COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

FLORENCE SWATERS, et.al.	:	CASE NO. A1001370
	:	Judge Norbert A. Nadel
Plaintiffs,	:	MEMORANDUM OF
-vs-	:	DECISION AND ORDER
KRISTINE KLEVE LAWSON, et al.,	:	
Defendants.	:	

This case is before the Court on Defendant Kristine Kleve Lawson's ("Lawson") Motions to Dismiss pursuant to 12(B)(6) and 12(B)(7) of the Ohio Rules of Civil Procedure.

Defendant Lawson's father, Karl Kleve, was a car collector from Westwood, Ohio. Among his collection was a Ferrari 375 Plus Grand Prix Roadster, serial number 0384AM ("Vehicle"). Sometime between 1985 and 1989, the vehicle and its VIN data plate were stolen from Kleve's property. Kleve reported the vehicle stolen to the Green Township police department and the FBI in January 1989.

In March 1990, the vehicle resurfaced in Belgium where it was purchased in good faith from an automobile trader by Jack Swaters and Philippe Lancksweert – i.e. without knowledge of the theft. Swaters and Lancksweert restored the vehicle in Belgium and in Italy at Ferrari headquarters in the years that followed. In 1997, Kleve located the vehicle in Belgium through the services of Mark Daniels, the President of National Search Services. In an effort to resolve ownership issues regarding the Vehicle, Kleve retained Daniels as his agent and attorney-in-fact to pursue negotiations with Swaters and Lancksweert.

On September 2, 1999, a document entitled "Settlement Agreement" was executed by Lancksweert, Kleve and Daniels. Plaintiffs allege that this document, in conjunction with other transfer documents prepared by the parties, transferred all ownership rights claimed by Kleve to Lancksweert and Swaters, and that upon execution of the Agreement, Lancksweert escrowed $625,000 - $400,00 to Karl Kleve and Mark Daniels; $225,000 to Mark Daniels' company, National Search Services. Following the receipt of the payments, Kleve and Daniels executed the remaining transfer documents referenced in the Settlement Agreement that included a Bill of Sale, Lien Release, a signed Ohio title, confirmation of the cancelations of both existing theft reports regarding the vehicle, and a Release of Theft Status Agreement. Plaintiffs maintain that neither Kleve nor Daniels ever delivered any other parts of the Vehicle or the VIN data plate to Lancksweert or Swaters. Lancksweert sold his ownership interest in the Vehicle to Jack Swaters in 1994 and Jack and Florence now claim an equal ownership interest in the Vehicle.

In December 2003, Karl Kleve died and his daughter, Defendant Kristine Kleve Lawson, was appointed Administrator by the Hamilton County Probate Court. During the probate proceedings, Defendant stated she was in possession of the Vehicle and executed an application for Sale/Transfer of the Vehicle. In 2005, Plaintiffs allege that Defendant Lawson engaged the services of an auction company to auction the Vehicle and other parts from the estate of Karl Kleve, but that the auction did not go forward after Plaintiffs objected to the sale and asserted their ownership claims in the Vehicle. In November 2006, Defendant Lawson transferred title in the Vehicle to herself individually.

In response to the actions of Defendant Lawson, Plaintiffs brought the present action based on the Settlement Agreement and filed a Motion for a Temporary Restraining Order and Preliminary Injunction to prevent Defendant Lawson from engaging in or attempting any action concerning any parts or title to the Vehicle. In their Complaint, Plaintiffs allege several different causes of action and request the Court for the following relief: temporary and permanent relief enjoining Defendants from taking any actions regarding the Vehicle including parts and title; damages; specific performance of the Settlement Agreement; restitution of all parts; an accounting of all known parts; a declaration that the Plaintiffs are the rightful owners of the Vehicle; costs and attorneys fees. Defendant Kristine Lawson has since filed two separate Motions to Dismiss Plaintiffs' Complaint. This Decision will address each Motion in turn.

DEFENDANT'S FIRST MOTION TO DISMISS

In her first Motion to Dismiss, Defendant Lawson argues that Plaintiffs' breach of contract claim is time barred and that her entire Complaint should be dismissed pursuant to Ohio Civil Rule 12(B)(6) for failure to state a claim for which relief can be granted. While it is undisputed that Plaintiffs' breach of contract claim arises from the Settlement Agreement, the nature of this transaction is in dispute. Defendant Lawson argues the Agreement is a contract for the sale of goods and thus governed by the UCC and its four year statute of limitations. Conversely, Plaintiffs maintain the Agreement concerned only the contractual rights of the parties, serving to settle competing claims of ownership in the Vehicle, and that the Ohio 15 year statute of limitations for action on written contracts should therefore apply.

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the Complaint that Plaintiffs can prove no set of facts entitling them to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242. A court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. See *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 193, 532 N .E.2d 753; *Battersby v. Avatar, Inc.,* 157 Ohio App.3d 648, 2004-Ohio-3324, 813 N.E.2d 46.

After reviewing Plaintiff's Complaint and its accompanying documents, it is clear that the purpose of the Settlement Agreement was not to "sell" the Vehicle, but rather to resolve outstanding ownership claims in the Vehicle. The Settlement Agreement repeatedly states that the parties entering into said Agreement were doing so for the purposes of "settlement, resolution and disposition" of the Vehicle. Nowhere in the Agreement does it state that it is a transaction for the sale of the Vehicle. Further, the checks issued for payment by Lancksweert to Karl Kleve, Daniels and National Search Services pursuant to the Settlement Agreement state on their face that their purpose is "For Settlement of Ferrari (Vehicle)" and not for purchase of the Vehicle.

Each respective side to the Vehicle negotiations claimed an ownership interest. While Defendant correctly points out that the Agreement specifically recognizes Kleve's ownership claim, the Agreement does not list him as the Vehicle's sole owner. Jack Swaters and Lancksweert were in possession of the Vehicle and also claimed ownership in it after having purchased it in 1990. It is counterintuitive to think that Jack Swaters

and Lancksweert repurchased a Vehicle they thought they already owned and had in their possession.

Ohio's UCC provisions governing sales are limited to the "sale of goods." Ohio Rev. Code 1302.01(8*)*. Contractual rights are "intangible non-goods" and as such, are distinguishable from goods. *Jamison v. Society Nat'l Bank* (1993) 66 Ohio St.3d 201. The UCC does not apply in this action because the Settlement Agreement does not involve the sale of a "good." Instead, the appropriate statute of limitations for actions on written contracts will apply. Typically, the analysis would end at this point and the Court would apply Ohio's 15-year statute of limitations for written contracts. However, in this case, the Settlement Agreement contains a choice of law provision, which leaves open the possibility of applying New York law in this case.

The Ohio Supreme Court has adopted the *Restatement (Second) of Conflict of Laws* as governing law for Ohio conflict issues. *Lewis v. Steinreich* (1995), 73 Ohio St.3d 299; *Morgan v. Biro Mfg. Co., Inc.* (1984), 15 Ohio St.3d 339. When a conflict arises between two states' statutes of limitations, the Restatement provides that "an action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state." *Nationwide Mut. Fire Ins. Co. v. Rose* (2007), 9 Dist. No. 05CA008814, 2007 –Ohio-1216; *Restatement (Second) Conflict of Laws)*. The Restatement thus requires Ohio courts to apply Ohio's statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state. *Nationwide Mut. Fire Ins. Co. v. Rose* (2007), 9 Dist. No. 05CA008814, 2007 –Ohio-1216; See *Males v. W.E. Gates & Associates* (1985), 29 Ohio Misc.2d 13. Absent an express statement in the Settlement Agreement that the parties

intended another state's statute of limitations to apply, the procedural law of Ohio governs time restrictions on an action for breach of contract. *Id.*

In the instant matter, the Settlement Agreement never expressly discusses the use of New York's statute of limitations. As a result, Ohio's 15-year statute of limitations for actions on written contracts applies. Statutes of limitations begin to run when the right of action accrues. *Causey v. Causey* (Sept. 25, 1990), 4th Dist. No. 599. The Settlement Agreement was executed in 1999, and Plaintiffs filed this suit nearly 11 years later in 2010; thus, regardless of when the breach is alleged to have occurred, Plaintiffs' cause of action is timely under Ohio's 15-year rule. As a result, Defendant Lawson's First Motion to Dismiss is denied.

DEFENDANT'S SECOND MOTION TO DISMISS

Defendant's second Motion to Dismiss is filed under Ohio Civil Rule 12(B)(7) and Ohio Civil Rule 17. In this Motion, Defendant Lawson puts forth two reasons why this action should be dismissed: (1) Plaintiffs lack standing to bring their claims because they are not the real parties in interest (2) Plaintiffs have failed to join Philippe Lancksweert and Mark Daniels as necessary parties to this action under Ohio Civil Rules 19 and 19.1.

Civ. R. 17(A) requires that "every action shall be prosecuted in the name of the real party in interest." A "real party in interest" has been defined as "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case." *Shealy v. Campbell* (1985), 20 Ohio St. 3d 23-25. Defendant argues that no privity exists between Plaintiffs and Kleve and/or herself, because Plaintiffs were not parties to the Settlement

Agreement. As a result, Lawson claims that Plaintiffs are not the real parties in interest and cannot assert claims premised on the Settlement Agreement. Lawson focuses her argument on the fact that neither Jack nor Florence Swaters were signatories to the aforementioned documents. She maintains that Lancksweert, as a signatory of the Settlement Agreement, is the only person in privity with Kleve and/or herself and is thus the only real party in interest who can assert such claims against this Defendant.

While neither Plaintiff was a signatory to the Settlement Agreement, a review of the record reveals that Jack Swaters was indeed a party to the Agreement. Jack Swaters partnered with Lancksweert to purchase the Vehicle in 1990 and the partnership was still in possession of the Vehicle when negotiations began with Kleve. It was at this time that Swaters designated Lancksweert as the agent for himself and their business partnership in all matters concerning the Vehicle. This is supported by the Settlement Agreement itself, which specifically states that Lancksweert was acting as the agent for the entity in possession of the Vehicle and further supported by the "Designation of Agent" document attached to Plaintiff's Complaint, which sets forth the conditions of Lancksweert's agency pertaining to the execution of said Settlement Agreement. Generally, when an agent makes a contract with a third party on behalf of the principal with the understanding of the third party that solely the principal was to be bound and where the agent was acting within the scope of his authority, then the agent incurs no liability on the contract." *Mayer v. Frame* (Dec. 6, 2000), 9th Dist. NO 3053-M, citing *James G. Smith& Assoc., Inc. v. Everett* (1981), 1 Ohio App.l3d 118, 120. As Swaters' agent, Lancksweert had the authority to sign the document on his behalf and bind him to the Settlement Agreement.

Lancksweert is not a real party in interest or a necessary party in this suit because he no longer claims an ownership interest in the Vehicle. Plaintiffs' Complaint reveals that Lancksweert sold his ownership in the Vehicle to Jack Swaters in November 2004, and that the Vehicle is currently owned equally between Florence Swaters and her father, Jack Swaters. Both the Settlement Agreement and the Bill of Sale allow for rights to pass to Lancksweert's successors and/or assigns. As the only parties currently claiming an ownership interest in the Vehicle based on the Settlement Agreement apart from the Defendant, Jack and Florence Swaters are the only two real parties in interest who would be directly benefited or injured by the outcome of this case.

Mark Daniels is also not a necessary party to this action. By Defendant's own admission, Daniels was the agent of Karl Kleve during negotiations for the Vehicle. He is not personally liable on the Settlement Agreement and there are no allegations that he has ever claimed an ownership interest in the Vehicle. Daniels simply has no interest in this suit. Complete relief can be accorded among those already parties.

Accordingly, Defendant Lawson's second Motion to Dismiss is also denied.

IT IS THEREFORE ORDERED that Defendant Lawson's Motions to Dismiss are hereby denied. **IT IS FURTHER ORDERED** that this case is set for CMC on **September 30th, 2010 at 9:30AM.**

Norbert A. Nadel, Judge

Date: 9/14/10

Copies to:

Michael Hirschfeld, Esq.
Tina Williams, Esq.
Graydon Head & Ritchey, LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202

Daniel P. Randolph, Esq.
Janaya L. Trotter, Esq.
Ritter & Randolph, LLC
105 East Fourth Street, Suite 1200
Cincinnati, OH 45202

R. Joseph Parker, Esq.
Dominick S. Gerace, Esq.
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202