[Cite as *Denlinger, Rosenthal & Greenberg v. Cohen*, 2012-Ohio-4774.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

DENLINGER, ROSENTHAL & GREENBERG, LPA,

Plaintiff-Appellant,

- vs -

MARK COHEN, et al.,

Defendants-Appellees.

CASE NO. CA2012-03-019

O P I N I O N
10/15/2012

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CV80625

Slovin & Associates Co., LPA, Randy T. Slovin, Brad A. Council, 8150 Corporate Park Drive, Suite 350, Cincinnati, Ohio 45242, for plaintiff-appellant

Statman Harris & Eyrick, LLC, Saba N. Alam, Alan J. Statman, 3700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for defendants-appellees

S. POWELL, P.J.

{¶ 1} Plaintiff-appellant, Denlinger, Rosenthal, & Greenberg, LPA, appeals a decision of the Warren County Court of Common Pleas dismissing its complaint for failure to state a claim upon which relief can be granted in a lawsuit filed against defendants-appellees, Mark Cohen, MRC Innovations, Inc., Adam H. Cohen Enterprises, Inc., and Marketing and

Industrial Solutions Corporation.[1]

{¶ 2} In a complaint filed September 29, 2011, appellant alleges that it provided legal services to appellees and that appellees now owe $8,540.00 for those services. Appellant asserts that the complaint lists claims for both an action on account and unjust enrichment. Attached to the complaint is a copy of the account on which the breach of contract action is allegedly based.

{¶ 3} On November 2, 2011, appellees moved to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). Specifically, appellees argued that there was no fee agreement between the parties and the account at issue had already been settled and satisfied.

{¶ 4} On February 3, 2012, the trial court dismissed appellant's complaint, finding that appellant had failed to satisfy the requirements of Civ.R. 10(D)(1) by providing the name of the party charged. As the account attached to appellant's complaint did not actually name appellees as the parties charged, the trial court reasoned that the account could "establish no link between [appellant] and [appellees] which would indicate an offer and acceptance for [appellant] to perform work for [appellees]." Therefore, the trial court determined that appellant had failed to establish the existence of a contract or attorney-client relationship between the parties and, consequently, could prove no set of facts entitling appellant to relief. The trial court then dismissed the complaint, failing to state whether the dismissal was with or without prejudice.

{¶ 5} From the trial court's dismissal, appellant appeals, raising three assignments of error.

{¶ 6} Assignment of Error No. 1:

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1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

{¶ 7} THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT UNDER CIV.R. 12(B)(6) BECAUSE THE COMPLAINT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR AN ACTION ON AN ACCOUNT.

{¶ 8} In its first assignment of error, appellant argues that the trial court erred in granting appellees' Civ.R. 12(B)(6) motion to dismiss. Specifically, appellant contends that, reading the account and complaint together, appellant complied with Civ.R. 10(D)(1) by sufficiently apprising appellees that they were the "other persons" specified on the account and, therefore, had stated a claim upon which relief could be granted.

{¶ 9} Appellant's complaint is based upon an action on account for breach of contract. "In an action on an account, the word 'account' has reference to the type of relationship between the parties and not to a particular book or record." *Gabriele v. Reagan*, 57 Ohio App.3d 84, 85 (12th Dist.1988), citing *American Security Service v. Baumann*, 32 Ohio App.2d 237, 245 (10th Dist.1972). "The action is founded upon contract and thus a plaintiff must prove the necessary elements of a contract action, and, in addition, must prove that the contract involves a transaction that usually forms the subject of a book account." *Id.*

{¶ 10} To assist in proving these elements, Civ.R. 10(D)(1) requires that a plaintiff attach "a copy of the account or written instrument" at issue to the pleading. If the account or written instrument cannot be attached to the pleading, a plaintiff is required to explain the reason for the omission. Civ.R. 10(D)(1). Furthermore, case law dictates that, for purposes of Civ.R. 10(D)(1), "an account must show the name of the party charged." *Asset Acceptance Corp. v. Proctor*, 156 Ohio App.3d 60, 2004-Ohio-623, at ¶ 12 (4th Dist.); *Gabriele v. Reagan*, 57 Ohio App.3d 84, 85 (12th Dist.1988).

{¶ 11} In determining the sufficiency of the account record attached to the complaint, various courts have utilized a four-part test regarding the requirements of the attached record. *Capital One Bank v. Toney*, 7th Dist. No. 06 JE 28, 2007-Ohio-1571, ¶ 36; *Creditrust*

Corp. v. Richard, 2d Dist. No. 99-CA-94, unreported, 2000 WL 896265 (July 7, 2000); *Broadway Resource Supply, Inc. v. West End Land Dev., Inc.*, 8th Dist. No. 72632, unreported, 1998 WL 323574 (June 18, 1998); *Arthur v. Parenteau*, 102 Ohio App.3d 302, 305 (3d Dist.1995); *Baumann*, 32 Ohio App.2d at 239. The first prong of the test is that the attached account includes "the debtor's name." *Id.*

{¶ 12} In this case, an account and affidavit are attached to appellant's complaint. The account lists "Adam H. Cohen, et al." as the party to be charged. Adam H. Cohen is not a party to the lawsuit. Thus, appellees are not clearly named as debtors in the account.

{¶ 13} Appellant also attached an affidavit to the complaint from Robert Shank, billing attorney for appellant. Although the affidavit lists all appellees by name, the affidavit does not purport to explain that these are the "other persons" described under the term "et al." Rather, the affidavit appears to be an authentication of the account as would be used in a motion for summary judgment. As such, the affidavit does not comport with the requirements of Civ.R. 10(D)(1) in explaining why an account could not be attached to the complaint.

{¶ 14} We acknowledge that the "et al." listed on the account means "and other persons" not specifically named. *Black's Law Dictionary* (9th Ed.2009). Nevertheless, case law clearly dictates that appellant was required to attach an account to its complaint which listed the names of the parties charged. *Asset Acceptance Corp.*, 2004-Ohio-623, at ¶ 12. As the account attached to appellant's complaint does not list any individual or entity that is named in the complaint as a defendant, appellant did not comply with Civ.R. 10(D)(1). However, while the account attached to appellant's complaint does not comport with Civ.R. 10(D)(1), this does not mean that appellant failed to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6).[2]

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2. We note that failure to comply with Civ.R. 10(D)(1) should generally be addressed in a less drastic manner through the filing of a motion for a definite statement pursuant to Civ.R. 12(E). *Hudson & Keyse, LLC v. Carson*,

{¶ 15} Civ.R. 12(B)(6) authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. *Marchetti v. Blankenburg*, 12th Dist. No. CA2010-09-232, 2011-Ohio-2212, ¶ 9. "In order 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 relief.'" *Id.*, quoting *DeMell v. The Cleveland Clinic Found.*, 8th Dist. No. 88505, 2007-Ohio-2924, ¶ 7. In construing a complaint upon a Civ.R. 12(B)(6) motion to dismiss, the trial court must presume the truth of all factual allegations of the complaint and make all reasonable inferences in favor of the nonmoving party. *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 34 (12th Dist.); *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144 (1991).

{¶ 16} "A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is subject to a de novo review on appeal." *Kolenich* at ¶ 35; *Sparks v. Bowling*, 12th Dist. No. CA2009-02-065, 2009-Ohio-5071, ¶ 10. An appellate court must independently review the complaint to determine whether dismissal was appropriate. *Kolenich* at ¶ 35.

{¶ 17} "When a motion to dismiss is founded upon a written instrument attached to the complaint, the complaint should not be dismissed under Civ.R. 12(B)(6) unless the complaint and any attached written instruments on their face show the court to a certainty that there is an insuperable bar to relief as a matter of law." *Cash v. Seery*, 12th Dist. No. CA97-10-194, unreported, 1998 WL 103006, *2 (March 9, 1998), citing *Slife v. Kundtz Properties*, 40 Ohio App.2d 179, 185 (8th Dist.1974); *See also Natl. Check Bur. v. Buerger*, 9th Dist. No. 06CA008882, 2006-Ohio-6673, ¶ 15; *McCamon-Hunt Insurance Agency, Inc. v. Medical Mutual of Ohio*, 7th Dist. No. 02 CA 23, 2003-Ohio-1221, ¶ 10. When reviewing the

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10th Dist. No. 07AP-936, 2008-Ohio-2570, ¶ 10; *Campbell v. Aepli*, 5th Dist. Nos. CT06-0069, CT06-0063, 2007-Ohio-3688, ¶ 43; *Natl. Check Bur. v. Buerger*, 9th Dist. No. 06CA008882, 2006-Ohio-6673, ¶ 12; *McCamon-Hunt Insurance Agency, Inc. v. Medical Mutual of Ohio*, 7th Dist. No. 02 CA 23, 2003-Ohio-1221, ¶ 12.

complaint and attached written instrument, the court "must avoid interpreting the [written instrument] at such an early stage unless the instrument is so clear and unambiguous on its face that the court can determine to a certainty that the plaintiff would be entitled to no relief under any provable set of facts." *Id.*, citing *Slife* at 185.

{¶ 18} Within its complaint, appellant alleged that (1) appellant performed legal services for appellees, listed as Mark Cohen aka Mark R. Cohen, MRC Innovations, Inc., Adam H Cohen Enterprises, Inc., and Marketing and Industrial Solutions Corp., (2) that appellant expected to be compensated for said services, (3) that appellees knew or should have known of appellant's expectation, and (4) appellant is entitled to the principal sum of $8,540 for its services. The attached account alleged that "Adam H. Cohen, et al." were responsible for the payment of the $8,540.

{¶ 19} Thus, the complaint alleges the essential elements of a breach of contract claim. Further, the use of the term "et al." in the account could mean any number of "other persons" and, therefore, is clearly ambiguous. Assuming, as we must, that appellant can prove that the use of "et al." in the account attached to the complaint refers to appellees, we find that appellant has validly pled a claim for breach of contract.

{¶ 20} The trial court's dismissal of the complaint solely because the account attached to the complaint did not name appellees as parties to be charged required a determination on whether appellant could prove that a breach of contract occurred between these parties. Appellant was not required to prove the elements of breach of contract at the pleading stage. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-145 (1991). Rather, appellant was merely required to, and did, present factual allegations that, if true, entitle it to relief.

{¶ 21} Based upon the foregoing, appellant's complaint failed to satisfy the requirements of Civ.R. 10(D)(1) by providing the name of the party to be charged on the account. However, appellant has still set forth a claim upon which relief can be granted for

breach of contract and, therefore, the trial court erred in dismissing appellant's complaint pursuant to Civ.R. 12(B)(6).

{¶ 22} Accordingly, appellant's first assignment of error is sustained.

{¶ 23} Assignment of Error No. 2:

{¶ 24} THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT WITHOUT ADDRESSING THE CLAIM FOR UNJUST ENRICHMENT.

{¶ 25} Assignment of Error No. 3:

{¶ 26} THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE.

{¶ 27} In appellant's second and third assignments of error, appellant contends that the trial court erred in failing to address appellant's unjust enrichment claim and in dismissing the complaint with prejudice. However, as our analysis of the first assignment of error requires a reversal of the trial court's decision, appellant's remaining arguments are moot and shall not be addressed.

{¶ 28} Judgment reversed and remanded.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.