

**IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**JAMES SCOTT PAULEY,**  
**Plaintiff,**

**vs.**

**Civil Case No.: 14-C-7**  
**Presiding Judge: Paul T. Farrell**  
**Resolution Judge: James H. Young Jr.**

**APPALACHIAN STREAM RESTORATION, LLC,**  
**a West Virginia limited liability company,**  
**CHRISTOPHER J. WHITE and ANTHONY J. WHITE,**  
**Defendants.**

**ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS AND  
GRANTING PLAINTIFF'S MOTION TO CONTINUE**

This matter came before the Court pursuant to Defendants' Motion to Dismiss. The Court has reviewed the Memorandums submitted by both parties and finds it appropriate to grant the motion in part. Also before the Court is the Plaintiff's Motion to Continue. In order to permit effective mediation, the Court grants the Motion to Continue and will issue a new scheduling order within thirty (30) days.

The Defendants' Motion to Dismiss ("Motion") requests that this Court dismiss the Complaint based on two grounds: first, that the individual members of Appalachian Stream Restoration, LLC, cannot be held personally liable for the alleged torts of the company by virtue of the corporate veil, and second, that the Plaintiff's Complaint fails to state the circumstances constituting fraud with particularity.

Generally, a motion to dismiss should be granted only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996). The Supreme Court of

Appeals of West Virginia has advised that motions to dismiss are viewed with disfavor and that lower courts should rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008); citing *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605-06, 245 S.E.2d 157, 159 (1978). For the purpose of evaluating motions to dismiss, complaints must be "construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978); *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). However, where it "appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" the courts may grant a motion to dismiss to weed out unfounded suits. Syl. pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977); *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003).

#### I. Corporate Veil

It is a well-settled point of law that "a limited liability company is a legal entity distinct from its members." W. Va. Code §31B-2-201. Typically, a member or manager cannot be held personally liable for a debt or liability of a company. However, this veil of protection can be pierced to prevent injustice.

To pierce the veil of a limited liability company in order to impose personal liability on its member(s) or manager(s), it must be established that (1) there exists such unity of interest and ownership that the separate personalities of the business and of the individual member(s) or managers(s) no longer exist and (2) fraud, injustice, or an inequitable result would occur if the veil is not pierced.

*Kubican v. The Tavern, LLC*, 232 W. Va. 268, 752 S.E.2d 299, 301 (2013).

There are many factors that can be examined in order to determine whether there is such an alter ego, but in the instant case, Plaintiff simply fails to allege any unity between the

company and the individual Defendants. A review of the Complaint reveals no argument for piercing the corporate veil. And while a Court may not consider extraneous matters beyond the scope of the pleadings when reviewing a 12(b)(6) motion to dismiss, it is noteworthy that even the Plaintiff's reply to the Motion fails to allege any unity between the company and the individual Defendants. Accordingly, Plaintiff has failed to allege a claim against the individuals Christopher White or Anthony White for which relief may be granted.

## II. Pleading Fraud with Specificity

Typically, parties are only required to offer a short and plain statement of their claims to meet the requirements of notice pleading under West Virginia law. However, when a party makes a claim for fraud or mistake, the West Virginia Rules of Civil Procedure specifically require that "the circumstances constituting fraud or mistake shall be stated with particularity." W. Va. R. Civ. P. 9(b).

The 1998 case of *Pocahontas Min. Co. P'ship v. Oxy USA, Inc* demonstrates how Rule 9(b) should be applied. 202 W. Va. 169, 171, 503 S.E.2d 258, 260 (1998). In *Pocahontas*, the Court found that while the plaintiff's claim of fraud was somewhat inartfully plead, it was asserted with sufficient particularity to afford the defendants reasonable notice of the nature of the claims.

[T]he first amended complaint clearly states that [defendant] provided "false information and surveys that the well was located on property owned by [plaintiff] ..." The complaints further allege that [defendant] willfully refrained from paying royalties due to [plaintiff]. It is also clear that [plaintiff] is claiming that, by willfully concealing the true location of the well, [defendant] attempted to conceal the fact that a well had been drilled on the [plaintiff's] property and that the misrepresentation was calculated to dissuade [plaintiff] from objecting to the location of the well and seeking the royalties due. ... The Court also believes that the evidence was sufficiently developed to raise such genuine issues of

material fact as to require submission of the case to a jury. Since the pleadings were sufficient to afford [defendant] an opportunity to prepare an adequate defense, the purpose underlying the Rule 9(b) requirement of pleading fraud with particularity, as discussed in *Hager v. Exxon Corporation, supra*, was realized, and the trial court erred in granting the motion of [defendant] to dismiss the fraud claim on the ground that it was not adequately pled.

*Pocahontas*, 202 W. Va. at 171.

In contrast, the plaintiffs in *Hager v. Exxon* failed to plead fraud or circumstances of fraud and then later attempted to prove fraud in trial. 161 W. Va. 278, 241 S.E.2d 920 (1978). The *Hager* Court found that the defendant was unprepared to defend and surprised by the claim and that the circuit court erred by allowing the plaintiff to present the claim.

In *Highmark West Virginia, Inc. v. Jamie*, the Court recalled the essential elements in an action for fraud. 221 W. Va. 487, 655 S.E.2d 509 (2007).

"(1) [T]hat the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737(1927).

*Id.* at 493. The Court maintained that Rule 9(b) required pleading with specificity but noted that the pleading was not required to *prove* each element. *Id.* at 494. The Court held that those counts that simply failed to aver detrimental reliance could survive a motion to dismiss, but that those counts which failed to connect the alleged fraud with the damages were fatally flawed.

In weighing the sufficiency of the pleading at bar, the Court looks to the purpose of 9(b). The West Virginia Supreme Court has stated that the purpose of Rule 9(b) is simply to permit the party charged with fraud the opportunity to prepare a defense. *Hager*, 161 W. Va. at 283, 241 S.E.2d at 923. While more than mere notice is required, a pleading of fraud is not charged with

proving the fraud claim and including every element of the proof. *Pocahontas*, 202 W. Va. at 173-74.

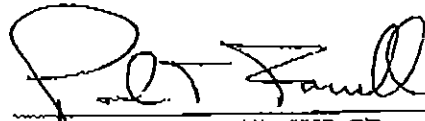
Here, the Complaint refers to exhibits that are not attached, including the purchase agreement Plaintiff was allegedly fraudulently induced into signing. Nor does the record contain any corrections or supplemental exhibits. While the Court can surmise that the alleged fraud occurred sometime between November 2009 and January 2012, the Complaint fails to state with any particularity when the alleged fraud was carried out. More importantly, the Complaint fails to explain what particular damages are the results of the Defendants' alleged actions. The Plaintiff complains that he was fraudulently induced to transfer his interest in Appalachian, but then claims that the transfer never occurred. Accordingly, the Complaint fails to connect the alleged fraud with damages and leaves the Defendants somewhat unprepared to meet the claims without clear allegations of when the complained action took place.

THEREFORE, recognizing the law's strong preference for the adjudication of claims on the merits, the Court HOLDS IN ABEYANCE the Defendants' Motion to Dismiss as it pertains to Plaintiff's failure to plead fraud with specificity. The Plaintiff may supplement the record and his briefs to reflect the allegations and damages within the Complaint within sixty (60) days from the entry of this Order. Moreover, for the aforementioned reasons, the Court hereby GRANTS IN PART Defendants' Motion to Dismiss and ORDERS that the individual defendants Christopher White and Anthony White are DISMISSED from the above-captioned case.

The Clerk of the Circuit Court of Lincoln County, West Virginia, is directed to forward an attested copy of this Order to the Resolution Judge, the Honorable James H. Young, Jr., at the Wayne County Courthouse, P.O. Box 68, Wayne, West Virginia 25570; the Business Court

Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100,  
Martinsburg, West Virginia, 25401; and all counsel of record.

ENTER this 23 day of Apr., 2015.

A handwritten signature in black ink, appearing to read "Paul T. Farrell", written over a horizontal line.

PAUL T. FARRELL, JUDGE  
BUSINESS COURT DIVISION

