

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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| GREGORY T. ALLSPACH, ET AL., | : | |
| Plaintiffs | : | CASE NO. 2015 CVH 00637 |
| vs. | : | Judge McBride |
| RESERVE OF LOVELAND HOMEOWNER'S ASSOCIATION INC. | : | DECISION/ENTRY |
| Defendant | : | |

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This cause is before the court for consideration of the defendant's motion to dismiss. The court held a hearing on the motion on July 24, 2015. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiffs Gregory T. Allspach and Susan M. Allspach are members of the defendant homeowners' association Reserve of Loveland Homeowner's Association, Inc. The plaintiffs aver they have reason to believe that the defendant may have breached a fiduciary duty and that there may be other "claims relating to other potential financial and records improprieties."¹ The plaintiffs contend that the potential breach stems from the actions of the president of the board of directors in 2013 or other individuals and that there are other possible financial and records-keeping improprieties from 2010-2013.² Furthermore, the plaintiffs submit that the alleged improprieties may have led to a discriminatory or unlawful refund of approximately \$12,000.³

The plaintiffs previously and unsuccessfully attempted to obtain financial information and documentation from the board president from 2010-2013.⁴ They claim that they can only secure the information through pretrial discovery measures.⁵ Accordingly, on May 18, 2015 the plaintiffs filed a complaint for discovery under R.C. 2317.48. The plaintiffs attached 25 interrogatories and 27 requests for production of documents. The requests mostly pertain to documentation of the defendant's budget,

¹ Compl. at pg. 2.

² Compl. at pgs. 1-2. Outside of their complaint, the plaintiffs additionally assert that the defendant may also have breached a statutory duty. Pls. Resp. at pg. 2.

³ Compl. at pg. 2.

⁴ Compl. at pg. 2. Of note, the defendant's position is that it has provided the plaintiffs with all the related, unprivileged records that they asked for and they do not have any additional documents or information to provide the plaintiff pursuant to their discovery complaint.

⁵ Compl. at pg. 2.

bank statements, communications regarding the refund, meeting minutes, accountings, and tax forms.⁶

The defendant filed a motion to dismiss under Civ.R. 12(B)(6) on June 17, 2015 contending that the plaintiffs did not satisfy the standards for pretrial discovery as set forth in Civ.R. 34(D). Following the response and reply briefing, this court scheduled and heard oral arguments from the parties on June 24.

STANDARD OF REVIEW

The defendant's motion to dismiss is made pursuant to Civ.R. 12(B)(6), which provides that a party may move to dismiss an action on the basis of failure 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 tests the sufficiency of the complaint."⁷ "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *."⁸ "The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom."⁹ "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."¹⁰

⁶ Pls. Compl. at pgs. 6-11.

⁷ *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

⁸ *Id.* citing Civ.R. 12(B).

⁹ *Id.* at ¶ 12, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

¹⁰ *Id.*, citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995).

LEGAL ANALYSIS

Complaints or petitions for pretrial discovery are governed by R.C. 2317.48 and Civ.R. 34(D).¹¹ These rules "afford a potential plaintiff with means of obtaining facts required for pleading."¹²

R.C. 2317.48 provides in part:

"When a person claiming to have a cause of action or a defense to an action commenced against him, without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery, setting forth in his complaint in the action for discovery the necessity and the grounds for the action, with any interrogatories relating to the subject matter of the discovery that are necessary to procure the discovery sought."

Civil Rule 34(D), which also governs pre-suit discovery, provides:

" * * * [A] person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule. Prior to filing a petition for discovery, the person seeking discovery shall make reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought. * * * The court shall issue an order authorizing the petitioner to obtain the requested discovery if the court finds all of the following:

- (a) The discovery is necessary to ascertain the identity of a potential adverse party;
- (b) The petitioner is otherwise unable to bring the contemplated action;
- (c) The petitioner made reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought."¹³

¹¹ *Rood, M.D. v. FRJ, Ltd.*, 11th Dist. Lake No. 2010-L-077, 2011-Ohio-2712, ¶ 13.

¹² *Sizemore v. Esis, Inc.*, 9th Dist. Medina No. 11CA0107-M, 2012-Ohio-4004, ¶ 9.

¹³ Civ.R. 34(D)(1) also requires: "(a) A statement of the subject matter of the petitioner's potential cause of action and the petitioner's interest in the potential cause of action; (b) A

The issue of whether these discovery requirements have been met is a question of law.¹⁴

In the seminal case of *Poulos v. Parker Sweeper Co.*, 44 Ohio St.3d 124, 541 N.E.2d 1031 (1989), the Ohio Supreme Court analyzed the application of R.C. 2317.48. The court held that pretrial discovery under R.C. 2317.48 is (1) "limited solely to interrogatories specifically concerning the facts necessary to the complaint or answer and are to be submitted only to the potentially adverse party contemplated by the lawsuit" and (2) the "person 'claiming to have a cause of action * * * ' must in his statutory action set forth 'the necessity and the grounds for the action' and the facts sought and deemed necessary to state a cause of action."¹⁵

The Court cautioned that "unlimited discovery prior to filing a valid complaint could certainly lead to undue expense, inappropriate invasion of a person's privacy, and the like."¹⁶ As such, pretrial discovery under R.C. 2317.48 "occupies a small niche between an unacceptable 'fishing expedition' and a short and plain statement of a complaint or a defense filed pursuant to the Civil Rules."¹⁷ Phrased differently, R.C.

statement of the efforts made by the petitioner to obtain voluntarily the information from the person from whom the discovery is sought; (c) A statement or description of the information sought to be discovered with reasonable particularity; (d) The names and addresses, if known, of any person the petitioner expects will be an adverse party in the potential action; (e) A request that the court issue an order authorizing the petitioner to obtain the discovery."

¹⁴ *Sizemore v. Esis, Inc.*, 9th Dist. Medina No. 11CA0107-M, 2012-Ohio-4004, ¶ 8 citing *Med. Mut. Of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. See *Mortiz v. Southern Ohio Correctional Facility*, 10th Dist. Franklin No. 98AP-574, 1998 WL 896387, *2 (Dec. 22, 1998) (stating that determining the scope of Civ.R. 34(D) is a question of law).

¹⁵ *Poulos v. Parker Sweeper Co.*, 44 Ohio St.3d, 124, 127, 541 N.E.2d 1031 (1989). E.g. *Riverview Health Ins., L.L.C. v. Kral*, 2nd Dist. Montgomery No. 24931, 2012-Ohio-3502, ¶ 18 (stating that R.C. 2317.48 only permits interrogatories and has no application where the pretrial discovery request is solely for production of documents).

¹⁶ *Poulos* at 126.

¹⁷ *Poulos* at 127. E.g., *Stepp v. Wiseco Piston Co. Inc.*, 37 I.E.R. Cases 740, 2013-Ohio-5832, ¶ 19 (11th Dist.).

2317.48 is “a satisfactory middle course for litigants who require additional facts in order to sufficiently file a valid complaint, but who already have enough factual basis for their assertions [so] that the discovery process would not be turned into a fishing expedition.”¹⁸ As such, the interrogatories must “be limited and directed toward only those facts necessary to draft a complaint * * * and are not to extend to discovery of the manner in which the opposition party * * * intends to establish his case or to evidence which relates exclusively to his case.”¹⁹ Moreover, R.C. 2317.48 does not permit pretrial discovery in the form of requests for the production of documents.²⁰

R.C. 2317.48 requires pretrial discovery to be “narrowly tailored” to only those “specific facts necessary for pleading.”²¹ In fact, the civil rule does not permit pretrial discovery “to gather proof to support a claim or to determine whether a cause of action exists.”²² Indeed, a mere “potential cause of action is not sufficient ground for a court to grant a complainant discovery under R.C. 2317.48.”²³

¹⁸ (Citation omitted.) *Baker v. Cooper Farms Cooked Meats*, 3rd Dist. Van Wert. No. 15-09-03, 2009-Ohio-3320, ¶ 11. See *Huge v. Ford Motor Co.*, 155 Ohio App.3d 730, 2004-Ohio-232, 803 N.E.2d 859, ¶ 10.

¹⁹ *Poulos* at 127. Notably, when interrogatories are not sought, R.C. 2317.48 is not at issue. See *Rood, M.D.*, 2011-Ohio-2712, ¶ 32.

²⁰ *M.D.T. Corp. v. The Cafaro Co.*, 5th Dist. Stark No. 2000CA00131, 2001 WL 46520, * 2 (Jan. 16, 2001).

²¹ *Sizemore*, 2012-Ohio-4004, ¶ 11, citing *Bridgestone/Firestone Inc. v. Hankook Tire Mfg. Co., Inc.*, 116 Ohio App.3d 228, 232, 687 N.E.2d 502 (9th Dist. 1996).

²² *Baker*, 2009-Ohio-3320, ¶ 11, citing *Huge*, 155 Ohio App.3d at 733. See, also, *Stepp*, 2013-Ohio-5832, at ¶ 19, quoting *Baker*, 2009-Ohio-3320, ¶ 11 (holding same); *Marsailis v. Wilson*, 149 Ohio App.3d 637, 2002-Ohio-5534, 778 N.E.2d 612, ¶ 17 (finding that a burden of proof and the evidence needed to satisfy it “are different matters” from obtaining facts needed for a pleading).

²³ *Stepp*, 2013-Ohio-5832, ¶ 19, quoting *Cleveland Constr., Inc. v. Carr*, 11th Dist. Ashtabula No. 98-A-002, 1998 Ohio App. LEXIS 6145, *9, 1998 WL 964538 (Dec. 18, 1998).

As such, the complaint must already contain "enough facts to support a potential cause of action."²⁴ A plaintiff is "not entitled to discovery unless and until it is clear that a viable cause exists."²⁵ Further, there is a difference between "seeking facts necessary to state a cause of action which [a plaintiff] already believed to exist," which is permissible, and "obtaining information necessary to determine whether [the plaintiff has] a cause of action at all," which is not.²⁶

The case of *Huge v. Ford Motor Co.*, 155 Ohio App.3d 730, 2004-Ohio-232, 803 N.E.2d 859, illustrates how such deficiencies can defeat a plaintiff's complaint for pretrial discovery. In *Huge*, the plaintiff's complaint for discovery alleged that she had "a potential cause of action against Defendant(s) under Revised Code 4112.02 and/or Ohio Revised Code 4123.215 and/or in traditional tort and/or contract, all of which need fine tuning to allow the proper framing of Plaintiff's complaint so as to make the proper selection of chose(s) [sic] of action."²⁷

The court found the complaint inadequate, explaining: "Appellant fails to identify what these causes of action may be, nor does she identify which facts sought in the

²⁴ *Sizemore*, 2012-Ohio-4004, ¶ 11, citing *Bridgestone/Firestone Inc.*, 116 Ohio App.3d at 232. See *Wheeler v. Girvin*, 1st Dist. Hamilton No. C-980302, 1999 WL 193431, * 3 (April 9, 1999).

²⁵ *Carr*, 1998 WL 964538, *3. In *Carr* the court denied pretrial discovery under R.C. 2317.48 because the plaintiff's suspicion that the defendant may have breached a non-compete clause contained in an employment agreement was not tantamount to clearly showing the plaintiff had a viable cause of action. *Id.* See *Natl. City Bank, N.E. v. Amedia*, 118 Ohio App.3d 542, 547, 693 N.E.2d 837 (9th Dist. 1997) (the plaintiff requested pretrial discovery from the holder of its escrow accounts because investors complained that the defendant had wrongfully disbursed funds, but these facts, standing alone, are inadequate to state a cause of action.); *Bridgestone/Firestone Inc.*, 116 Ohio App.3d at 232 (holding that the plaintiff's averment that "it had reason to believe" the defendant disclosed confidential, proprietary trade secret information was insufficient for R.C. 2317.48 purposes because it did not state the plaintiff's "reason to believe," and those facts did not reveal any causes of action).

²⁶ *Smith v. Baumgartner*, 6th Dist. Ottawa No. OT-01-018, OT-01-014, 2002 WL 107767, * 3, 2002-Ohio-232. In *Smith*, the plaintiff failed to satisfy Civ.R. 34(D) because he requested pretrial discovery "to determine his claims and rights" against the defendant and potential other defendants. *Id.* at *1.

²⁷ *Huge v. Ford Motor Co.*, 155 Ohio App.3d 730, 2004-Ohio-232, 803 N.E.2d 859, ¶ 11.

discovery action will support these causes of action. This type of assertion is exactly what *Poulos* seeks to disallow. The appellant obviously cannot determine whether she has a cause of action without the information sought by the discovery action."²⁸ As such, the plaintiff failed to satisfy the requirements of R.C. 2317.48.²⁹

The plaintiffs in *Marsailis v. Wilson*, 149 Ohio App.3d 637, 2002-Ohio-5534, 778 N.E.2d 612 (2nd Dist.), also were unable to satisfy R.C. 2317.48 for pretrial discovery. The plaintiffs argued that they required information regarding a loan from Champaign Telephone Company and certain officers and directors in relation to the company's reorganization and business operations.³⁰ The court held that, because the information was "needed to determine whether they have a cause of action for relief, not merely plead one," as required in R.C. 2317.48, the plaintiffs were correctly denied pretrial discovery.³¹

The plaintiffs contended they needed the information because the president was acting in a dual role, which is federally prohibited.³² Without the pretrial discovery, the plaintiffs averred that they would be "unable to determine the propriety of the loan and whether [the president] engaged in a self-interested transaction which breached his fiduciary duties."³³ The court rejected this argument, stating that "[a]lleging only the

²⁸ *Id.*

²⁹ Moreover, the plaintiff in *Huge* also failed to satisfy Civ.R. 34, discussed below. *Id.* at ¶ 26. The plaintiff had failed to set forth the information required in the civil rule, including whether she had previously tried to obtain the discovery voluntarily. *Id.*

³⁰ *Marsailis*, 2002-Ohio-5534, ¶ 1.

³¹ *Id.* at ¶ 30. See *Bridgestone/Firestone, Inc.* 116 Ohio App.3d at 505 (denying discovery sought "to determine whether it [the plaintiff] had a cause of action" under different legal theories).

³² *Marsailis* at ¶ 22.

³³ *Id.* at ¶ 22.

possibility of the existence of some grounds, plaintiffs cast their line in a fishing expedition in the hope of obtaining the grounds they need.”³⁴

Following the Supreme Court’s interpretation of R.C. 2317.48 in *Poulos*, Civ.R. 34(D) was promulgated, and this rule expands the “concept of pre-suit discovery” codified in R.C. 2317.48.³⁵ Nevertheless, like R.C. 2317.48, this civil rule is not intended to permit the plaintiff to “complete all the discovery necessary to support his claim.”³⁶ The civil rule and statute work “in tandem to govern” pretrial discovery.³⁷

While R.C. 2317.48 is limited to interrogatories only, Civ.R. 34(D) permits, among other things, “the inspection and copying of documents.”³⁸ In light of the 1993 staff note to Civ.R. 34(D), courts have concluded that “Civ.R. 34(D) was intended to be directed at a non-party who may know the identity of a potential adverse party. The rule enables a plaintiff to obtain identifying information without joining the non-party as a defendant.”³⁹

Civ.R. 34 “explicitly and unambiguously limits pre-suit discovery to the information necessary to ascertain the identity of a potential adverse party.”⁴⁰ When the plaintiff already knows of one adverse party, and the “traditional discovery process could be expected to result in identification of other potential adverse parties, then

³⁴ Id. at ¶ 28.

³⁵ 1993 Staff Note, Civ.R. 34. See, also, *Kral*, 2012-Ohio-3502, ¶ 19, quoting *Benner v. Walker Ambulance Co.*, 118 Ohio App.3d 341, 343, 629 N.E.2d (6th Dist. 1997); *Rood, M.D.*, 2011-Ohio-2712, ¶ 16; *White v. Equity, Inc.*, 178 Ohio App.3d 604, 2008-Ohio-5226, 899 N.E.2d 205, ¶ 14 (10th Dist.) (noting that Civ.R. 34(D) “expanded the scope of pre-suit discovery.”).

³⁶ *Wheeler*, 1999 WL 193431, *3.

³⁷ *Huge*, 2004-Ohio-232, ¶ 12. See *Lieberman v. Screen Mach Advertising Specialties & Screen Print Design, et al.*, 10th Dist. Franklin No. 96APE05-665, 1997 WL 52923, *4 (Feb. 4, 1997) (holding same).

³⁸ 1993 Staff Note, Civ.R. 34.

³⁹ See *Kral*, 2012-Ohio-3502, ¶ 20, quoting *Cruz v. Kettering Health Network*, 2nd Dist. Montgomery No. 24465, 2012-Ohio-24, ¶ 29.

⁴⁰ (Citation omitted.) *Kral*, 2012-Ohio-3502, ¶ 21; *Rood, M.D.*, 2011-Ohio-2712, ¶ 38. (finding it is inappropriate to use Civ.R. 34 to discover facts that would help a party determine if it “has a valid cause of action against the known adverse party.”).

reliance on Civ.R. 34 would not be necessary."⁴¹ Stated differently, Civ.R. 34(D) is inapplicable when the plaintiff already knows at least one adverse party and could learn of others through traditional discovery after filing a cause of action against the known party.

In *Cruz v. Kettering Health Network*, 2nd Dist. Montgomery No. 24465, 2012-Ohio-24, the plaintiff failed to satisfy Civ.R. 34(D) for this reason. In *Cruz*, the plaintiff wanted pretrial discovery from known, potential defendants in order to learn of additional possible defendants.⁴² The court explained the deficiency: "The goal of Civ.R. 34(D), to avoid needlessly joining as defendants non-labile parties who may have valuable information, is not advanced by allowing Cruz to obtain pre-suit discovery from five defendants he intends to sue."⁴³ The court also rejected the plaintiff's argument that Civ.R. 34(D)'s requisites were met because he needed pretrial discovery to "properly frame his complaint" and to "gather evidence to support his anticipated claims."⁴⁴

Likewise, in *Riverview Health Ins., L.L.C. v. Kral*, 2nd Dist. Montgomery No. 24931, 2012-Ohio-3502, ¶ 22, the Second District Court of Appeals denied a plaintiff's complaint for pretrial discovery under Civ.R. 34(D) because it exceeded the scope "since it is not directed at any-nonparties who may know the identity of a potential

⁴¹ *Cruz*, 2012-Ohio-24, ¶ 24.

⁴² *Id.* at ¶ 30.

⁴³ *Id.* .

⁴⁴ *Id.* at ¶ 31. Additionally, the *Cruz* Court specifically rejected the holding in *Benner v. Walker Co.*, 118 Ohio App.3d 321, 692 N.E.2d 1053 (6th Dist. 1997), which held that Civ.R. 34(D) could be used to discover facts other than the identity of the defendant. *Cruz* at ¶¶ 31-32. In so doing the court noted "the *Benner* court failed to cite any language in Civ.R. 34(D) that permits discovery for any purpose beyond ascertaining the identity of a potential adverse party. To the contrary, the rule itself explicitly and unambiguously limits presuit discovery information "necessary to ascertain the identity of a potential adverse party." *Id.*, citing Civ.R. 34(D)(3)(a).

adverse party, but rather seeks to obtain evidence to plead fraud with particularity ... and to support its potential fraud action."⁴⁵

Moreover, when a plaintiff already has sufficient identity information to file a claim, Civ.R. 34(D) is inapplicable. For instance, in *Clements v. Progressive Specialty Ins. Co.*, 8th Dist. Cuyahoga No. 83879, 2004-Ohio-3602, the Eighth District Court of Appeals affirmed a trial court's denial of pretrial discovery. The plaintiff already knew the potential adverse party.⁴⁶ Rather, the plaintiff sought "identifying information *about*" the potential adverse party.⁴⁷ The court denied the petition for pretrial discovery, because lacking information about an adverse party did not prevent the plaintiff from filing a complaint, and as such the plaintiff was not entitled to discovery.⁴⁸

In addition to seeking the identity of the defendants, pretrial discovery pursuant to Civ.R. 34(D) requires "a threshold *identification* of a known cause of action for the petitioner to proceed."⁴⁹ In *Rood, M.D. v. FRJ, Ltd.*, 11th Dist. Lake No. 2010-L-077, 2011-Ohio-2712, the Eleventh District Court of Appeals reflected that the phrase "potential cause of action," as used in Civ.R. 34(D), "is only 'potential' in the sense that it has not yet been filed."⁵⁰ Hence, the petition must "aver sufficient facts to reveal a potential cause of action."⁵¹ Even if one of the reasons for a plaintiff's pretrial discovery is to identify new defendants, Civ.R. 34(D) will not be satisfied if the plaintiff requires the

⁴⁵ *Kral*, 2012-Ohio-3502, ¶ 22.

⁴⁶ *Clements v. Progressive Specialty Ins. Co.*, 8th Dist. Cuyahoga No. 83879, 2004-Ohio-3602, ¶ 12.

⁴⁷ (Emphasis original.) *Id.*

⁴⁸ *Id.* at ¶ 13.

⁴⁹ (Emphasis original.) *Rood, M.D.*, 2011-Ohio-2712, ¶ 38. *Contra Benner*, 118 Ohio App.3d at 333-34. (finding it is appropriate to use Civ.R. 34 to discover facts that would help a party determine if it "has a valid cause of action against the known adverse party.").

⁵⁰ *Rood, M.D.*, 2011-Ohio-2712, ¶ 38.

⁵¹ (Citation omitted). *Sizemore*, 2012-Ohio-4004, ¶ 11.

discovery to determine whether there are “good grounds” to pursue civil action.⁵² Phrased differently, the plaintiff must already have good grounds for a claim before seeking pretrial discovery to identify a potential adverse party. Additionally, when a plaintiff already knows the identity of at least one of the defendants, and could have filed suit against it, Civ.R. 34(D) is not satisfied.⁵³

In sum, there are “four important distinctions” between the statute and civil rule: (1) the statute allows for interrogatories only whereas the civil rule also permits production of documents, (2) discovery under the statute is limited to only those facts necessary to determine a cause of action or file an answer while the civil rule restricts discovery to the identification of proper parties for a cause of action, (3) the statute only applies when used against potential adverse parties, but the civil rule directs discovery from parties who will not be defendants in the underlying claim, and (4) “while the statute may be employed if the information is needed for a complaint or an answer, the civil rule is limited to use by the party filing a claim.”⁵⁴ In light of these differences, the statute and civil rule may conflict at times, in which case Civ.R. 34(D) prevails.⁵⁵

In the case at bar, the plaintiffs have moved for pretrial discovery pursuant to R.C. 2317.48. The plaintiffs aver they have “reason to believe that the defendant may have breached a fiduciary duty” and that it may have other “claims relating to other potential financial and records improprieties.”⁵⁶ The plaintiffs state that the breach

⁵² *Mortiz*, 1998 WL 896387, *3.

⁵³ *Id.* The *Mortiz* Court elaborated that if the “plaintiff felt others were potentially liable, plaintiff could easily have named any number of “John Does” in his complaint and within a year amended the complaint to add the real identifies of those people that plaintiff would learn through discovery. *Id.*, *4, citing Civ.R. 15(D).

⁵⁴ *Rood, M.D.*, 2011-Ohio-2712, ¶ 30.

⁵⁵ *White*, 2008-Ohio-5226, ¶ 8, citing *Wheeler*, 1999 WL 19343.

⁵⁶ Compl. at pg. 2.

resulted from the defendant's actions in 2013 and other possible financial and records-keeping improprieties from 2010-2013, which may have resulted in an unlawful refund of \$12,000.⁵⁷

Under *Poulos*, pretrial discovery pursuant to R.C. 2317.48 is (1) limited solely to interrogatories specifically concerning the facts necessary to the complaint and (2) the plaintiff must set forth the "the necessity and the grounds for the action' and the facts necessary to state a cause of action."⁵⁸ First, the plaintiffs have not contained their pretrial discovery request to interrogatories alone. The plaintiffs attached 25 interrogatories as well as 27 requests for production of documents. In light of the express language of the statute and the plethora of case law consistently interpreting it, R.C. 2317.48 does not entitle the plaintiffs to receive the requested documents from the defendant.⁵⁹

As to the interrogatories, the plaintiffs are "not entitled to discovery unless and until it is clear that a viable cause exists."⁶⁰ The plaintiffs claim they "have reason to believe there may have been a breach of fiduciary duty" and/or a breach of statutory duty.⁶¹ As in previous cases, the plaintiffs' claims that they have "reason to believe" there is a cause of action or that there "may" be a cause of action falls short of demonstrating that a viable cause of action clearly exists.⁶²

⁵⁷ Compl. at pgs. 1-2; Pls. Resp. at pg. 2.

⁵⁸ *Poulos*, 44 Ohio St.3d at 127.

⁵⁹ *E.g. Kral*, 2012-Ohio-3502, ¶ 18 (stating that R.C. 2317.48 only permits interrogatories and has no application where the pretrial discovery request is solely for production of documents).

⁶⁰ *Carr*, 1998 WL 964538, *3.

⁶¹ Compl. at pgs. 1-2; Pls. Resp. at pg. 2.

⁶² *See Carr*, 1998 WL 964538, *3 (finding the plaintiff's suspicion that the defendant may have breached a non-compete clause contained in an employment agreement insufficient under R.C. 2317.48); *Amedia*, 118 Ohio App.3d at 547 (holding that complaints the plaintiff received from investors that the defendant wrongfully disbursed funds was inadequate to state a cause of

In oral argument, the plaintiffs asserted multiple times that they were unsure whether they had a viable cause of action and that they were uncertain whether a civil suit would prove financially feasible. However, using R.C. 2317.48 to obtain "information necessary to determine whether [the plaintiffs have] a cause of action at all" is beyond the scope of the statute.⁶³ Furthermore, R.C. 2317.48 requires all pretrial discovery to be "narrowly tailored" to only those "specific facts necessary for pleading."⁶⁴

The plaintiffs' 25 interrogatories touch on multiple topics, ranging from the defendant's budget, bank statements, communications about the refund, meeting minutes, accountings, and tax forms.⁶⁵ It is simply not clear specifically "which facts" the plaintiffs need, but the plaintiffs "obviously cannot determine whether [they have] a cause of action without the information sought by the discovery action."⁶⁶ As such, the plaintiffs are unable to meet R.C. 2317.48 to obtain pretrial discovery.

Being unable to satisfy R.C. 2317.48, the plaintiffs must satisfy Civ.R. 34(D) to receive pretrial discovery from the defendant.⁶⁷ Civil Rule 34(D) has three mandates, all of which the plaintiff must meet:

"(a) The discovery is necessary to ascertain the identity of a potential adverse party;

(b) The petitioner is otherwise unable to bring the contemplated action;

action); *Bridgestone/Firestone, Inc.*, 116 Ohio App.3d at 232 (concluding that the plaintiff's claim "it had reason to believe" the defendant disclosed confidential, proprietary trade secret information was insufficient to state a cause of action).

⁶³ *Smith v. Baumgartner*, 6th Dist. Ottawa No. OT-01-018, OT-01-014, 2002 WL 107767, 2002-Ohio-232, * 3. In *Smith*, the plaintiff failed to satisfy Civ.R. 34(D) because he requested pretrial discovery "to determine his claims and rights" against the defendant and potential other defendants. *Id.* at *1.

⁶⁴ *Sizemore*, 2012-Ohio-4004, ¶ 11, citing *Bridgestone/Firestone Inc.*, 116 Ohio App.3d at 232.

⁶⁵ Compl. at pgs. 6-11.

⁶⁶ *Huge*, 2004-Ohio-232, ¶ 11.

⁶⁷ Of note, the plaintiffs only moved under R.C. 2317.48 in their complaint for pretrial discovery.

(c) The petitioner made reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought.⁶⁸

The plaintiffs are unable to satisfy Civ.R. 34(D) from the outset. They claim they have attempted to obtain financial information and documentation from the board president from 2010-2013.⁶⁹ Their complaint states that this documentation and information is "necessary to the proper evaluation of an alleged claim of breach of fiduciary duty and claims relating to other potential financial and records improprieties."⁷⁰ Plaintiffs further submit that the complaint is needed to "identify what, if anything, is owed to the Plaintiffs as a result of the discriminatory refund."⁷¹ As discussed, the plaintiffs confirmed at oral argument that they seek pretrial discovery to determine if their case has merit and monetary value.

However, Civ.R. 34(D) is not designed to enable the plaintiff to "complete all the discovery necessary to support [their] claim."⁷² Rather, the legislature enacted Civ.R. 34(D) so that a plaintiff could obtain discovery from a non-party who may know the identity of other adverse parties.⁷³ In doing so, a plaintiff could discover the identity of an adverse party without needlessly joining a third party who would be dismissed once discovery uncovered the identity of the adverse party.⁷⁴

Moreover, when the plaintiff already knows of at least one adverse party, which is true in this case, and traditional discovery would lead to identifying other potential

⁶⁸ Civ.R. 34(D).

⁶⁹ Compl. at pg. 2.

⁷⁰ Id.

⁷¹ Id.

⁷² *Wheeler*, 1999 WL 193431, *3.

⁷³ See *Kral*, 2012-Ohio-3502, ¶ 20; 1993 Staff Note, Civ.R. 34.

⁷⁴ Id.

adverse parties,” Civ.R. 34(D) is inapplicable.⁷⁵ The plaintiffs’ complaint clearly indicates that the prospective adverse party is the defendant. In the plaintiffs’ briefing, they also identify Towne Properties as a second party that may have engaged in wrongdoing.⁷⁶ The plaintiffs have not explained whether they believe there are additional, unidentified defendants, and if so, why traditional discovery would be inadequate to uncover them.

Courts have denied pretrial discovery in similar cases, such as when the discovery request was sought to determine if the plaintiff had “good grounds” to sue,⁷⁷ to “properly frame [the plaintiff’s] complaint,”⁷⁸ to “gather evidence to support [a plaintiff’s] anticipated claims,”⁷⁹ and to gather information “about” a known defendant.⁸⁰ The plaintiffs have made clear that they intend to use pretrial discovery to determine if they have a claim, and that is simply not a sanctioned purpose for pretrial discovery under Civ.R. 34(D).

The plaintiffs also fail to meet the second requirement for Civ.R. 34(D), which requires them to show they are “otherwise unable to bring the contemplated action.” The plaintiffs know at least one defendant, which is the Reserve of Loveland Homeowner’s Association, Inc. The plaintiffs also stated in oral argument that they may already have grounds to file at least one cause of action against the defendant. Specifically, the defendant told the plaintiffs that it does not have certain documents, and the plaintiffs contend the defendant is statutorily required to maintain such

⁷⁵ *Cruz*, 2012-Ohio-24, ¶ 24.

⁷⁶ Pls. Resp. at pg. 2.

⁷⁷ *Mortiz*, 1998 WL 896387, *3.

⁷⁸ *Cruz*, 2012-Ohio-24, ¶ 31.

⁷⁹ *Id.*

⁸⁰ *Id.*

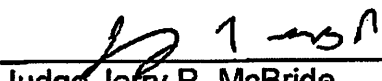
documents. The plaintiffs were unable to articulate why they could not bring a cause of action against the defendant on that basis. Because the plaintiffs cannot meet two of the three requirements under Civ.R. 34(D), they are not entitled to pretrial discovery pursuant to that civil rule.⁸¹

CONCLUSION

Because the plaintiffs cannot satisfy either R.C. 2317.48 or Civ.R. 34(D), they are not entitled to pretrial discovery from the defendant. Accordingly, the defendant's motion to dismiss is well-taken and is granted.

IT IS SO ORDERED

DATED: 12-7-15



Judge Jeffrey R. McBride

⁸¹ During oral argument the defendant conceded that the plaintiffs have satisfied the third requirement for Civ.R. 34(D) because they previously made multiple requests to voluntarily obtain the requested information from the defendant.