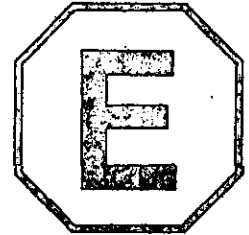




THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



MICHAEL K. CUNDALL, et al.,

Case No. A0602080

Plaintiffs,

Judge Ethna M. Cooper

v.

U.S. BANK, N.A., TRUSTEE, et
al.,

**ENTRY GRANTING
DEFENDANTS' MOTIONS TO
DISMISS**

Defendants.

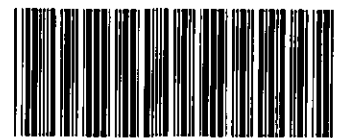
This matter is before the Court on Defendants' Motions to Dismiss. Having reviewed the Motions to Dismiss, Plaintiffs' Memorandum in Opposition, the Supplemental Memoranda, all pertinent pleadings, and having considered the oral argument of counsel presented to the Court on October 16, 2006, the Court finds the Motions to Dismiss well-taken for the reasons that follow.

I. BACKGROUND

This action arises from a 1984 sale of stock in a closely-held family corporation. In 1984, Plaintiff and his family sold all of their shares in the Koon-Cundall-Mitchell Corporation ("KCM") to Central Investment Company ("CIC").¹ In his First Amended Complaint, Plaintiff Michael Cundall alleges that his Uncle, John F. Koons, III ("Bud Koons"), used his power and influence in CIC and as the trustee appointed to various family trusts to "threaten and cajole" his sister's family, (the Cundall family), into providing "releases and/or consents" in connection with the sale of stock owned by the Cundall family and stock held in trust for their benefit.²

¹ KMC was a holding company whose sole asset was shares of CIC.

² A more detailed history of the Koons/Cundall families, the family corporation and the trusts at issue is provided in the First Amended Complaint, the parties' briefs, and oral argument on the Motion to Dismiss.



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In addition, Plaintiffs allege that U.S. Bank, also a former trustee, breached its fiduciary duty by, among other things, knowingly concealing the true value of the stock in an attempt to mislead the Plaintiffs and failing to seek court approval for the transaction.

Plaintiffs further allege that through the alleged breach of their respective fiduciary duties, Defendant U.S. Bank and the deceased Bud Koons, engaged in conduct that unfairly benefited Koons beneficiaries to the detriment of Cundall beneficiaries. Consequently, in bringing this action for tortious breach of fiduciary duty, constructive trust, declaratory judgment, accounting and related relief, Plaintiffs have sued the personal representatives of the estate of Bud Koons, successor trustees of various Koons trusts and the beneficiaries of various trusts in addition to U.S. Bank.

* * *

At the heart of Plaintiffs' complaint are the stock sale and the accompanying releases allegedly obtained and "achieved through duress, coercion, overreaching and *undue influence*" by an uncle who used "various threats and cajoling"³ and a bank who allegedly concealed the true value of the stock in an effort to please its other clients, Bud Koons and CIC. Although Plaintiffs refer to a specific transaction and release in their First Amended Complaint, Plaintiffs fail to mention any operative dates or attach a stock purchase agreement or release to their complaint. Also significantly missing from the First Amended Complaint is an allegation that the Plaintiffs (or any Cundall) returned the consideration they were given in exchange for the release. As discussed below, because a releasor may not attack the validity of a release for fraud in the inducement unless he first

³ The Plaintiffs further claim that because of the discretionary powers of their uncle trustee, they were afraid to challenge him. (First Amend. Compl. at ¶ E.)

tenders back the consideration he received for making the release, all claims related to the 1984 stock sale and release are barred as a matter of law. *Haller v. Borrer Corp.* (Ohio 1990), 50 Ohio St.3d 10, 552 N.E.2d 207, (paragraph two of the Syllabus).

II. LAW

A. Ohio Civil Rule 12(B)(6) Standard

Civ. R. 12(B)(6) dismissal “motions are procedural in nature and test the sufficiency of the complaint. When ruling on a Civ.R. 12(B)(6) motion, courts consider all factual allegations in the complaint to be true and make all reasonable inferences in favor of the nonmoving party.” *Coors v. Fifth Third Bank*, 1 Dist. No. C-050927, 2006-Ohio-4505, ¶ 12, 2006 WL 2520322 (slip op.). Before this Court can grant a dismissal of a complaint, it must appear beyond doubt that the plaintiff can prove no set of facts warranting a recovery. *Id.* However, a plaintiff’s “factual allegations must be distinguished from unsupported conclusions. Unsupported conclusions are not deemed true, nor are they sufficient to withstand a dismissal motion.” *Id.*

Moreover, in considering a motion to dismiss for failure to state a claim, the mere submission of evidentiary material in support of a dismissal “does not require a court to convert the motion into one for summary judgment. A trial court has the power to exclude the extraneous evidence[.]” *Id.* at ¶ 10. While a court should not rely on evidence outside the complaint when resolving a Civ. R. 12(B)(6) motion, the court may consider materials that are referred to or incorporated in the complaint. *Id.* at ¶ 11, 13.

When ruling upon the dismissal motions in this case, the Court relies solely upon the First Amended Complaint, excluding from its review all extraneous evidence not referred to or incorporated in the complaint. Thus, the Court may consider the letters

from the Cundalls embodying the terms of the stock purchase agreement and releases attached to the Personal Representative's Motion to Dismiss as the stock purchase agreement and the release were referred to in the First Amended Complaint.

B. Release/Tender Rule

A release of a cause of action for damages is generally an "absolute bar to a later action on any claim encompassed within the release. To avoid that bar, the releasor must *allege* that the release was obtained by fraud and that he has tendered back the consideration received for his release." *Haller*, 50 Ohio St.3d 10, at 13 (emphasis added, internal citations omitted). Tender is required where the fraud alleged would render the release voidable. If, on the other hand, the fraud alleged would render the release void, no tender of consideration is required and none need be alleged. *Id.* citing *Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 84 N.E.2d 214.

Whether a release of liability is void or voidable upon an allegation of fraud will hinge on the nature of the fraud alleged. "A release obtained by fraud in the factum is void *ab initio*, while a release obtained by fraud in the inducement is merely voidable." *Id.*

A release is obtained by fraud in the factum, and is void *ab initio*, "where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." *Id.* In such cases, the releasor fails to understand the nature or consequence of the release as a result of "device, trick or want of capacity" and the releasor has no intention to sign such a release. *Haller*, 50 Ohio St.3d at 13 citing *Picklesimer*, 151 Ohio St. at 5.

However, a “release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration.” *Haller*, 50 Ohio St.3d at 14. Cases of fraud in the inducement are those in which the plaintiff admits that he released his claim for damages and received consideration therefore, but asserts that he was induced to do so by the defendant's fraud or misrepresentation. “‘The fraud relates not to the nature of the release, but to the facts inducing its execution.’ ... In that event, there is no failure of understanding of the party to be bound by the release ... Rather, the releasor claims that he was induced to grant the release upon the wrongful conduct or misrepresentation of the person so benefited. The misrepresentation may concern the economic value of the claim released, and wrongful conduct may include even coercion and duress.” *Haller*, 50 Ohio St.3d at 14 citing *Picklesimer*, *supra*, and *National Bank v. Wheelock* (1895), 52 Ohio St. 534, 40 N.E. 636. “Whether the fraud as alleged is in the factum or in the inducement is an issue of law for the court.” *Id.* at 14-15.

As recognized by the Ohio Supreme Court, the foregoing distinctions between fraud in the factum and fraud in the inducement reflect two well-settled principles of law: “First, the law favors the prevention of litigation by the compromise and settlement of controversies. Second, a releasor ought not be allowed to retain the benefit of his act of compromise and at the same time attack its validity when he understood the nature and consequence of his act, *regardless* of the basic nature of the inducement employed.” *Haller*, 50 Ohio St.3d at 14 (emphasis added).

The plaintiffs in *Haller*, like Plaintiffs here, did not allege that they failed to understand the release they signed. Rather, they alleged that the value of the

consideration paid was misrepresented to them and that their release was procured through duress. As the court noted in *Haller*, “neither cause constitutes fraud in the factum. They are purely matters of fraud in the inducement. The pleadings therefore set up an allegation of a settlement agreement and release that is only voidable, and in order to attack that release for fraud, the Hallers were first required to tender back the consideration they received.” *Id.*

Likewise, in *Lewis v. Mathes* (4 Dist.), 161 Ohio App.3d 1, 8, 2005-Ohio-1975, ¶ 17, 829 N.E.2d 318, the plaintiff alleged fraud in the inducement rather than fraud in factum when he sought to avoid the release he executed on the ground that the individual defendants and the Corporation misrepresented the Corporation's earnings and, therefore, misrepresented the value of his one-third interest in the Corporation.

III. ANALYSIS

Assuming there was fraud, as the Court must on a motion to dismiss, there is no question that, as a matter of law, the fraud alleged – coercion, duress, misrepresentation of value – is fraud in the inducement. Under established Ohio case law, Plaintiffs cannot bring suit on the released claims without having tendered the consideration the Cundalls received in the transaction in which they granted the releases. Such tender had to be made prior to filing suit and Plaintiffs were required to allege the fact of tender in the First Amended Complaint. Plaintiffs have done neither.

Notwithstanding the foregoing, Plaintiffs argue that the tender rule should not apply in this case for several reasons. First and foremost, Plaintiffs argue that the tender rule does not apply in this fiduciary duty case because “self-dealing by a trustee is presumptively fraudulent.” (Plaintiffs’ Suppl. Opp. Memo., p. 1.)

However, the Court has found no recognized exception to the tender rule announced by the Ohio Supreme Court in *Haller*. Nor, has the Court found any authority to suggest that it should look outside of the fraud in the factum/fraud in the inducement framework prescribed by the Ohio Supreme Court in *Haller* for a case involving a self-dealing trustee, particularly where, as here, the fraud alleged by Plaintiffs so clearly constitutes fraud in the inducement. Regardless of the basic nature of the inducement allegedly employed here (i.e. self-dealing by a trustee),⁴ there is simply no authority that would permit the Court to disregard Ohio Supreme Court precedent and so elevate the status of these Plaintiffs that they should somehow be permitted to keep the benefit of their bargain while challenging its validity at the same time.

Plaintiffs also argue that the tender rule should not apply to them because, as the beneficial owners, the “Cundalls already owned all the stock at issue” and since all that the Cundalls received was the value of their stock, there was no separate consideration for the release.” (Plaintiffs’ Suppl. Opp. Memo., p. 3, 4.) In *Lewis*, supra, the court rejected a strikingly similar argument. In that case, the plaintiff argued that he should not be required to return the \$68,000 consideration that he received in order to maintain his causes of action because (1) the monetary consideration he received was solely for the purchase of his stock at the value determined by the corporate valuation, and (2) he received no monetary consideration in exchange for the mutual release. *Lewis*, 2005-Ohio-1975. As the court in *Lewis* noted, in the absence of the stock purchase agreement and mutual release, the defendants were not obligated to buy the plaintiff’s shares at any

⁴ Although Plaintiffs allege that U.S. Bank breached its fiduciary duty in agreeing to the stock sale and release, the Court can perceive no basis for Plaintiff’s unsupported conclusion that U.S. Bank engaged in “self-dealing” when U.S. Bank stood to gain nothing of consequence as a result of the stock sale.

price. *Id.* at ¶ 28. Thus, the Plaintiff was required to return the consideration that he received to avoid the release and pursue his causes of action against the defendants. *Id.* at ¶ 30, 32.

Plaintiffs allege nothing in the First Amended Complaint to demonstrate that CIC was required or obligated to purchase the Cundalls' stock. Indeed, the premise of Plaintiffs' complaint is that the Cundalls were coerced into selling their stock – not that others were forced to purchase their stock. Furthermore, Plaintiffs do not allege or point to anything in the trust agreements that would necessarily preclude the Cundalls from selling their stock or CIC from purchasing it. On the contrary, nothing in the trust agreement prohibits the sale of family stock. The trust expressly authorizes the sale or exchange of any asset, without limitation.⁵

Plaintiffs cannot avoid the tender requirement because there is no preexisting obligation to sell or purchase the stock nor is there any other basis to sever the stock purchase and the releases. Akin to the situation in *Lewis*, the stock purchase agreement here (embodied in the letters from the Cundalls), specifically refers to and incorporates the releases signed by the Cundalls as a condition of the sale. Accordingly, the consideration received, the agreement to sell the stock, cannot be severed from the releases.

III. CONCLUSION

For the foregoing reasons, the failure to tender and to allege tender requires dismissal of all claims of all parties related to any claim encompassed in the releases. The Court is not aware of any circumstances that would necessarily foreclose the possibility that Plaintiffs or the Cundalls might tender the consideration received. Accordingly, the

⁵ See Grandparent's Trust, Article II and IV(3).

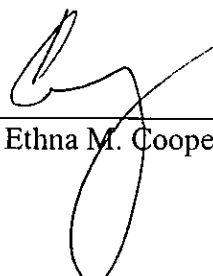
dismissal of the claims and cross-claims herein based on the failure to tender must be without prejudice.

In addition, for the reasons stated in the Defendants' respective briefs, the Court also finds merit in the Defendants' arguments to dismiss: (1) with prejudice the claims against U.S. Bank on statute of limitation grounds; (2) without prejudice the claims against out-of-state Koons beneficiaries for lack of personal jurisdiction; and, (3) with prejudice the claims against the personal representatives of the Koons Estate for failure to present the tort claims within the statutory period.

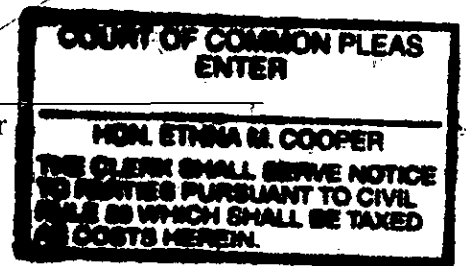
Because the proposed Second Amended Complaint does not allege tender, Plaintiffs' Motion for Leave to File a Second Amended Complaint is denied as futile. All other pending motions are denied as moot.

There is no just cause for delay.

IT IS SO ORDERED.



Judge Ethna M. Cooper



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