

2012 WL 11943186 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)  
District Court of Nevada.  
Clark County

Matthew Q. CALLISTER, in his capacity as Guardian of the Person and Estate of Raymond  
P. Hawkinson; Does 1 through 10 inclusive; and Roes 11 through 20, inclusive, Plaintiff,

v.

Dennis DEGORI, and Does 1 through 10, inclusive; Roes Corporations  
and Limited Liability Companies 1 through 10, inclusive, Defendant.

No. 12A657762.  
July 26, 2012.

Dept. No.: 29

**Motion To Dismiss Complaint**

Mdsm, [Kevin R. Stolworthy](#), Esq., Nevada Bar No. 2798, [Conor P. Flynn](#), Esq., Nevada Bar No. 11569, Armstrong Teasdale LLP, 3770 Howard Hughes Parkway, Suite 200, Las Vegas, NV 89169, Telephone: 702-678-5070, Facsimile: 702-878-9555, Kstolworthy@armstrongteasdale.com, cflynn@armstrongteasdale.com, for defendant Dennis Degori.

Defendant Dennis DeGori ("DeGori"), by and through his attorneys of record, the law firm of Armstrong Teasdale LLP, hereby moves this Court for an order dismissing the Plaintiff Matthew Q. Callister's ("Plaintiff"), in his capacity as guardian of the person and estate of Raymond P. Hawkinson ("Hawkinson"), Complaint with prejudice.

This Motion is made pursuant to [Nev. R. Civ. P. 12\(b\)\(5\)](#) and is based on the following Memorandum of Points and Authorities, all pleadings, papers, and documents on file with the Court in this action, such further documentary evidence as the Court deems appropriate, and the arguments of counsel at the hearing on this Motion.

DATED this 26<sup>th</sup> day of July, 2012.

ARMSTRONG TEASDALE, LLP

By:

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff has filed the instant lawsuit in order to recover money from a poor business investment made by Hawkinson. Plaintiff alleges in this case that Hawkinson and DeGori entered into an alleged oral agreement in June, 2007, for the sum of \$500,000. The Complaint fails to set forth any information concerning the terms of the contract. This is likely because if the case proceeds, the evidence will establish that Hawkinson in fact did not have a contract with DeGori. Rather, Hawkinson had a contract with a *company* in which he purchased an ownership interest. Hawkinson purchased this ownership interest as an investment that he believed would return a substantial profit. However, as is often the case, the investment did not pan out, and now the Plaintiff, as apparent guardian for Hawkinson, seeks to recover from DeGori in his individual capacity.

It is important to note that DeGori vehemently denies the claims asserted against him in this case, which consist of claims for breach of contract, **elder abuse**, quantum meruit, and fraudulent inducement. As will be established below, dismissal of these claims at this juncture is appropriate on the following grounds:

- (1) The statute of limitations has run on each of Plaintiff's claims;
- (2) Nevada does not recognize a cause of action for **elder abuse** against an individual;
- (3) The Plaintiffs claims for fraudulent inducement and **elder abuse** fail to satisfy the requirements of [NRC 9\(b\)](#);

### II. STATEMENT OF ALLEGED FACTS

The Complaint alleges that Raymond P. Hawkinson ("Hawkinson") and DeGori entered into a "verbal agreement in "late June of 2007." <sup>1</sup> See Complaint, p. 2, ¶ 7 attached hereto as Exhibit A. Pursuant to this purported oral agreement, it is alleged that Hawkinson agreed to loan DeGori the sum of \$500,000 in exchange for DeGori promising to re-pay \$25,000 per month for twenty (20) months. See *id.* at ¶ 8. It is further alleged that Hawkinson wire transferred \$500,000 directly to "DeGori's bank account on July 3, 2007." See *id.* at p. 3, ¶9. However, "since that time[,] i.e., July 3, 2007, it is alleged that DeGori "failed to make the agreed upon monthly payments pursuant to the terms of the Agreement, and to date, has only re-paid [sic] Hawkinson the sum of \$25,000." See *id.* at ¶ 10.

### III. STANDARDS FOR DISMISSAL

"If the allegations contained in the amended complaint demonstrate that the statute of limitations has run, then dismissal upon the pleadings is appropriate." *In re Amerco Derivative Litigation*, 252 P.3d 681, 703 (Nev. 2011). "To survive dismissal, a complaint must contain some set of facts, which, if true, would entitle the plaintiff to relief." *In re Amerco Derivative Litigation*, 252 P.3d 681, 692 (Nev. 2011) (internal quotation marks omitted). Failure to satisfy heightened pleading requirements justifies dismissal of the complaint for failure to state a claim upon which relief may be granted. *Id.* at 697.

### IV. ARGUMENT

#### A. Plaintiff's Claims Are Barred By The Statute Of Limitations

##### 1. The Claim for Breach of Oral Contract Is Time-Barred

As the Complaint reflects, this case involves breach of an alleged “verbal contract” entered into in “late June of 2007.” See Complaint, p. 2, ¶ 7. Under Nevada law, there is a four-year statute of limitations for actions “upon a contract, obligation or liability not founded upon an instrument in writing.” NRS 11.190(2)(c); *see also DeLee v. Roggen*, 111 Nev. 1453, 1458, 907 P.2d 168, 170 (1995); *Schumacher v. State Farm Fire & Cas. Co.*, 467 F.Supp.2d 1090, 1095 (D.Nev. 2006).

The Nevada Supreme Court has noted that “an action for breach of contract accrues as soon as the plaintiff knows or should know of facts constituting a breach.” *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). The date performance is due under the contract is often the measuring stick for determining when the statutory prescriptive period governing actions in contract begins to run. *See Schwartz v. Wasserburger*, 117 Nev. 703, 706, 30 P.3d 1114, 1116 (2001) (holding that a cause of action in contract cases involving an anticipatory repudiation “accrues either on the date that performance under the contract is due or, if the plaintiff so elects, on the date that the plaintiff sues upon the anticipatory breach.”)

Here, the Complaint alleges that Hawkinson wire transferred \$500,000 to “DeGori's bank account on July 3, 2007.” See Exhibit A, p. 3, ¶ 9. The Complaint further expressly asserts that “*since that time*, DeGori has failed to make the agreed upon monthly payments pursuant to the terms of the Agreement [.]” *See id.* (emphasis added). Therefore, the Complaint itself alleges that the contract was breached on or about July 3, 2007, which is apparently when DeGori allegedly failed to perform under the contract by making the first monthly payment of \$25,000. *See id.* This alleged breach occurred more than four and a half years before the Complaint in this case was filed on March 7, 2012.

Furthermore, the Complaint alleges that DeGori only ever repaid \$25,000. *See id.* at ¶ 10. This means that DeGori allegedly only made one of the twenty installment payments. Even assuming DeGori made the first payment in July, 2007, he necessarily must have breached the contract in August, 2007, when he failed to make the second installment payment. In this example, the breach still would have occurred more than 4 years before the Complaint was filed in this case. In fact, the only possible way the breach of contract claim would be timely is if the breach occurred on or after March 8, 2008, which is more than one year after the alleged oral contract was entered into. This situation seems unlikely, however, because it directly conflicts with the express language of Plaintiff's own Complaint, which alleges that the contract was breached in July, 2007. *See id.* at ¶ 9.

Accordingly, it is clear from the face of the Complaint that the statute of limitations has run on the breach of contract claim. The Court should dismiss the claim with prejudice.

## 2. The Claim for Elder Abuse is Time-Barred

Nevada law does not recognize a claim for elder abuse against individual. As explained in Section III.B below, this fact alone serves as a basis for dismissal of this claim. Because Nevada law does not recognize a claim for elder abuse against an individual, it is necessary to review the allegations of the claim to assess what the statute of limitations would be if such a claim existed. The Complaint alleges liability for elder abuse on the grounds that “DeGori willfully and unjustifiably has exploited Hawkinson” and that DeGori “intentionally deprived Hawkinson of the ownership, use, benefit or possession of Hawkinson's money.” *See id.* at ¶ 21-22.

The Plaintiff's use of the terms “willful” and “intentional” signifies that Plaintiff's elder abuse claim is one for an intentional tort. At least one court has noted that an elder abuse claim brought pursuant to the legislative enactment of a state's elder abuse act “is tantamount to a fraud claim...” *McKie v. Sears Protection Co.*, 2011 WL 1587112 at \*3 (D.Or. 2011). The Nevada Supreme Court has recognized that “NRS 11.190(3)(d) provides for a three-year statute of limitations for fraud actions which accrues ‘upon the discovery by the aggrieved party of the facts constituting the fraud.’” *Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998).

Although not entirely clear, it appears that the elder abuse claims seeks relief based upon the facts surrounding entry of the alleged oral agreement. Indeed, the elder abuse claim alleges relief stemming from DeGori allegedly “not re-paying the Loan pursuant to the terms of the Agreement[.]” *See* Complaint, p. 3, ¶ 22. The Complaint alleges that DeGori made only one payment

under the terms of the alleged oral agreement, and that he breached the alleged oral agreement on or about July 3, 2007. *See id.* at ¶ 10. Therefore, any alleged fraudulent conduct must necessarily have occurred at that time, which is over four and a half years ago.

Even assuming a common law claim for **elder abuse** existed, which it does not, the claim is untimely because it has been brought over four and a half years after it accrued.

### 3. The Claim for Quantum Meruit is Time-Barred

The statute of limitations for an unjust enrichment claim in Nevada is four years. *See In re Amerco Derivative Litigation*, 252 P.3d at 703 (relying upon NRS 11.190(2)(c) presumably because the claim is based upon liability not founded upon a written contract). Nevada courts treat quantum meruit claims and unjust enrichment claims in similar fashion. *See Asphalt Products Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995) (using the doctrines interchangeably). In Nevada, a claim for quantum meruit exists in absence of an express contract. *See Ewing v. Sargent*, 87 Nev. 74, 79, 482 P.2d 819, 823 (1971) (“[W]hen an express agreement cannot be found or provisions payment are uncertain... quantum meruit may be allowed if necessary to prevent unjust enrichment.”). Therefore, the statute of limitations for a quantum meruit claim should be at the most four years. *See NRS 11.190(2)(c)* (four-year statute of limitations applicable to claims not based upon an express contract).

The statute of limitations for the quantum meruit claim began to run when the Plaintiff “knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause action...” *In re Amerco Derivative Litigation*, 252 P.3d at 703. Here, the Plaintiff knew or should have known of the facts constituting the elements of his quantum meruit claim when he allegedly transferred the money to DeGori on July 3, 2007, and then received only \$25,000 in return for this benefit. According to the express language of the Complaint, this cause of action accrued on July 3, 2007. *See* Complaint, p. 3, ¶ 10.

Because this was more than four and a half years before the Complaint was filed, the quantum meruit cause of action must be dismissed with prejudice as time-barred.

### 4. The Claim for Fraudulent Inducement Is Time-Barred

As noted above, “NRS 11.190(3)(d) provides for a three-year statute of limitations for fraud actions which accrues ‘upon the discovery by the aggrieved party of the facts constituting the fraud.’” *Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998).

The Complaint is silent as to the time, place, and manner of any alleged fraudulent statements or misrepresentations made by DeGori to Hawkinson. The fraudulent inducement claim apparently seeks relief based upon facts surrounding the consummation of the alleged oral agreement between DeGori and Hawkinson. *See* Complaint, at p. 5, ¶ 32-34. Because the alleged oral agreement was entered into in July, 2007, and because the Complaint alleges that DeGori failed to perform under the terms of the agreement immediately thereafter, the statute of limitations began to run on or about July, 2007. *See id.* at ¶ 9-10. The fraud claim would only be timely if Hawkinson discovered the fraud on or after March 8, 2009. However, this is belied by the express facts of the Complaint.

Consequently, because the fraud claim has been filed more than four and a half years after the alleged fraudulent acts occurred, the fraud claim must be dismissed with prejudice.

### B. Nevada Does Not Recognize A Claim For **Elder Abuse** Against An Individual

There is not a single case in Nevada either acknowledging or analyzing a common law claim for **elder abuse**. In most states, a cause of action for **elder abuse** is typically a creature of state statutory law. *See, e.g., Covenant Care, Inc. v. Superior Court*,

32 Cal.4<sup>th</sup> 771 (2004) (claim filed under California's **Elder Abuse** Act enacted in 1982); *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 945 P.2d 1283 (1997) (claim filed under Arizona's **Elder Abuse** Act).

The Nevada Legislature has enacted a criminal statutory scheme for **elder abuse** prevention. See *NRS 200.5091, et seq.* This statutory scheme does not provide a civil private right of action. The Nevada Legislature has also enacted a statutory scheme permitting the filing of an administrative Complaint for an **elder abuse** type claim against a “facility for intermediate care, a facility for skilled nursing, a residential facility for groups, a home for individual residential care, an agency to provide personal care services in the home, an intermediary service organization or an agency to provide nursing in the home in protecting the property[.]” See *NRS 427A.175*. This section does not apply to claims against individuals such as DeGori. In fact, there appears to be no statutory scheme in Nevada permitting the filing of a private civil cause of action for **elder abuse** against an individual.

Thus, it is clear that Nevada has recognized neither a common law claim for **elder abuse** nor a statutory claim for **elder abuse** against an individual. Therefore, the **elder abuse** claim must be dismissed with prejudice.

### **C. Plaintiff's Claims For Fraudulent Inducement And **Elder Abuse** Were Not Pled With The Particularity Required By NRCP**

*NRCP 9(b)* provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” This heightened pleading requirement exists to ensure that adequate notice is given to the defendant about the nature of the charges so that it may defend the claims without merely asserting a general denial. *Rocker v. KMPG, LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 707-08. To comply with *NRCP 9(b)*, a complaint for fraud must allege the time, place, identify of the parties involved, and nature of the fraud. *Id.* at 1192, 148 P.3d at 708; see also *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874 (1981).

Assuming, *arguendo*, that the Plaintiff could maintain a claim for **elder abuse**, that claim should be treated as a fraud claim and must meet the heightened pleading requirements of *NRCP 9(b)*. See *McKie v. Sears Protection Co.*, 2011 WL 1587112 at \*3

It should be abundantly clear that Plaintiff's claims for fraudulent inducement and **elder abuse** do not meet the heightened pleading requirements set forth in *NRCP 9(b)*. The claims utterly fail to state the specific time, place, manner, and nature of any alleged fraudulent statements or misrepresentations that were made by DeGori to induce Hawkinson into entering into a contract. The allegations in the Complaint are nothing more than general breach of oral contract allegations. For this reason, the Court should dismiss these claims.

### **CONCLUSION**

Based upon the foregoing reasons, DeGori submits that the Plaintiff's claims should be dismissed with prejudice.

DATED this 26<sup>th</sup> day of July, 2012.

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#### Footnotes

- 1 For purposes of this Motion, the numerous conclusory allegations set forth in the Complaint of, among other things, fraud, are not to be given the presumption of truth. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (“It is the conclusory nature of respondent's allegations, rather than their fanciful nature, that disentitles them to the presumption of truth.”)

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