

DATE FILED: March 19, 2020 11:28 PM
FILING ID: 9255DACA15AAB
CASE NUMBER: 2020CV30255

DISTRICT COURT, DENVER COUNTY
STATE OF COLORADO
Denver District Court
1437 Bannock St.
Denver, CO 80202

Plaintiff: HARVEY SENDER, AS RECEIVER
FOR GARY DRAGUL; GDA REAL ESTATE
SERVICES, LLC; AND GDA REAL ESTATE
MANAGEMENT, LLC

v.

Defendants: GARY J. DRAGUL, an individual;
BENJAMIN KAHN, an individual; THE
CONUNDRUM GROUP, LLP, a Colorado
Limited Liability Company; SUSAN
MARKUSCH, an individual; ALAN C. FOX, an
individual; ACF PROPERTY MANAGEMENT,
INC.; a California Corporation, MARLIN S.
HERSHEY, an individual; and PERFORMANCE
HOLDINGS, INC., a Florida Corporation; JOHN
AND JANE DOES 1 – 10; and XYZ
CORPORATIONS 1 – 10.

Attorney for Defendant Susan Markusch:

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MOTION TO DISMISS

Defendant Susan Markusch (“Defendant” or “Ms. Markusch”), by and through her undersigned counsel, hereby moves the Court under Rule 12 (b) (1) (5) and (6) for an Order dismissing Plaintiff’s Complaint as against her. As grounds for the requested relief, Defendant states as follows:

C.R.C.P. 121 § 1-15, ¶ 8 CERTIFICATE REGARDING CONFERRAL

By an email exchange with counsel for Plaintiff, undersigned counsel confirmed that Plaintiff will oppose the relief requested in this Motion.

INTRODUCTION

On August 30, 2018, the Plaintiff Harvey Sender was appointed as Receiver for Gary Dragul, GDA Real Estate Services LLC and GDA Real Estate Management a civil enforcement action captioned *Gerald Rome v. Gary Dragul et al.*, Denver District Court case number 2018CV33011 (“Receivership Action”), asserted by the Colorado Securities Commissioner against Gary Dragul, GDA Real Estate Services LLC and GDA Real Estate Management. Ms Markusch was not and is not a party to the Receivership Action.

ALLEGATIONS OF THE COMPLAINT

Plaintiff alleges that Defendant Dragul operated a Ponzi scheme through various special purpose entities (“SPEs”) engaged in acquiring and managing commercial real estate, commingled investor funds, and diverted them to his personal accounts. Compl. ¶¶ 31, 47. Plaintiff alleges that Defendant Dragul was unable to pay investors promised return, he used new investments to pay fictitious returns and employed other means to conceal the actual performance of the investments. *Id.* ¶¶ 52, 56, 60-61.

Plaintiff’s Claims are not all asserted against Ms Markusch. Plaintiff’s claims against Ms Markusch fall into two general categories: (1) excessive or unearned “commissions;” and (2) aiding and abetting the alleged Ponzi scheme.

DEFENDANT’S MOTION

Ms Markusch moves the Court for order dismissing the Complaint in its entirety as against her. The grounds for the relief requested are as follows: (1) lack of standing on the part of the Trustee to bring the claims in a representative capacity; (2) failure to state the claims against Ms Markusch; and (3) failure to join indispensable parties. These grounds are more fully set forth below.

1. THE RECEIVER LACKS STANDING TO BRING THE CLAIMS IN A REPRESENTATIVE CAPACITY.

Plaintiff’s Complaint asserts fourteen claims for relief against eight named Defendants (including Ms Markusch) and up to twenty John Doe and XYZ Corporations. Plaintiff asserts that he has standing to bring each of the Claims for Relief as a representative of creditors of the Receivership Estate (Complaint, ¶¶ 167, 177, 182, 193, 200, 214, 229, 236, 241, 257, 261, 262, 267, 269.) Plaintiff does not allege any claim for relief other than in a representative capacity.

A party must have standing to assert claims, or the Court lacks jurisdiction to hear them and they must be dismissed pursuant to Rule 12(b)(1). *Ferguson v. Spalding Rehab., LLC*, 456 P.3d 59, 61 (Colo. App. 2019). “Standing is a threshold issue that must be satisfied before a case may be decided on the merits. To establish standing, a plaintiff must show that he has suffered an injury in fact to a legally protected interest.” *Adams v. Land Services, Inc.*, 194 P.3d 429, 430 (Colo. App. 2008).

Defendants Gary Dragul, Alan C. Fox And ACF Property Management, Inc .have each filed Motions to Dismiss thoroughly supporting the proposition that Plaintiff Receiver lacks standing to

bring claims in a representative capacity. Ms Markusch adopts those Motions and the arguments set forth therein as her own, in support of this Motion. Ms Markusch reserves the right to independently respond to any argument in opposition to that proposition that the Plaintiff may make. 2.

PLAINTIFF’S COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF AGAINST MS MARKUSCH WITH THE PARTICULARITY REQUIRED UNDER RULE 9 (b) C.R.C.P.

The Complaint contains 64 pages, divided into 271 paragraphs. Starting on page 39, Plaintiff provides headings of the Claims for Relief which identify the parties against whom the Claim is asserted, as well as the legal theory upon which the Claim is brought, as follows:

Page 39

FIRST CLAIM FOR RELIEF
Violations of the Colorado Securities Act
Colo. Rev. Stat §§ 11-51-501 and 11-51-604 (3)
(Against Dragul and the Hershey and Fox Defendants)

Page 42

SECOND CLAIM FOR RELIEF
Negligence
(Against Dragul and the Fox and Hershey Defendants)

Page 43

THIRD CLAIM FOR RELIEF
Negligent Misrepresentation
(Against Dragul and the Fox and Hershey Defendants)

Page 45

FOURTH CLAIM FOR RELIEF
Civil Theft – Colo. Rev. Stat §§ 18-4-401 and 11-51-604 (3)
(against All Defendants)

Page 46

FIFTH CLAIM FOR RELIEF
Violations of the Colorado Organized Crime Control Act
Colo. Rev. Stat §§ 18-17-101, et seq.
(against All Defendants)

Page 51

SIXTH CLAIM FOR RELIEF++
Aiding and Abetting Violations of COCCA
Colo. Rev. Stat §§ 18-17-101, et seq.

(against Khan, CG, Markusch, Fox, ACF, Hershey and PHI)

Page 54	SEVENTH CLAIM FOR RELIEF Breach of Fiduciary Duty <i>(against Dragul)</i>
Page 56	EIGHTH CLAIM FOR RELIEF Aiding and Abetting Breach of Fiduciary Duty) <i>(against the Kahn Defendants)</i>
Page 57	NINTH CLAIM FOR RELIEF Negligence <i>(against the Kahn Defendants)</i>
Page 58	TENTH CLAIM FOR RELIEF Breach of Fiduciary Duty <i>(against the Kahn Defendants)</i>
Page 60	ELEVENTH CLAIM FOR RELIEF Fraudulent Transfer– Colo Rev. Stat. 38-8-105 (1) (A) <i>(against all Defendants)</i>
Page 61	TWELFTH CLAIM FOR RELIEF Constructive Fraud– Colo Rev. Stat. 38-8-105 (1) (A) <i>(against all Defendants)</i>
Page 62	THIRTEENTH CLAIM FOR RELIEF Unjust Enrichment <i>(against all Defendants)</i>
Page 63	FOURTEENTH CLAIM FOR RELIEF Turnover <i>(against all Defendants)</i>

The effect of these headings is to create the impression of specificity. But as to Ms Markusch, the specificity is only an illusion. “Defendants” is defined to include Defendants Gary Dragul, Concundrum Group, Alan C. Fox, ACF Property Management, Marlin S. Hershey, and Performance Holdings and Ms Markusch. Complaint, ¶ 25. In the first thirty-eight pages of the Complaint,

Plaintiff paints a lurid picture of fraud and representation by “Defendants.” But Plaintiff provides scant information as to the specific conduct of Ms Markusch in furtherance of the alleged scheme. For example, the Receiver alleges in a conclusory manner that in soliciting investments Dragul acted “in concert with,” or “with the assistance of” the “Non-Dragul Defendants.” *See, e.g.,* Complaint. ¶¶ 1, 47, 62, 65, 96. The lack of specificity of allegations against Ms Markusch is compounded by the fact that these “General Allegations” are incorporated by reference in every one of the fourteen supposedly separate claims for relief, only six of which are labeled as claims against Ms Markusch or “all Defendants”). Through incorporations by reference, all fourteen claims for relief are swept into the six claims for relief asserted against Ms Markusch.

The particularity requirement imposed by Rule 9 applies to all claims “sounding in fraud,” regardless of the label that a party attaches to a particular claim. *State Farm Mutual Auto Ins. Co. v. Parrish*, 899 P.2d 285 (Colo. App. 1994). Clearly, all of the Receiver’s claims “sound in fraud”. But the Complaint does not allege with specificity who was defrauded, the dates and statements (or omissions) alleged to have been made or omitted by Ms Markusch to such person, when those events occurred, or what action was taken on the basis of the alleged fraud. Co-mingling the conduct of Ms Markusch (who had a very specific and limited role), with the conduct of the other “Defendants” deprives Ms Markusch of any reasonable opportunity to defend. To satisfy Rule 9(b)’s particularity requirement, Plaintiff must allege specifically what conduct is attributed to each defendant. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000) (plaintiff “failed to identify any specific Defendant who made these alleged fraudulent misrepresentations or omissions.”); *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1304 (D. Colo. 1998) (under the requirement that fraud be plead

with particularity, “[t]he lumping together of defendants in allegations of fact is impermissible.”). The particularity requirements of Rule 9(b) apply to each element of the claim. *Kinsey v. Preeson*, 746 P.2d 542, 550 (Colo. 1987). These elements include: (1) a false representation of a material fact; (2) knowledge that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) representation made with intention that it be acted upon; (5) resulting damage.

Specificity in pleading is also necessary for determination of statute of limitations defenses, assessment of the actuality and reasonableness of reliance upon the alleged fraud and other defenses and elements.

Even as to the claim that Ms Markusch received unreasonable and unlawful “commissions,” the Complaint lacks necessary specificity. Plaintiff alleges that Ms Markusch received “undisclosed and illegal commissions” from Closings. Complaint ¶ 156. and that that the payments were made through her wholly-owned entities Olsen Real Estate ,LLC and Juniper Consulting Group. Complaint ¶ 156. Yet the several settlement statements attached to the Complaint do not reveal any “commissions” paid to either of those entities. The only payment for which detail is shown is on Exhibit 14, which discloses a payment of \$15,200 for “Consulting Fee/ Loan Assumption to Juniper Consulting Services. Ms Markusch denies ownership or control of Juniper Consulting Group, or receipt of any payment from that entity. Denial of facts alleged in the Complaint is beyond the scope of this Motion, but the existence of this dispute illustrates the necessity of specific allegations. Further, the single example of a transaction document refutes on its face the Plaintiff’s characterization of payments as “commissions.” It is only a construct of the Plaintiff made to create the semblance of factual support for the Plaintiff’s otherwise unsupported allegation that Ms Markusch

received unlawful payments.

3. PLAINTIFF HAS FAILED TO JOIN INDISPENSABLE PARTIES.

Rule 19 requires a Plaintiff to join all persons subject to service of process to be joined in an action if leaving such persons absent may subject a party (here, Ms Markusch) subject to double, multiple or otherwise inconsistent obligations. The Plaintiff has brought this action against Ms Markusch, purportedly in a representative capacity — on behalf of unnamed investors or creditors of the Receivership Defendants. Proceeding with this case without joinder of the investors or creditors on whose behalf the claims are brought exposes Ms Markusch to double liability, once to the Receiver, and a second time to the unnamed investors and/or creditors. No evidence or allegation has been made that such persons are unknown or unavailable. Under the facts presented, joinder of the unnamed parties for whom the Plaintiff brings this action is mandatory. *Potts v. Gordon*, 34 Colo App. 128, 525 P. 2d 500 (1974).

REQUEST FOR RELIEF

For the foregoing reasons, Defendant Susan Markusch requests the Court to dismiss the Complaint in its entirety. A proposed order granting that dismissal is filed herewith.

Date: March 19, 2020

THOMAS F. QUINN, P.C.
*Original signed copy of this pleading on file at the
offices of Thomas F. Quinn, P. C.*

/s/ Thomas F. Quinn

By: _____
Thomas F. Quinn, Esq., Reg No. 5887
Attorney for Defendant Susan Markusch

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2020 a true and correct copy of the foregoing pleading was provided to ICCES, with copies to be furnished, to all counsel of record in the case.

/s/ Thomas F. Quinn

Thomas F. QUINN