheld, whether or not the tax has in fact been withheld * * * and the amount shall be deemed to be a special fund in trust for the general revenue fund." An employer who withholds taxes from its employees, but fails to remit the tax "is personally liable for any amount collected that the employer fails to remit." R.C. 5747.13(A). An employee remains liable for unremitted taxes only "if the tax commissioner ascertains that the employee colluded with the employer with respect to the failure to remit the tax." R.C. 5747.06(C). The same rule applies with respect to municipal income taxes in Ohio. See R.C. 718.03(D)(2) ("[t]he failure of an employer to remit to the municipal corporation the [municipal income] tax withheld relieves the employee from liability for that tax unless the employee colluded with the employer in connection with the failure to remit the tax withheld"). Of course, Cramer's complaint contains no allegation that he colluded with Aeon in the conduct of which he complains.

{¶18} Cramer has not contested that Aeon was statutorily required to deduct the withheld amounts from his severance pay. His allegations of wrongdoing stem entirely from the alleged subsequent failure to remit the withholdings to the appropriate government agencies. Cramer's complaint contains no allegation that he has suffered any harm or is subject to any harm as a result of Aeon's alleged failure to remit the

withholdings. Cramer neither was entitled to the withheld funds nor is subject to liability to the government as a result of Aeon's alleged failure to remit those funds. See *Slodov*. To the extent that Aeon withheld, but did not remit federal, state, and local taxes, Aeon may remain liable to the appropriate taxing authorities, but not to Cramer. Aeon's alleged failure to remit the withheld funds simply does not give rise to an injury in fact to Cramer. Therefore, Cramer lacks standing to sue on that basis, no matter how Cramer frames his claims and no matter whether his claims are stated against Aeon or its agents.

{¶19} In his remaining claims, Cramer asserts that the individual appellees are liable under R.C. 1775.64 and 1775.14(C)(2), and that appellees acted in violation of R.C. 1703.28 and 1703.30. R.C. 1775.64 and 1775.14, both of which were repealed effective January 1, 2010, applied only to limited liability partnerships. R.C. 1775.64 required foreign limited liability partnerships to register with the secretary of state before transacting business in Ohio, and R.C. 1775.14(C)(2) provided that a partner in a registered limited liability partnership may be personally liable for certain liabilities. Neither of those provisions are applicable to Aeon, which is not a limited liability partnership. Similarly, neither R.C. 1703.28 nor R.C. 1703.30 applies to Aeon. R.C. 1703.28 states that a foreign corporation that conducts business in Ohio without being licensed, as required, is subject to a forfeiture in an action commenced by the attorney general or a prosecuting attorney, whereas R.C. 1703.30 states that no officer of a foreign corporation that is required to be, but is not, licensed shall transact business in Ohio on the corporation's behalf. Those statutes do not apply to limited liability

companies, like Aeon. Further, none of the enumerated statutes creates a private right of action upon which Cramer could sue. Finally, as with his other claims, Cramer has alleged no injury in fact as a result of appellees' alleged statutory violations. Accordingly, Cramer's complaint does not state a claim for relief under the enumerated statutes. Therefore, we overrule Cramer's first, third, and fourth assignments of error.

{¶20} In conclusion, we agree with the trial court's determination that Cramer's complaint fails to state a claim upon which relief can be granted. Therefore, the trial court appropriately dismissed Cramer's complaint pursuant to Civ.R. 12(B)(6). For these reasons, we overrule each of Cramer's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DELANEY, JJ., concur.

DELANEY, J., of the Fifth Appellate District, sitting by
assignment in the Tenth Appellate District.
