

2012 WL 11943197 (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; Roe Corporations
and Limited Liability Companies 1 through 10, inclusive, Defendant.

No. 12A657762.
August 6, 2012.

DEPT. No.: 29

Case No.: A-12-657762-C

Plaintiff's Opposition to Defendant's Motion to Dismiss

OPP Matthew Q. Callister, Esq., Nevada Bar No. 001396, Callister Associates, LLC, 823 Las Vegas Boulevard South, Fifth Floor, Las Vegas, NV 89101, Telephone No.: (702) 385-3343, Facsimile No.: (702) 385-2899, for plaintiffs.

COMES NOW, Plaintiff MATTHEW Q. CALLISTER, in his capacity as GUARDIAN OF THE PERSON AND ESTATE OF RAYMOND P. HAWKINSON, by and through the law firm of CALLISTER ASSOCIATES, LLC, and hereby opposes the Defendant's Motion to Dismiss.

This Opposition is made and based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral arguments of counsel that may be entertained by this Honorable Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this instance case, Defendant has argued that Plaintiffs Complaint should be dismissed, based upon expiration of applicable statutes of limitation and that Plaintiff's Fraud and **Elder Abuse** claims are not pled with the requisite specificity, under **NRCP 9**. As fully briefed below, Defendant's Motion is factually and legally unsupported, warranting denial of the instant Motion to Dismiss.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. In late June of 2007, Raymond P. Hawkinson, ("Hawkinson") and DeGori entered into a verbal agreement (the "Agreement") wherein Hawkinson agreed to loan DeGori the sum of \$500,000.00 (the "Loan") (*See evidence of \$500,000.00 Wire Transfer at Exhibit 1*).

2. As part of the Agreement, DeGori promised to re-pay the Loan by making payments in the amount of \$25,000.00 per month for twenty (20) months.

3. Accordingly, pursuant to their verbal contract, Hawkinson wire transferred the sum of \$500,000.00 directly to DeGori's bank account on July 3, 2007.

4. Over the course of the next several years, DeGori made sporadic payments under the terms of the repayment agreement, with the latest such installment payment of \$25,000.00 being tendered by DeGori to Hawkinson on October 5, 2009 (See, bank statements, at Exhibit 2).

5. No further payments under the terms of the loan are believed to have been made, subsequent to October 5, 2009, constituting a breach of the repayment contract at that time. 6. This instant action was filed on March 7, 2012.

LAW AND ARGUMENT

A. LEGAL STANDARD FOR A MOTION TO DISMISS.

Under [NRCIP 12\(b\)](#), a party may file a motion to dismiss for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 129 S.Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To survive a motion to dismiss, the "complaint must set forth 'factual allegation, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'" [Berner v. Delahanty](#), 129 F.3d 20, 25 (1st Cir 1997) "A Court considering a motion to dismiss can choose to begin by identifying pleading that, because they are no more than conclusions, are not entitled to the assumption of truth." [Ashcroft v. Iqbal](#), 129 S.Ct. 1937, 1949 (2009). A complaint should be dismissed if it appears that the Plaintiff can prove no set of facts that would entitle him to relief. [Cohn v. Mirage Resorts, Inc.](#), 62 P.3d 720, 734 (Nev. 2003), citing [Edgae v. Wagner](#), 101 Nev. 226, 288(1985).

As fully briefed below, all of Plaintiff's claims have been brought within the applicable statutes of limitation, as the breach of the oral contract at issue occurred as of October 5, 2009, the date on which DeGori made his final installment payment to Hawkinson. Also, as briefed below, Plaintiff's claims for fraudulent inducement and **elder abuse** have in fact been pled with the requisite specificity, as required by [NRCIP 9](#). As such, the instant Motion to Dismiss should be denied in its entirety.

B. ALL OF PLAINTIFF'S CLAIMS WERE BROUGHT WITHIN THE APPLICABLE STATUTES OF LIMITATION FOR THE SAME, WARRANTING DENIAL OF THE INSTANT MOTION ON SAID GROUNDS.

All of Plaintiff's claims were brought within the applicable statutes of limitation for the same, warranting denial of the instant motion on said grounds.

1. Plaintiffs Claim for Breach of Oral Contract is Not Time Barred.

Under Nevada law, Plaintiff's breach of oral contract is governed by a four-year statute of limitations. [NRS 11.190\(2\)\(c\)](#). As has clearly been demonstrated by the exhibits attached hereto, specifically **Exhibit 2**, DeGori did not cease making payments under the terms of the oral contract until October 5, 2009. As such, the applicable four-year statute of limitations would not expire on this claim until October 5, 2014. The Complaint in this action was filed on March 7, 2012.

As such, the Plaintiff's claim for breach of oral contract is timely and the instant Motion should be denied.

2. Plaintiff's Claim for Elder Abuse is Not Time Barred.

As a prerequisite to this argument, Defendant has asserted that Nevada does not recognize a claim for elder abuse against an individual. As fully briefed below, this assertion is simply incorrect. Elder Abuse claims are governed specifically by the provisions of NRS 41.1395. Be that as it may, Defendant has nevertheless accurately stated the applicable 3-year statute of limitations for such a claim in their instant Motion.

Again, DeGori did not consummate his scheme to divest Hawkinson of his money until October 5, 2009. The Complaint in this action was filed on March 7, 2012. This filing falls within the applicable 3-year statute of limitations for a claim for elder abuse. As such, the instant Motion should be denied.

3. Plaintiff's Claim for Unjust Enrichment is Not Time Barred.

The Statute of Limitations for an unjust enrichment claim in Nevada is four years. *In re Amerco Derivative Litigation*, 252 P.3d at 681 (Nev. 2011). The statute of limitations for such a claim starts to run when the Plaintiff knew, or in the exercise of due diligence, should have known of the facts constituting the elements of the cause of action. *Id.* at 703.

DeGori did not cease making payments under the terms of the oral contract until October 5, 2009 (See, Exhibit 2). As such, the applicable four-year statute of limitations would not expire on this claim until October 5, 2014. The Complaint in this action was filed on March 7, 2012.

As such, the Plaintiffs claim for unjust enrichment is timely and the instant Motion should be denied.

4. Plaintiff's Claim for Fraudulent Inducement is Not Time Barred.

Virtually analogous to the Plaintiff's argument surrounding his elder abuse claim is Plaintiffs argument surrounding his Fraudulent Inducement claim. Again, the statute of limitations for a fraud claim in Nevada is three years. NRS 11.190(3).

DeGori did not consummate his scheme to divest Hawkinson of his money until October 5, 2009. The Complaint in this action was filed on March 7, 2012. This filing falls within the applicable 3-year statute of limitations for a claim for elder abuse. As such, the instant Motion should be denied.

C. NEVADA ABSOLUTELY RECOGNIZES A CLAIM FOR ELDER ABUSE, VIA STATUTE.

Without belaboring a patently obvious point to this Court, Defendant is simply incorrect in asserting that Nevada does not recognize a claim for elder abuse against an individual. This claim is expressly delineated in NRS 41.395. That statute reads: NRS 41.1395 Action for damages for injury or loss suffered by older or vulnerable person from abuse, neglect or exploitation; double damages; attorney's fees and costs.

1. Except as otherwise provided in subsection 3, if an older person or a vulnerable person suffers a personal injury or death that is caused by abuse or neglect or suffers a loss of money or property caused by exploitation, the person who caused the injury, death or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person.

2. If it is established by a preponderance of the evidence that a person who is liable for damages pursuant to this section acted with recklessness, oppression, fraud or malice, the court shall order the person to pay the attorney's fees and costs of the person who initiated the lawsuit.

3. The provisions of this section do not apply to a person who caused injury, death or loss to a vulnerable person if the person did not know or have reason to know that the harmed person was a vulnerable person.

4. For the purposes of this section:

(a) “**Abuse**” means willful and unjustified:

(1) Infliction of pain, injury or mental anguish; or

(2) Deprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person.

(b) “Exploitation” means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to:

(1) Obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property; or

(2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that persons money, assets or property.

See, [NRS 41.1395](#).

As is clear, Nevada has enacted a statutory claim for **elder abuse** against individuals. Any such argument to the contrary that has been presented by Defendant should be summarily rejected and the instant Motion to Dismiss on said grounds should be denied.

D. PLAINTIFF'S CLAIMS HAVE BEEN PLED WITH THE REQUISITE SPECIFICITY UNDER [N.R.C.P. 9](#), WARRANTING DENIAL OF THE INSTANT MOTION.

[NRCP 9\(b\)](#) reads:

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

See, [NRCP 9\(b\)](#).

To comply with [NRCP 9\(b\)](#), a complaint for fraud must allege the time, place, identity of the parties involved and nature of the fraud. *Rocker v. KMPG, LLP*, 122 Nev, 1185.

1. Plaintiff's Fraud Claim is Pled With Sufficient Specificity Under [NRCP 9\(b\)](#).

Stated simply, the Plaintiff has sufficiently pled all elements to support a fraud claim with specificity. It is obvious that the fraud claim states the time, place and identity of the parties involved in the claim. Moreover, the complaint specifically states: DeGori convinced Hawkisonson to loan him the sum of \$500,000.00 with the promise to re-pay said Loan in its entirety.

DeGori's promise to re-pay the Loan was material to Hawkinson when making the decision to enter into an oral contract and loan DeGori the amount of \$500,000.00.

Hawkinson reasonably relied on DeGori's promise to repay the Loan when deciding whether or not to make said Loan,

See, Complaint, pg. 5, lines 15-22.

These allegations, as contained in the Complaint, clearly state the nature of the fraud committed by Defendant against Plaintiff. As such, the instant Motion to Dismiss should be denied in its entirety.

2. Plaintiffs Elder Abuse Claim Need Not Be Pled With Specificity to Begin With, Warranting Denial of the Instant Motion.

Defendant further argues that Plaintiff's Elder Abuse claim must be pled with specificity, as it is tantamount to a fraud claim. Again, without belaboring the point, Defendant supports this argument with the case of *McKie v. v. Sears Protection Co.*, Not Reported in F.Supp.2d, 2011 WL 1587112 (D.Or.,2011). This is an unpublished opinion from the State of Oregon. Stated another way, this ruling is not legal authority in Nevada and cannot support the instant Motion to Dismiss.

Further, turning one's attention to what is the law in Nevada, nowhere in NRCP 9(b) is a statutory Elder Abuse claim required to be pled with specificity.

In sum, there is simply no statutory or case law precedent supporting Defendant's position that an Elder Abuse claim must be pled with specificity. As such, the instant Motion to Dismiss on said grounds should be denied in its entirety.

It bears noting also that the Plaintiffs Complaint sets forth allegations which fully comply with the requisite elements of a statutory claim for elder abuse in Nevada, as contained in the provisions of NRS 41.1395. As such, Plaintiff has certainly pled his claim for Elder Abuse in compliance with all relevant and applicable Nevada Revised Statutes and Rules of Civil Procedure, further warranting denial of the instant Motion.

CONCLUSION

In sum, the Defendant has not presented a valid factual or legal argument to warrant dismissal of the instant action. As such, this Motion to Dismiss should be denied in its entirety.

DATED: This 2 day of August, 2012.

CALLISTER ASSOCIATES, LLC

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Counsel for Plaintiff

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