99612717

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

EDWARD GRAHAM, ET AL
Plaintiff

2017 JUL 10 P 4:11

CLERK OF COURTS
CUYAHOGA COUNTY

CITY OF LAKEWOOD, ET AL
Defendant

Case No: CV-15-846212

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

96 DISP.OTHER - FINAL

JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED AND VERIFIED COMPLAINT.

O.S.J.

COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

7/10/2017
Date

- 96
07/10/2017

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, *et al.*	)	**CASE NO. CV 15 846212**
	)	
Plaintiffs	)	**JUDGE JOHN P. O'DONNELL**
vs.	)	**JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED AND VERIFIED COMPLAINT**
THE CITY OF LAKEWOOD, *et al.*	)	
Defendants.	)	

John P. O'Donnell, J.:

This is a lawsuit by five Lakewood residents to prevent the closing of Lakewood Hospital. According to the plaintiffs there "is no reason to close and demolish Lakewood Hospital" and its closing "violates contract terms, city ordinances and the economic facts."[1] The defendants have moved under Rule 12(B)(6) and Rule 9 of the Ohio Rules of Civil Procedure to dismiss every claim in the lawsuit on the basis that the plaintiffs have failed to state a single claim upon which relief under law can be granted.

The parties

Plaintiffs Edward Graham, Marguerite Harkness, William Grulich, Deborah Meckes and Amy Dilzell all live in Lakewood, and Dilzell works at Lakewood Hospital.

Defendant Michael Summers is a Lakewood resident and mayor of the defendant City of Lakewood. The city owns the real estate and a building at 14601 Detroit Avenue known as Lakewood Hospital. The property is leased by the city to defendant Lakewood Hospital

[1] First amended and verified complaint, page 18, ¶55.

Association, and LHA contracted in 1996 with defendant The Cleveland Clinic Foundation to operate the hospital.

Defendant Lakewood Hospital Foundation is a charitable trust corporation established to raise money to support the hospital.

Defendant Thomas Gable is the chairman of LHA, defendant Delos Cosgrove, M.D. is the chief executive officer of CCF, and defendant Kenneth Haber is the president of LHF.

Mike DeWine is Ohio's attorney general. The first amended and verified complaint includes a claim that the hospital is held by the defendants LHA, LHF and CCF as a charitable trust, and DeWine is included as a defendant under section 109.25 of the Ohio Revised Code, which makes the attorney general a necessary party to any lawsuit intended to construe the provisions of an instrument with respect to a charitable trust or to terminate a charitable trust or distribute its assets.

The amended complaint includes a tenth named defendant, Subsidium Healthcare, LLC. Subsidium served as a consultant for Lakewood in 2014 to request proposals from parties who might be interested in taking over the hospital. Subsidium's motion to dismiss was granted on December 17, 2015, and it is no longer a party.

Summary of the defendants' relationships

Lakewood is a municipal corporation bound by its charter. The charter includes Article XV allowing the city council to establish, by ordinance, a municipal hospital. The charter also provides for the composition of the hospital's board of trustees and permits the council to pass an ordinance authorizing a lease of the hospital.

Section 907.03 of the Lakewood Codified Ordinances, effective December 1, 1930, established the Lakewood Hospital. On January 5, 1987, Lakewood's council passed an

ordinance approving the transfer of the operation, management and assets of Lakewood Hospital from the hospital's board to LHA. The ordinance also authorized the city to lease the hospital to LHA, and a lease was given in 1987 then amended and restated in 1996. At about the same time the city enacted an ordinance giving it the right to appoint seven people to LHA's governing board, two of whom must be members of the city council.

In 1996, LHA and CCF entered into a contract known as the definitive agreement. The general import of the agreement was to "integrate" Lakewood Hospital into CCF's network of regional hospitals and operate it as if it were one of CCF's own. The agreement also made CCF the sole member of LHA with the ability to exercise a great deal of control over LHA's board. The other important aspect of the definitive agreement obligated LHA to enter into a new 30-year lease of the hospital from the city.

Summary of the defendants' alleged wrongdoing

The operative pleading is the plaintiff's first amended and verified complaint filed on August 5, 2015. It includes 15 separate causes of action listed after 29 pages of factual allegations. The amended complaint is 242 paragraphs long plus 85 pages of exhibits, not including the exhibits from the original complaint that have been incorporated into the amended complaint by the parties' agreement. A succinct but thorough paraphrase of the facts alleged in the amended complaint is thus elusive. Instead, this entry will address each of the amended complaint's causes of action in order and refer to specific factual allegations as needed in connection with a given cause of action. In the meantime, to give context to the defendants' motion to dismiss and this entry, I offer the plaintiffs' own words:

The definitive agreement and the lease "have created an unusual and complex love triangle among CCF, LHA" and Lakewood.[2] LHA is caught between CCF and the city, two "competing interests that were supposed to share power and work together for"[3] the plaintiffs' benefit. As for CCF, it "has been terminating or redirecting high margin medical services for years with the intended effect of crippling Lakewood Hospital's financial viability and moving these services to its wholly-owned hospitals" and now "wants to close Lakewood Hospital in breach of" the definitive agreement and lease.[4] As for the city, it "has failed to adequately represent the best interests of the city and the general public by [not] enforcing its rights to maintain Lakewood Hospital as an acute care community hospital in good working order and [by failing to prevent] the closure of Lakewood Hospital."[5]

The motions to dismiss

All of the defendants (except the attorney general, a nominal defendant) jointly moved to dismiss every claim in the amended complaint for failure to state a claim upon which relief can be granted. The plaintiffs opposed the motion and the defendants replied to that opposition, after which the plaintiffs filed a surreply brief.

Later, the defendants filed a separate motion to dismiss the first three causes of action in the amended complaint – all labeled as taxpayer suits where the plaintiffs, as taxpayers, stand in for Lakewood to enforce rights they allege the city has declined to enforce – on the grounds that the court lacks subject matter jurisdiction over those claims because they are moot by virtue of a

[2] Am. comp., page 28, ¶ 82.
[3] *Id.*
[4] *Id.*, p. 28, ¶81.
[5] *Id.*, p. 29, ¶82.

contract executed on December 21, 2015, while the lawsuit was pending. That motion also has a brief in opposition, a reply to the brief in opposition and a surreply to the reply.

Both motions are fully briefed and this entry follows.

Civil Rule 12(B)(6) and Civil Rule 9

Civil Rule 12(B)(6) allows a defendant to move to dismiss a lawsuit where the complaint fails to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). The motion may only be granted if, taking the factual allegations in the complaint as true, it appears that the plaintiff can prove no set of facts that would justify a court granting relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St. 2d 242 (1975), syllabus. In reviewing the complaint, every reasonable inference from the factual allegations must be made in favor of the plaintiff. *Salyer v. Eplion*, 4th Dist. No. 08CA18, 2009-Ohio-1623, ¶21. But unsupported conclusions are not taken as admitted by a motion to dismiss and are not sufficient to withstand the motion. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 2d, 190, 193.

Claims of fraud are additionally subject to Civil Rule 9(B), which requires that the circumstances constituting fraud shall be stated with particularity. But the requirement of particularity in the pleading of fraud must be applied in conjunction with the general directives in Civil Rule 8 that the pleadings should contain a "short and plain statement of the claim" and that each averment should be "simple, concise, and direct." Where it is apparent that even though the pleadings may be vague the defendant does in fact have notice of the matters of which plaintiff complains, a strict application of Civil Rule 9(B) can serve no useful purpose. *F & J Roofing Co. v. McGinley & Sons, Inc.*, 35 Ohio App. 3d 16, syllabus 2 (9th Dist. 1987).

The plaintiffs' taxpayer claims

The plaintiffs' first cause of action, labeled in the amended complaint as **count 1A**, is a taxpayer lawsuit under R.C. 733.59. That statute provides:

> If the . . . city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation.

On April 14, 2015, the plaintiffs, all five of whom are Lakewood taxpayers, through counsel, corresponded to Lakewood's law director with a demand that the city file a lawsuit "to preserve and ensure the continued operation of Lakewood Hospital for the benefit of the Lakewood community."[6] The letter asks the law director to "bring an action in the name of the city of Lakewood" against "the city of Lakewood, its officials, the Lakewood Hospital Association, the Cleveland Clinic Foundation and the Lakewood Hospital Foundation."[7] According to the plaintiffs, a lawsuit by Lakewood against these parties – including itself – was necessary to 1) enjoin abuses of Lakewood's corporate power by the mayor and city council members, 2) obtain specific performance of the lease and definitive agreement, and 3) compel the mayor and city council to perform their duties to the city.

The law director, Kevin Butler, Esq., declined the demand on May 1, 2015.[8] This lawsuit was filed less than a month later.

Statutory taxpayer lawsuits are permitted only for the reasons specified in R.C. 733.56 through 733.58. Section 733.56 allows actions for an injunction to restrain the abuse of the

---

[6] Complaint, Exhibit 8. The parties have agreed that the exhibits attached to the original complaint are incorporated into the amended complaint.
[7] *Id.*
[8] Comp., Ex. 9.

city's corporate powers or to restrain the execution or performance of any contract made on behalf of the city either in violation of its laws or through fraud or corruption. Section 733.57 permits a lawsuit for specific performance of a contract made on behalf of the city that is being evaded or violated, and section 733.58 authorizes an action in mandamus against a city officer who fails to perform his legal duty.

The only proper goal of a statutory taxpayer action is to enforce a public right, regardless of any personal or private motive or advantage. *State ex rel. Fisher v. Cleveland*, 109 Ohio St. 3d 33, 2006-Ohio-1827, ¶12. A taxpayer action is properly brought only when the right under review in the action is one benefiting the public. *Id.*, ¶10. In other words, for the taxpayer causes of action in this case, the plaintiff, in all but name, is the City of Lakewood, and the named plaintiffs' factual allegations must be examined to determine whether they state one or more of the permissible claims under R.C. 733.56 through 733.58.

For the claim under R.C. 733.56, the plaintiffs aver that "the city has engaged in a series of improper activities that constitute abuse of corporate powers"[9] by failing to enforce the definitive agreement and the lease. Putting aside for now whether Lakewood has any legal right to enforce the definitive agreement, to which it is not a party, since Summers is the only city actor named as a defendant I must assume that only Summers is alleged to have abused the city's corporate powers.

The abuse of corporate powers within the purview of section 733.56 includes the unlawful exercise of powers possessed by the corporation as well as the assumption of powers not conferred. *Fisher*, supra, ¶19. I can find no allegation in the amended complaint to the effect that Summers has assumed powers not conferred upon him as Lakewood's mayor. This leaves only the question of whether Summers has unlawfully exercised Lakewood's corporate powers.

[9] Am. comp., p. 30, ¶ 86.

Court decisions have carefully restricted taxpayer actions involving an alleged abuse of corporate powers by establishing that public officials who act in good faith, and in the absence of fraud or collusion, have a range of discretion which courts respect, and courts will not substitute their judgment for that of the public official. *Columbus ex rel. Willits v. Cremean*, 27 Ohio App. 2d 137, 149 (10th Dist.1971).

A thorough examination of the amended complaint, construed most favorably toward the plaintiffs, reveals no allegations sufficient to support a claim that the mayor has abused the city's corporate powers. On page 4 the plaintiffs allege that the city is failing to enforce valuable contractual rights and remedies. On that same page they claim that "City leadership" has misled residents about the real reasons the hospital must close. On page 24 and 25 they complain that the mayor, as an *ex officio* member of LHA's board, fully supported plans to diminish or close the hospital contrary to the city's best interests and, in doing so, violated LHA's own rules against attempting to influence legislation. All of these actions, if true, fall within the wide range of discretionary lawful conduct conferred on the mayor by virtue of his position as the city's executive. Accordingly, **count 1A** of the amended complaint fails to state a claim under R.C. 733.56 and 733.59 for an injunction to restrain the abuse of Lakewood's corporate powers.

Count 1A also purports to set out a claim under R.C. 733.56 *et seq.* to enforce the definitive agreement and lease. The first part of this claim is to restrain "the execution or performance of any . . . contract in contravention of the existing [definitive agreement] and lease."[10] This claim does not fall within the ambit of claims permitted under section 733.56, which allows an application for an injunction to restrain only the execution or performance of any contract in the city's name that was procured in contravention of *the laws or ordinances governing* the city. There is no provision allowing a taxpayer to seek to restrain the performance

[10] *Id.*, p. 32, ¶98.

or execution by the city of one contract on the basis that to do so would violate a different contract. Since the plaintiffs are claiming just that, **count 1A** of the amended complaint fails to state a claim under R.C. 733.56 and 733.59 for an injunction to restrain the execution or performance of any contract made on behalf of Lakewood in contravention of its laws and ordinances.

The next part of **count 1A** is a claim under R.C. 733.57. That section provides, in pertinent part:

> When an obligation or contract made on behalf of a municipal corporation, ~~granting a right, . . . is being evaded or violated . . . [the] city director of law shall apply~~ for the forfeiture or the specific performance thereof as the nature of the case requires.

For this claim, at paragraph 97 of the amended complaint, the plaintiffs' allege that "[t]he obligations and duties under the [definitive agreement] and lease . . . have been and are currently being evaded and/or violated" by LHA and CCF for: failing to maintain the facility; eliminating available medical services; sending patients to other CCF hospitals to weaken the hospital's financial viability; planning to eliminate inpatient care while preventing the city from making alternate plans to preserve the hospital as an inpatient facility; and "other nonfeasance, misfeasance, malfeasance and negligence regarding various other duties and obligations" under the two contracts. The plaintiffs demand specific performance of both contracts. According to the amended complaint, specific performance, by both LHA and CCF, would include: maintaining the hospital's "Required Services" (a defined term in the lease) until 2026; providing indigent health care; maintaining a 1:1 cash-to-debt ratio through 2026; accounting for all administrative expenses from 1996 until now; and disgorgement of excessive administrative expenses and other excess charges.

The lease is undoubtedly a contract made on behalf of a municipal corporation granting to LHA a right to the hospital and the taxpayers made a presuit demand to the law director that the city enforce it. That demand was rejected and security for costs has been proffered, thus R.C. 733.59 gives the taxpayers the right to institute suit in their own names.[11]

That leaves the question of whether they have sufficiently pled a violation, or breach, of the contract. The defendants claim the plaintiffs' have not alleged any actionable breach of the particular terms of the lease.[12]

Section 6.1 of the lease obligates the lessee to keep and maintain the premises in good repair and in good operating condition. Under sections 9.11(b) and 9.16, LHA agrees to provide "Required Services," defined at section 1.2 to include "(i) obstetrical/gynecological services, (ii) 24 hour a day emergency-room providing trauma services, (iii) rescue squad/paramedic services, (iv) intensive care services and (v) acute care medical/surgical services . . . of the nature then generally provided by a community hospital in communities comparable to" Lakewood. Paragraph 47 of the amended complaint alleges the defendants have slashed and "diminished to nothing" vital medical services at the hospital. Paragraph 49 alleges that many "Required Services" have been terminated. Paragraph 53 alleges that the defendants are selling or moving medical equipment subject to the lease. Paragraph 57 alleges that valuable medical services and equipment have been "siphon[ed]" by the defendants, an allegation expanded on in Paragraph 59. The allegation of terminated medical services is repeated in Paragraph 81 and again in Paragraph 97.

[11] R.C. 733.59 refers to a demand on the law director by "any taxpayer" and subsequent suit by "the taxpayer . . . in his own name" provided that "the taxpayer" gives adequate security. That statute thus appears to authorize a lawsuit by only one taxpayer, not five. The defendants have not raised the issue so it need not be decided now and I will proceed, for the time being, as if all five plaintiffs have the right to institute a single suit in all of their names.
[12] Plaintiffs' 8/21/2015 motion to dismiss, pp. 19-22.

Civil Rule 8(A) requires a complaint to contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. This rule means only that the complaint must give a defendant fair notice of the nature of the action. *DeVore v. Mutual of Omaha Ins. Co.*, 32 Ohio App. 2d 36, 38 (7th Dist. 1972). Civil Rule 8(A) opens the courthouse door wide and Civil Rule 12(B)(6) is not intended to slam that door shut, especially in a taxpayer action since the taxpayer will not always possess the detailed knowledge of a city officer, yet may be generally aware that a city contract is being evaded or violated. Although the number of detailed factual allegations in the amended complaint is inversely proportional to the quantity of words in the pleading, the factual allegations are sufficient to give the defendants fair notice of the nature of the lawsuit, and since LHA is indisputably a party to the contract with Lakewood, LHA's motion to dismiss the claim in **count 1A** under R.C. 733.57 for specific performance of the lease is denied.

But CCF is not a party to the lease, and Lakewood is not a party to the definitive agreement, and **count 1A** under R.C. 733.57 alleges a right of the city to enforce the lease against CCF and the definitive agreement against both defendants. I will address that question in the discussion of **count 2** for breach of contract.

The third statutory taxpayer claim in **count 1A** is made under R.C. 733.58, which says:

> In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the . . . city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

To support this claim, at Paragraph 100 of the amended complaint the plaintiffs demand a "writ of mandamus to compel the City to perform their (*sic*) official duties" under Lakewood's charter and ordinances to "ensure the preservation and operation" of the hospital through the

term of the lease. But the city itself cannot be both the plaintiff, through the taxpayers, and the defendant. The statutory action is to compel "an officer or board" of the city to perform his duty. Since Summers is the only officer of the city named as a defendant I will consider this as a claim to compel Summers to perform his duty.

To be entitled to a writ of mandamus a relator must establish a clear legal right to the requested relief, a clear legal duty on the part of the respondent to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Brown v. Lemmerman*, 124 Ohio St.3d 296, 2010-Ohio-137, ¶ 9. The clear legal right sought is the enforcement of the lease and definitive agreement. That is the exact relief sought in the R.C. 733.57 claim. The clear legal duties are 1) the mayor's obligation under Ordinance No. 63-86 to execute the 1987 lease with LHA, 2) his duty under that same ordinance to represent the city's best interests as an LHA board member and 3) his obligation under Ordinance No. 51-96 to execute the 1996 lease with LHA.[13] Two of these duties – executing the 1987 and 1996 leases – have been performed, leaving the mayor's alleged legal duty to represent the city's best interests as an LHA board member.

Ordinance No. 63-86 does dictate that the mayor and council members on LHA's governing board are obligated to "represent the City and its interests." That creates a legal duty. But it is not a duty that is sufficiently clear to permit an order via mandamus to compel its performance. Given the number of issues that likely arise in the board's oversight of the hospital – hiring, retaining and terminating employees; contracting for maintenance and other services; approving capital expenditures; negotiating with suppliers; prosecuting and defending lawsuits; planning for an uncertain future; etc. – acting in the city's interests presupposes a broad range of

[13] It is difficult to piece together through a reading of the amended complaint the legal duties the performance of which the plaintiffs seek to compel, but the plaintiffs identify the ordinances they want enforced on page 36 of their brief in opposition to the motion to dismiss.

discretion. Discretion is a square peg that does not fit in the round hole of mandamus. It would be one thing to command the mayor to execute an already identified contract; that is a sufficiently clear legal duty. It is quite another to command him, as an LHA board member, to "represent the City and its interests." Such an order would be impossible to enforce because it could never contain an unambiguous statement of what is, and is not, in the city's interest.

Even if the plaintiffs, acting in the name of the city, have articulated a legal duty that is sufficiently clear to be commanded by a court through mandamus, they have an adequate legal remedy, namely their R.C. 733.57 claim for enforcement of the 1996 lease. For both of these reasons – the lack of an unambiguous legal duty and the availability of an adequate remedy at law – **count 1A** fails to state a claim for relief under R.C. 733.58.

Count 1B of the amended complaint is a taxpayer action under Article VII, Sections 1(D) through 1(G) of Lakewood's charter. Those sections are coextensive with R.C. 733.56 through 733.59 and the claims in **count 1B** are the same as those in **count 1A** so the same analysis applies and a separate discussion is not needed.

Count 1C of the amended complaint is an alternative common law taxpayer action seeking the same three remedies as in counts 1A and 1B: an injunction, specific performance and a writ of mandamus. Where statutory relief is afforded and clearly applies to the circumstances giving rise to a common law taxpayer action, the statute constitutes the exclusive avenue for seeking redress. *Westbrook v. Prudential Ins. Co.*, 37 Ohio St. 3d 166, 170 (1988). Since the taxpayers have instituted actions under the Ohio Revised Code and the Lakewood charter they may not seek redress under the common law too.

Even if they could, they have not pled facts that support standing to bring a common law taxpayer action. Unless a taxpayer has some special interest in a public contract by reason of

which his own property rights are put in jeopardy he may not bring a common law taxpayer action. *State ex rel. Masterson v. Ohio State Racing Com.*, 162 Ohio St. 366, 368 (1954). In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. *Id.* The plaintiffs claim they have a special interest in the lease and definitive agreement, and the property those agreements affect – namely, Lakewood Hospital assets[14] - because 1) the hospital has been supported by public funds through taxation, 2) they have all used the hospital and its services and 3) plaintiff Dilzell works at the hospital. None of these qualify as interests that are distinct from every other taxpaying resident of Lakewood. The burden of taxes falls more or less equally on every taxpayer and using, or working at, the hospital may create some rights and obligations between the patient and the hospital or employee and the hospital, but those relationships do not create the right to participate in decisions about the hospital's operation and management through a taxpayer lawsuit.

Accordingly, the motion to dismiss **count 1C** is well-taken.

Count 2 of the amended complaint is for breach of contract: or, more accurately, breach of *contracts*, namely the lease and the definitive agreement. Here, the cause of action is asserted on behalf of the named plaintiffs themselves as intended third-party beneficiaries to the two contracts. The gist of this count is that LHA, LHF and CCF have breached contractual duties to provide medical services (including indigent care), maintain the hospital and its equipment, continue the current level of service through the end of the contract, minimize administrative expenses, and fund any deficit between expenses and income. The defendants have moved to dismiss count 2 on the grounds that the plaintiffs are not parties to either contract and therefore have no standing to sue for a breach.

[14] Br. in opp., p. 38.

The elements of a breach of contract claim include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Doner v. Snapp*, 98 Ohio App. 3d 597, 600 (2d Dist. 1994). But only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. *Thornton v. Windsor House, Inc.*, 57 Ohio St. 3d 158, 161 (1991). Since the plaintiffs concede they are not signatory parties to either contract they only have standing to bring count 2 for themselves if they are intended third-party beneficiaries.

A person who benefits from a contract's promises is an intended beneficiary with standing to enforce the contract only if: 1) recognition of a right of the beneficiary to performance is appropriate to effectuate the intention of the parties and 2) either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St. 3d 36, 40 (1988). Performance of a contract will often benefit a third person, but unless the third person is an intended beneficiary as here defined, no duty to him is created. *Id.*

Ohio courts use the "intent to benefit" test to determine whether a third party is an intended beneficiary. Under this analysis, if the promisee (the party entitled to performance under the contract) intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. *Id.* If the promisee has no intent to benefit a third party, then any third-party benefiting from the contract is merely an "incidental beneficiary" with no enforceable rights under the contract. *Id.* The mere conferring of some benefit on the supposed beneficiary by the performance of a particular

promise in a contract is insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary. *Id.*

The relationships in *Hill* provide a practical illustration. That case involved defendant Sonitrol's sale of a security system to Today's Adult Entertainment Center, an adult bookstore. Hill was a cashier at the bookstore. Before leaving the store she activated the security system – which was on only when the store was closed and unoccupied – by calling Sonitrol, who affirmed that the system was active. Upon her departure she was accosted by a person who forced her at the point of a knife back into the store, and soon kidnapped Hill's husband when he arrived to pick her up from work, terrorizing both with the knife and a gun for nearly an hour and raping Hill in the process. Eventually Sonitrol detected something out of the ordinary and called the store. Hill was able to alert Sonitrol's representative that there was a problem and the police were finally called.

The Hills ultimately sued Sonitrol for its failures, essentially alleging negligence, product liability and breach of warranty. The trial court dismissed the lawsuit because the Hills were neither express parties to the contract to provide the security services nor were they intended beneficiaries. The Ohio Supreme Court affirmed, holding that the only potential source of a legal duty to Hill was the contract with the bookstore and Hill was not an intended beneficiary of the contract, i.e. a person intended by the bookstore to benefit from the contractual rendition of the security service.

Here, the plaintiffs must demonstrate that Lakewood entered into the lease with LHA, and that LHA entered into the definitive agreement with CCF, intending to benefit them.

Generally, the intention of contracting parties to benefit a third party will be found in the language of the agreement. *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 200 (2011). In the

case of contracts entered into by governmental entities, such as the lease in this case, private citizens have no right to enforce government contracts on their own behalf, unless a different intention is "clearly manifested" in the contract. *Duncan v. Cuyahoga Cmty. College*, 8th Dist. No. 101644, 2015-Ohio-687, ¶32.

In the amended complaint the plaintiffs aver that taxpayers "were identified in [the definitive agreement and the lease] and in City Ordinance No. 63-86 as the parties" to benefit from the hospital's services.[15] But the plaintiffs do not point to specific portions of the lease and definitive agreement that would clearly manifest an intention to make all Lakewood residents beneficiaries of the contracts. In their brief in opposition to the motion to dismiss they do cite to the "Provision for Indigent Care" section of the lease, on page 3, whereby LHA agrees to "continue to provide healthcare services in accordance with this Lease to *residents* of the City without regard to their ability to pay," and to the "Operation and Services of the Hospital" section on that same page where LHA agrees "to continue to provide *residents* of the City" with the services required by lease. (Emphasis in italics added.)

Both of these terms are in a section of the lease captioned "Statement of Intent." It is worth noting that, according to the lease, the Statement of Intent provisions are qualified by Articles I through XIV of the lease, which "shall control and be determinative of the interpretation of this Lease."[16] Nowhere else in the lease's 53 single-spaced pages (not including signature pages and exhibits) is there any term that evidences an intent to create a contractual obligation enforceable by the taxpayers of Lakewood. In fact, the opposite is true: the lease names Lakewood as the sole lessor and LHA as the sole lessee and the lease's definition of "Required Services" does not limit those services to Lakewood residents. The lease does have

[15] Am. comp., p. 42, ¶137.
[16] 1996 lease, p. 3.

the stated purpose of operating a hospital "for the service of the general public, without discrimination by reason of race, sex, creed, color or national origin."[17] But the same could likely be said for any other hospital in the United States and this provision does not reveal an intent to make the general public – much less Lakewood taxpayers alone – beneficiaries of the lease with legally enforceable rights under it. Finally, the lease says that it "shall inure to the benefit of and shall be binding upon the City [and] the Lessee"[18] without mentioning the taxpayers.

The plaintiffs also rely on Ordinance No. 63-86 and Lakewood's charter as evidence that the lease was intended to benefit them. The 1986 ordinance authorized the first lease to LHA, which is not the lease to which the plaintiffs claim they are beneficiaries, so it can hardly be said to create an enforceable right in the public to benefits from the 1996 lease. The charter simply empowers Lakewood to establish a municipal hospital and to lease it under whatever terms the city believes are necessary to "provide for the health and welfare of the residents."[19] Presumably all municipal governments, acting in good faith, intend their actions to advance the welfare of their residents: indeed, that's a definition of good government and public servants should hardly need explicit laws to remind them of that obligation. But a municipality is a separate legal entity that enters into contracts creating enforceable rights and obligations apart from its residents, yet with the purpose – implied or explicit – of serving the residents' good. So language in a city's charter or a municipal contract's authorizing legislation to the effect that the city's contracts are for the benefit of its residents is redundant and individual residents or taxpayers get the right to enforce such contracts in their own names only where the contracts creating those rights and

[17] *Id.*, p. 14. By Section 9.11 of the lease, LHA essentially repeats the same promise by agreeing to provide services to "patients who are residents of the City and all members of the general public."
[18] *Id.*, p. 50.
[19] Exhibit 10 to the amended complaint, Lakewood charter, Article XX, section 4.

obligations clearly demonstrate a specific intent to give that right. The lease here falls short of demonstrating such an intent.

As with the lease, the definitive agreement does not clearly reveal an intention to make Lakewood's residents or its taxpayers beneficiaries of the contract. First, it is unambiguously a contract between only LHA and CCF as named parties, contrary to the plaintiffs' assertion that Section 1.8 gives the city the right to enforce it. Section 1.8 simply provides that LHA must enter into a lease with the city on terms that are acceptable to CCF. It also gives CCF the right to cure any default of the lease by LHA, but it does not include any provision to the effect that Lakewood may enforce the definitive agreement against either LHA or CCF. But even if Lakewood were an intended third-party beneficiary of the definitive agreement that would still leave the plaintiffs as strangers to the agreement without other evidence of an intention to make them third-party beneficiaries. That evidence is missing from the amended complaint and its exhibits.

The definitive agreement, in the "Recitals" portion, acknowledges that the parties intend to integrate their medical services to best "serve the health care needs of the residents of the communities served by CCF and"[20] LHA. If this acknowledgment demonstrates an intention to make Lakewood's residents third-party beneficiaries of the definitive agreement then the residents of every other community served by the Cleveland Clinic Foundation also stand as parties with the right to sue for a breach of the agreement, and a thorough reading of the contract reveals no such intention. Instead, this and other statements of the principles behind, and broad goals of, the definitive agreement – e.g., Page 2's recitation that the goal of integration is to "benefit the community through the promotion, expansion and support of community front line physician practices" – are simply expressions of the general purposes of the agreement that do

[20] Definitive agreement.

not create enforceable obligations and rights between the named parties, much less obligations enforceable by every resident of Lakewood or any other community getting services because of the definitive agreement.

The plaintiffs oppose the motion to dismiss count 2 not only because the pleadings and their attachments, construed most strongly in favor of the plaintiffs, demonstrate that they can prove a set of facts justifying relief, but also on the grounds that the question of whether a party not named in a contract is an intended third-party beneficiary is not the proper subject of a motion to dismiss since the use of the "intent to benefit test" of whether a party is an intended beneficiary of the contract necessitates a finding of fact upon a full evidentiary record. But construction of written contracts is a matter of law. *DVCC, Inc. v. Medical College*, 10th Dist. No. 05AP-237, 2006-Ohio-945, ¶48. A court presumes that the intent of the parties to a contract is within the language used in the written instrument. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. If a court is able to determine the parties' intent from the plain language of the agreement, then there is no need to interpret the contract. *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 88 (2004). In this case the lease and definitive agreement are part of the record as attachments to pleadings and neither side has questioned the contracts' authenticity. Evidence beyond the terms of the contract may be considered in an effort to give effect to the parties' intentions only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635 (1992), syllabus. The terms of the contracts here clearly and unambiguously exclude an intention to make Lakewood's taxpayers or residents beneficiaries to the contracts with the right to enforce them, thus evidence beyond the current record is not necessary to decide whether the first amended

complaint and its attachments state a claim in favor of the plaintiffs at Count 2 for breach of contract. They do not.

Count 3 alleges the defendants breached a fiduciary duty owed to the plaintiffs. Specifically, the plaintiffs claim that a fiduciary duty for LHA and CCF to act at all times in the best interest of the plaintiffs was created by the lease, the definitive agreement, an express and constructive trust, and R.C. 140.02.

A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St. 3d 274, 282 (1993). The person in whom the special confidence and trust are reposed, the fiduciary, has a duty to act for someone else's benefit, while subordinating his or her personal interests to that of the other person. *Id.* A fiduciary relationship may arise from a written agreement, including a statute, or from an informal relationship, but in both cases only where both parties understand that a special trust or confidence has been reposed. *Id.*, at 283; *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St. 2d 282, 286 (1979).

The plaintiffs do not cite in the amended complaint to the particular passages in the lease and definitive agreement that create the alleged fiduciary duty. But both of those contracts are part of the record and my examination of them has failed to uncover an express undertaking by the parties to those agreements to act primarily for the benefit of the five plaintiffs, or any of them, much less for the benefit of all of the residents and taxpayers of Lakewood. Whether a fiduciary duty arose through a trust will be addressed in the discussion of Count 4 later in this opinion. That leaves R.C. 140.02 as the only other possible source of the fiduciary duty alleged.

R.C. Chapter 140 authorizes public and nonprofit hospital agencies to engage in certain business practices that might otherwise be considered anticompetitive or beyond the usual services allowed to a hospital, such as joint agreements: to acquire and operate a hospital (R.C. 140.03); to provide extended care services (R.C. 140.04); or to lease a hospital (R.C. 140.05). R.C. 140.02 provides that the

> authorizations granted in this chapter . . . [a]re granted for the public purpose of better providing for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of hospital facilities and the services rendered thereby, by providing for cooperation of hospital agencies in the utilization of shared facilities and services to obtain economies in operation and more effective health service, facilitating participation of hospital agencies in federal financial assistance provided by . . . [federal law] . . . , providing efficient operation of hospital facilities through leasing to hospital agencies and facilitating the financing of hospital facilities to be available to or for the service of the general public.

This section is simply a statement by the Ohio General Assembly of its policy reasons for allowing the activities permitted in Chapter 140. The legislature believes the cooperation allowed by the provisions of Chapter 140 will achieve economies and efficiencies that aren't otherwise being accomplished, ultimately resulting in the delivery of better health care. But there is nothing in R.C. 140.02 that places a fiduciary duty on the hospital agencies who choose to combine their efforts in ways allowed under the rest of the chapter to subordinate their own interests in favor of always acting in the interest of the five plaintiffs in this case, or even in favor of, to use the language of R.C. 140.02, the people of the state.

The plaintiffs go on to allege that "[a]s a party to the Lease, the City, including Mayor Summers"[21] owes a fiduciary duty to "the Taxpayers and City community it represents."[22] Yet again, the plaintiffs do not point out the language of the lease that creates a fiduciary duty and I can find none upon an independent review. The same can be said for the claim that LHF has a fiduciary duty to "the Taxpayers and the City community"[23] by virtue of its articles of incorporation.

The amended complaint itself alleges no other source of a fiduciary duty owed to the plaintiffs by defendant Summers, but the plaintiffs argue in their brief in opposition to the motion to dismiss that the mayor owes them, as "citizens (*sic*) of the City," a fiduciary duty created by the language in Ordinance 63-86 requiring Lakewood's mayor to represent the City and its interests in his position as a member of LHA's board. Putting aside that this particular duty – to each plaintiff as a member of LHA's board – is not alleged in the amended complaint, whether such a duty exists is a question that needs to be resolved and can be determined from the pleadings.

If Summers was bound to act as a fiduciary for the plaintiffs, that duty arose from one of two places: his membership on the LHA board of trustees or his position as mayor.

As a nonprofit hospital agency, LHA is a nonprofit corporation organized under R.C. Chapter 1702. Its code of regulations is of record as Exhibit 14 to the amended complaint. Section 3.2(a) of the code of regulations makes Lakewood's mayor an *ex officio* member of the 23-person board of trustees. Section 3.11 prohibits a trustee from voting on any matters where the trustee has a conflict of interest or responsibility.

---

[21] Am. comp., p. 47, ¶159.
[22] *Id.*
[23] *Id.*

R.C. 1702.30(B) requires a director[24] of a nonprofit corporation to perform his duties in good faith and in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. This is a fiduciary duty. See *Kleemann v. Carriage Trace, Inc.*, 2d Dist. No. 21873, 2007-Ohio-4209, ¶43. It is the equivalent duty that directors of a for profit corporation owe under R.C. 1701.59(B). In turn, R.C. 1702.30(E) says a director is liable for a breach of this duty only where the harmful act or omission of the director was one undertaken with a deliberate intent to cause *injury to the corporation* or was one undertaken with a reckless *disregard for the best interests of the corporation.* (Emphasis added.) In other words, the director's duty is to the corporation and, continuing the analogy to the rules applicable to for profit corporations, a breach of the duty is actionable only by the corporation itself or its shareholders through a derivative lawsuit brought for the benefit of the corporation. In this case, the "shareholder" of LHA is its member, CCF. The residents or taxpayers of Lakewood are not the equivalent of "shareholders" for whose benefit the corporation is operated and thus have no standing to sue a director of LHA for a breach of the fiduciary duty the director owes to the corporation.

That leaves Summers's status as Lakewood's mayor as the only other possible origin of a fiduciary duty to the plaintiffs.

As noted here already, a fiduciary is required to act at all times in the best interests of someone else. A fiduciary is a trustee. There is little doubt that a public official – especially in the executive branch of government – must act at all times in the best interests of the public. A public officer owes an undivided duty to the public whom he serves and is not permitted to place

[24] Nonprofit boards of trustees became known, by statute, as boards of directors after the 1997 amendment to LHA's code of regulations.

himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public. *City of Alexandria v. Cleco Corp.*, 735 F. Supp. 2d 448, 457 (W.D. La. 2010). The questions in this case are whether the plaintiffs have sufficiently alleged a breach by Summers of that duty and, if so, whether they have standing to sue for it.

The factual allegations against Summers are uncomplicated. The plaintiffs claim that as a member of LHA's board the mayor is "obligated to protect the City's interests."[25] They allege that a "lack of oversight by LHA and City trustees"[26] allowed CCF to eliminate services provided by Lakewood Hospital and weaken it to the point that closing the hospital and putting a family health center in its place was recommended in 2015 by LHA's own health care consultant, Subsidium. Summers then "fully supported [the new plan] despite the City's best interests,"[27] instead favoring CCF over Lakewood's residents. In particular, the plaintiffs assert that Summers agreed to sell real property at 850 Columbia Road in Westlake that Lakewood owns for only about 60% of its market value but they do not allege that Summers somehow personally benefited from the deal. In general, the plaintiffs say that Summers has "failed to adequately represent the best interests of the City and the general public by [not] enforcing [rights under the lease and definitive agreement] to maintain Lakewood Hospital as an acute care community hospital in good working order and to prohibit the closure of"[28] the hospital.

The mayor of Lakewood is vested with the executive and administrative powers of the city.[29] He must supervise the administration of the affairs of the city, see that all ordinances of the city are enforced, recommend to the council such measures as he may deem necessary or expedient, keep council advised of the financial condition and future needs of the city, exercise

---

[25] Am. comp., p. 8, ¶23.
[26] *Id.*, p. 24, ¶69.
[27] *Id.*
[28] *Id.*, p. 29, ¶82.
[29] Lakewood's charter, Article II, Section 1.

such powers and perform such duties as are conferred or required by the charter, by ordinance or resolution of council, or by general law.[30] These are broad powers necessarily entailing broad executive discretion; in essence, he is entrusted with the management of the city guided only by his informed perception of its best interests.

The manner in which the authority conferred upon a mayor or other public official is to be exercised is left to the discretion of the official. *Butler v. Karb*, 96 Ohio St. 472, 480 (1917). The general principle is well established that in the absence of fraud or gross abuse of discretion the courts will not interfere with the discharge of such duties. *Id.* Difference in opinion or judgment is never a sufficient ground for interference. *Id.*

In this case the city leased Lakewood Hospital to LHA. Summers, in the exercise of his discretion, believes the lease should be terminated and that the city should enter into a new arrangement for the Lakewood Hospital property that essentially closes the hospital but keeps some health care services at the location. And he believes this is a good alternative despite, according to the plaintiffs, the fact that Lakewood Hospital would continue to thrive as a full service hospital if CCF had not sabotaged it in favor of its own interest. Assuming the plaintiffs are correct and the deal is bad for Lakewood, they have alleged nothing more than a difference of opinion with Summers. But poor judgment by a mayor in the good faith performance of his discretionary executive duties does not amount to a breach of fiduciary duty enforceable in court and the plaintiffs have not alleged facts demonstrating a gross of abuse of discretion, bad faith or criminal conduct, all of which are beyond the vast boundary of non-actionable discretion afforded to decision makers in the executive branches of government.

[30] *Id.*, Article II, Section 6.

Since the plaintiffs did not set forth enough facts to support a breach of fiduciary duty it is not essential to decide whether they are parties with standing to sue for such a breach. But their lack of standing gives a separate basis to find that count 3 fails to state a claim.

It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469 (1999). Where the ability to file a lawsuit has not been granted by a statute, standing is typically conferred only where a plaintiff seeking redress has incurred a unique injury. Standing depends upon whether the party has alleged a personal stake in the outcome of the controversy. *Sierra Club v. Morton*, 92 S. Ct. 1361, 1364 (1972). A party has standing where the party demonstrates an injury in fact. *Wilmington City Sch. Dist. Bd. of Educ. v. Board of County Comm'rs*, 141 Ohio App. 3d 232, 238 (12th Dist. 2000). An injury in fact requires a showing that the party has suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision. *Id.* Private citizens may not sue for official acts when they fail to allege damage to themselves different in character from that sustained by the public generally. *Masterson*, supra.

These five plaintiffs have not alleged damages to them different in kind to those claimed to have been sustained by every other Lakewood taxpayer and do not have standing to sue for a breach of fiduciary duty. All of the damages alleged by the plaintiffs – injury to Lakewood Hospital assets[31] owned by the city – were sustained by the city and only Lakewood may sue the mayor for a breach of his fiduciary duty where the breach did not cause specific injury to a third party. To see why, a return to the corporate analogy is appropriate. A corporation is owned by, and operated for the benefit of, its shareholders. A city is "owned" by its residents and

[31] Am. comp., p. 47, ¶161.

municipal government manages the city's affairs for the residents' benefit. In the corporate context, it is well-settled that only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation. *Adair v. Wozniak*, 23 Ohio St. 3d 174, 176 (1986). Accordingly, a plaintiff-shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed towards the corporation. *Id.*, syllabus. Just as a pecuniary interest to a corporation as a whole does not give a shareholder a right to sue for the damage, an injury to Lakewood by Summers's breach of his fiduciary duty does not give any one resident (or five of them) standing to sue individually for a breach. The only exceptions are those cases allowed for by statute or charter, i.e. taxpayer suits under R.C. 733.56 *et seq.* or Article VII, Sections 1(D) through 1(G) of Lakewood's charter. Those exceptions are cousins to the shareholder derivative lawsuit provided for by Civil Rule 23.1, and have already been discussed in an earlier part of this opinion.

Count 4 of the amended complaint alleges a breach of an express trust and **count 5** alleges breach of a constructive trust.

A trust is the legal relationship created when one party holds property for the benefit of another. To constitute an express trust there must be an explicit declaration of trust, or circumstances which show that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, for a definite term, vesting the legal title presently in the trustee for the benefit of a cestui que trust, or a retention of title by the owner under circumstances which clearly and unequivocably disclose an intent to hold for the use of another. *Mock v. Bowen*, 1992 Ohio App. LEXIS 3768, *13-14, 6th Dist. No. L-91--210.

In the plaintiffs' version of events, the lease of the hospital was intended to serve as the transfer of property to LHA as a trustee – not a lessee – for the "benefit of the City, Taxpayers, employees and residents of this community area"[32] as the cestui que trust, or beneficiaries. But a close reading of the lease, construed most favorably to the plaintiffs, reveals no such intention. First, it is called a lease. Second, LHA is called a lessee. Third, the lease's preamble acknowledges it is made with the intention that LHA would then affiliate with CCF to make the hospital's patients eligible for coverage under the requirements of insurance companies that ultimately pay for hospitalization. Fourth, the contract's statement of intent mentions continuing health care services to Lakewood residents – and not, it is worth noting, to "residents of this community area," part of the expansive group of beneficiaries posited by the plaintiffs – as only one of several purposes of the lease. Fifth, although the plaintiffs allege that LHA and every defendant other than the city and Summers is a trustee, only LHA is a party to the lease. Sixth, the lease requires LHA to cover Lakewood's indebtedness under bonds issued to improve the hospital, a benefit that does not inure to hospital employees and "residents of this community area." Seventh, I can find no reference to a trust in the lease. Eighth, I can find no reference to trust beneficiaries. Ninth, there are no references in the lease to a trustee in connection with the hospital property itself as the corpus of any trust. Tenth, contrary to the plaintiffs' assertion that the "overriding intention"[33] of the transfer of the hospital to LHA was "the provision and maintenance of community hospital services for the Taxpayer (*sic*), employees, and residents"[34] of Lakewood, section 2.2 of the lease cites as its purpose the operation of a hospital for "the service of the general public."

---

[32] *Id.*, p. 48, ¶166.
[33] *Id.*, p. 48, ¶167.
[34] *Id.*

In the end, and accepting as true the claim that the operation of the hospital was for the plaintiffs' benefit, the facts alleged in the amended complaint do not demonstrate the express or implied creation of a trust enforceable by the plaintiffs. Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244 (1974), paragraph one of the syllabus. A contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997). Nothing about the 1996 lease manifests an intention to create a trust.

Count 5 of the amended complaint is labeled as "breach of constructive trust." Here the plaintiffs allege that they have demonstrated an entitlement to a declaration that the hospital is held by the defendants in trust for the benefit of the plaintiffs as a remedy for the breach of contract claims in counts 1 and 2 and the breach of fiduciary claims in count 3. They further allege that the defendants have breached the duties imposed on them by the constructive trust. To put it simply, the plaintiffs claim the defendants have breached a remedy never imposed for a claim never proved. The best that can be said for this claim is that it is premature.

Count 6 is related to count 4 in that it seeks a declaratory judgment of the rights and obligations of the parties interested in the trust alleged by the plaintiffs in count 4 to have been established by the lease of the hospital. Considering the plaintiffs have failed to state a claim that a trust exists in the first place, count 6 fails to state a claim to declare the legal relations of the participants in the nonexistent trust.

Count 7 of the amended complaint alleges an entitlement to injunctive relief. Specifically, the plaintiffs ask for an injunction: to prohibit the defendants from ending services at the hospital; to require the defendants to restore any hospital service that was already

discontinued; and to keep the hospital open and standing. This count – set forth at paragraphs 198 through 201 of the amended complaint – is not a cause of action but a request for a remedy. To the extent that it is set forth as a stand alone cause of action, the motion to dismiss it is granted on the basis that it does not state a claim for relief.

To the extent it is a request for a remedy, the cause of action giving rise to the remedy is not explicit but it appears to be the taxpayer, breach of contract and breach of fiduciary duty claims outlined in counts 1 through 3. I have already determined that the taxpayer claims fail to sufficiently allege an abuse of corporate powers that would justify an injunction under R.C. 733.56, and most of counts 1, 2 and 3 are dismissed on separate grounds. To the extent that any of the claims surviving the motion to dismiss are properly remediable by an injunction then such a remedy will be considered once the plaintiffs have proved an entitlement to relief.

Like count 7, **count 8** is a request for a remedy – namely, a writ of mandamus ordering Lakewood to enforce the lease and definitive agreement (to which, it must be remembered, Lakewood is not a party) and ordering the other defendants to abide by the lease, definitive agreements and their own corporate bylaws – labeled as a cause of action. But to the extent that it is intended by the plaintiffs as a separate cause of action it fails to state a claim for the same reasons given in connection with the R.C. 733.58 claim of count 1A.

The analysis of **count 9** for an accounting is similar counts 7 and 8. An accounting is a remedy allowed where a plaintiff has demonstrated a right to it because of a defendant's legal liability on a distinct cause of action. It is not a stand alone cause of action and does not state a claim for relief that can withstand a motion to dismiss. Accordingly, it is dismissed. Should the plaintiffs prevail on any of their causes of action their right to an accounting can be addressed then.

Count 10 alleges a cause of action for unjust enrichment. The elements of unjust enrichment exist when a plaintiff demonstrates that it conferred a benefit upon a defendant, the defendant is aware of the benefit, and the defendant retains the benefit under circumstances where it is unjust to do so. *Hammill Mfg. Co. v. Park-Ohio Industries, Inc.*, 6th Dist. Lucas. No. L-12-1121, 2013-Ohio-1476, ¶14. It is an equitable claim that is often, although not always, an alternative to a breach of contract claim where the parties failed to create an enforceable contractual relationship and is intended – as the name of the cause of action suggests – to prevent an injustice. But if the parties' relationship is governed by a contract then a cause of action for unjust enrichment is not available. *Booher Carpet Sales v. Erickson*, 2d Dist. No. 98-CA-0007, 1998 Ohio App. LEXIS 4643 (Oct. 2, 1998).

For this count, the plaintiffs contend that Lakewood conferred a benefit on the other corporate defendants (LHA, LHF and CCF) and that those defendants "have retained the benefit of Lakewood Hospital assets"[35] under circumstances where it would be unjust to do so. The first, and fatal, deficiency in count 10 is that the plaintiffs do not allege injury to themselves distinct from injury to Lakewood's other residents and taxpayers. Instead, they obviously seek to stand in for Lakewood as a plaintiff on this equitable claim. But this is not a claim expressly permitted under R.C. 733.56 *et seq.* or Lakewood's charter, and the failure to allege particularized damage precludes a common law taxpayer's claim.

The defendants' motion to dismiss the unjust enrichment claim is granted.

Count 11 is a claim for promissory estoppel. Like unjust enrichment, promissory estoppel is an equitable doctrine applied in circumstances to enforce a promise that does not meet the criteria of a formal contract. *Healey v. Republic Powdered Metals, Inc.*, 85 Ohio App. 3d 281, 284 (9th Dist. 1992). In plain language, promissory estoppel prevents a party from

[35] *Id.*, p. 55, ¶211.

escaping liability where he made a promise knowing that the other party would change her position in reliance on the promise. The elements of promissory estoppel include: a promise, clear and unambiguous in its terms; reliance by the party to whom the promise is made; the reliance was reasonable and foreseeable; and the party claiming estoppel was injured by the reliance. *Id.*

This claim is asserted against LHA and CCF only. For the first element – an enforceable promise – the plaintiffs claim those two defendants "repeatedly made firm and specific promises to the City and Taxpayers"[36] before and after the execution of the lease that they would provide inpatient and other hospital services through the end of the lease period in 2026. For the second element – reliance – the plaintiffs allege that Lakewood "relied on those promises by leasing"[37] the hospital to LHA and incurred damages by not living up to the contract. Yet again, the plaintiffs seek to stand in for Lakewood to assert a claim on its behalf, and yet again the claim falls outside the ambit of permissible statutory, charter or common law taxpayer claims, so this count too fails to state a claim upon which relief can be granted.[38]

Count 12A is denominated as a fraud claim against LHA, CCF and Cosgrove. The gist of this claim is that CCF's senior general counsel said at a May 2010 LHA board meeting that the lease did not have to be amended for Lakewood's protection and that CCF promised that if it were allowed to terminate certain required services under the lease then it would replace them with four centers of clinical excellence in neurosciences, orthopedics, diabetes and geriatrics. The amended complaint goes on to allege that these misrepresentations were made "with the

[36] *Id*, p. 56, ¶214.
[37] *Id.*
[38] I recognize that this count essentially alleges that the breach of the promise is really the breach of the lease, which provides an independent basis to dismiss it for failure to state a claim. Nevertheless, I must construe the amended complaint's allegations most favorably to the plaintiffs, so I base the dismissal of this claim only on the lack of standing.

intent of misleading the City into relying upon them"[39] and Lakewood has been injured by the reliance.

Putting aside Civil Rule 9(B)'s requirement that averments of fraud shall be stated with particularity, this is another claim that the plaintiffs do not have standing to make even where the facts alleged are taken as true.

Count 12B claims fraud by the corporate defendants. The plaintiffs essentially allege that LHA, CCF and LHF all knew that they were going to "cripple"[40] then close Lakewood Hospital, but hid those plans while continuing to raise money from donors. Significantly, the amended complaint does not include an allegation that any of the five named plaintiffs were duped into making contributions. Assuming for the purpose of the pending motion the dubious proposition that the entities were legally obligated to inform prospective donors of every detail of the hospital's current and future operation, the failure of these plaintiffs to allege that they were among the members of "the public"[41] who relied on, and were individually damaged by, the fraudulent nondisclosure excludes them as parties with standing to assert the claim in the first place.

Count 13 alleges a civil conspiracy among LHA, CCF and Lakewood's consultant, Subsidium. According to the amended complaint, these defendants engaged in "bid rigging"[42] when Subsidium recommended to Lakewood that it accept CCF's proposal for the future of the hospital – and reject a competing proposal by MetroHealth – even though CCF's proposal did not meet the hospital association's minimum bid requirements.

---

[39] Am. comp., p. 57, ¶219.
[40] *Id.*, p. 59, ¶226.
[41] *Id.*, p. 58, ¶225.
[42] *Id.*, p. 59, ¶230.

Count 15 alleges that CCF tortiously interfered with the lease between Lakewood and LHA. This claim is asserted in the alternative to the claim that CCF is actually a party to the lease.

I discuss these two claims together because, even assuming the amended complaint includes factual allegations otherwise sufficient to state claims, they fail to sufficiently plead the plaintiffs as people with standing to bring the causes of action for the same basic reason several of the other claims are insufficient: the plaintiffs cannot stand in for Lakewood on this claim nor do they allege damages unique to them.

Summary of the first motion to dismiss

To this point I have found merit to the defendants' motion to dismiss every count except the taxpayer claim at count 1A under R.C. 733.57 for specific performance of the 1996 lease between Lakewood and LHA and I have not addressed count 14 alleging that CCF is the alter ego to LHA and should be legally liable for the performance of the lease even though it is not a named party to the contract.

But the remaining viable claim under R.C. 733.57 is the subject of the defendants' separate motion to dismiss on the grounds that events occurring since the amended complaint was filed have eliminated the subject matter jurisdiction of this court. If that claim is correct then the taxpayer cause of action for specific performance must be dismissed and the alter ego claim of count 14 will be moot, so I will first address the second motion to dismiss.

Second motion to dismiss

The defendants' second motion to dismiss is aimed only at the taxpayer causes of action at count 1A (statutory claims), count 1B (charter) and count 1C (common law). The motion is made under Civil Rules 12(B)(1) and 12(H)(3) on the grounds that the court lacks subject matter

jurisdiction to hear the taxpayer causes of action because, since the filing of the amended complaint, the City of Lakewood, LHA and CCF entered into a contract known as the master agreement which includes Lakewood's release of LHA and CCF from any claims arising out of the lease or definitive agreement.

The plaintiffs oppose the motion as improper and better suited for a motion for summary judgment, not a motion to dismiss, since it requires a consideration of evidence beyond the pleadings and their attachments.

Civil Rule 12(H)(3) provides that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action, and Civil Rule 12(B)(1) allows for the defense of lack of jurisdiction over the subject matter to be made by motion. A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction pursuant to a Civil Rule 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211 (1976), paragraph one of the syllabus.

The master agreement is attached as Exhibit A to the motion. The parties to it are Lakewood, LHA and CCF. The substance of the contract is the parties' intention to replace the inpatient hospital with a family health center. Pertinent to this lawsuit, the master agreement includes 1) a termination of the definitive agreement between LHA and CCF, 2) amendment of the 1996 lease between Lakewood and LHA to allow elimination of the "Required Services" and inpatient care, and then terminate the lease once the family health center is operational, and 3) a waiver and release of Lakewood's claims against LHA and CCF under the 1996 lease and the definitive agreement.

In short, Lakewood settled the claims the plaintiffs purported to bring on Lakewood's behalf at counts 1A, 1B and 1C of the amended complaint.

Article IV, Section 4(B) of the Ohio Constitution provides that the court of common pleas has "original jurisdiction over all justiciable matters." For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Hirsch v. TRW Inc.*, 8th Dist. No. 83204, 2004-Ohio-1125, ¶10. If what were once justiciable matters have been resolved to the point where they become moot, the court of common pleas no longer has subject matter jurisdiction to hear the case. *Id.*, ¶11. That is the situation here. The release and waiver of claims, combined with the amendment and imminent termination of the 1996 lease and the definitive agreement, have made the plaintiffs' taxpayer claims – which, it is worth repeating, are really Lakewood's claims – moot and there is no case or controversy for me to decide.

Accordingly, the defendants' second motion to dismiss **count 1A's** claim for specific performance under R.C. 733.57 is granted, and the lack of subject matter jurisdiction provides a basis to dismiss the rest of counts 1A, 1B and 1C in addition to the reasons given above.

Count 14

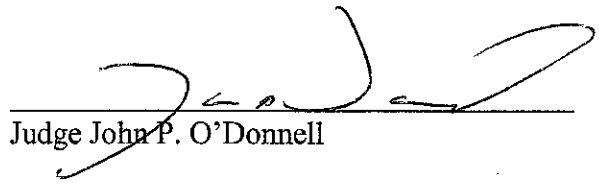
Count 14 for CCF's liability as the alter ego of LHA is not an independent cause of action but instead rests on the proposition that "[c]ontrol over LHA . . . by CCF was exercised in such a manner as to commit the wrongful and/or unjust . . . acts alleged [in the amended complaint] against" Lakewood, its taxpayers and residents.[43] Because all of the substantive claims in the amended complaint are dismissed for failure to state a claim or lack of subject matter jurisdiction, count 14 must be dismissed too.

[43] *Id.*, p. 60, ¶235.

Conclusion

For all of the reasons given here, the entire amended complaint, filed August 5, 2015, is dismissed at the plaintiffs' costs.

IT IS SO ORDERED:



Judge John P. O'Donnell

July 10, 2017
Date

SERVICE

A copy of this judgment entry was sent by email on July 10, 2017, to the following:

Christopher M. DeVito, Esq.
ChrisMDeVito@gmail.com
A. Steven Dever, Esq.
astevendever@aol.com
Attorneys for the plaintiffs

James R. Wooley, Esq.
jrwooley@jonesday.com
Tracy K. Stratford, Esq.
tkstratford@jonesday.com
Katie M. McVoy, Esq.
kmmcvoy@jonesday.com
Attorneys for defendants CCF and Cosgrove

Robert E. Cahill, Esq.
rcahill@sutter-law.com
Kevin M. Butler, Esq.
kevin.butler@lakewoodoh.net
Jennifer L. Swallow, Esq.
jennifer.swallow@lakewoodoh.net
Attorneys for defendants Lakewood and Summers

O. Judson Scheaf, Esq.
jscheaf@mcdonaldhopkins.com
Jennifer D. Armstrong, Esq.
jarmstrong@mcdonaldhopkins.com
Sara H. Jodka, Esq.
sjodka@mcdonaldhopkins.com
Ann M. Hunt, Esq.
ahunt@mcdonaldhopkins.com
Attorneys for defendants LHA and Gable

Walter F. Ehrnfelt, Esq.
walter@healthlaw.com
Thomas M. Ehrnfelt, Esq.
tehrnfelt@healthlaw.com
Attorneys for defendants LHF and Haber

Judge John P. O'Donnell