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THE LAW FIRM OF PUCKETT AND FARAJ, PC

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5 June 2009

VIA EXPRESS MAIL

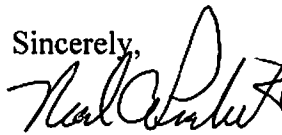
John T. Frey, Clerk  
Fairfax County Circuit Court  
4110 Chain Bridge Road  
Fairfax, VA 22030  
Attention: Third Floor

**Re: AIC Inc. v. Fatiha Soliman, et al**  
**Civil Action No. 2009-1558**

Dear Mr. Frey,

I am enclosing the following for filing:

- Defendant's response to Demurrer and Motion Craving Oyer

Sincerely,  
  
Neal A. Puckett

Cc: Edward E. Nicholas, III, Esq.  
James R. Hart, Esq.

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

A.I.C., INC.

Plaintiff,

v.

FATIHA SOLIMAN, individually, trading  
as "FAZ CREATIVE EDUCATION",

and

FATEMA ALZAHRAA CHILD CARE &  
EARLY LEARNING, INC.,

Defendants.

CIVIL ACTION NO. 2009-1558

**DEFENDANTS-COUNTERCLAIMANTS' MEMORANDUM  
IN OPPOSITION OF PLAINTIFF'S DEMURRER AND MOTION CRAVING OYER**

Comes now Defendant-Counterclaimant, FAZ Creative Education and Fatema Alzahraa Child care and early learning, Inc., by an through counsel, submits the following in response to Plaintiff's demurrer and motion craving oyer.

Plaintiff demurred by setting forth eight "shortcomings" within Defendant's Amended Counterclaim. Plaintiff's first assignment of error challenges the naming of Mazen Ayoubi as Plaintiff. Defendant prepared and filed a motion to add a party pursuant to § 3.16 of the Rules of Virginia Supreme Court. Defendant has since withdrawn its motion and again amended the counterclaim to remove Mr. Ayoubi. Accordingly, Plaintiff's "first" and "Third" assignments of error are now moot.

Plaintiff's raises issue with Defendant's demand for the difference in the fair market value of the work completed and that which the Plaintiff received. Defendant denies that a valid

contract exists. Nonetheless, even if a contract does exist, defendant is not entitled to receive compensation for work it did not engage in or complete. Plaintiff did complete some work for Defendant and is entitled to the fair market value of that work. Defendant engaged two different contractors to determine the fair market value of the Plaintiff's work. Defendant used the higher estimate of \$15,763.00 in its counterclaim. Plaintiff also argues that the allegation fails to state a claim because the allegation that Plaintiff billed and received payment for work he did not engage in or complete does not include an assertion that any billing or receipt of payment breached the contract. Defendant's Breach of Contract claim alleges several facts that when proved true are sufficient to sustain the charge of Breach of Contract. ¶¶ 40-42 of the Amended Counterclaim are such allegations. Additionally, Plaintiff's claim that the allegation of false and fraudulent billing for work that the Plaintiff did not engage in is insufficient to support a breach of contract claim is specious. The Contract created a duty on Plaintiff to bill only for those services that he completed. When he build for services he did not engage in his contract.

Plaintiff in its forth claim of a shortcoming states that any action arising out of a contract matter must be a breach of contract. While it is accurate that a contract disagreement generally results in a breach of contract, in this case the Defendant's has alleged the defense of "fraud in the inducement" and alleged a "Fraud counterclaim. When a party undertakes to commit fraud to induce another party into a "contract while never intending to perform as represented but merely to defraud, then such conduct sounds in tort and is actionable as an actionable fraud. *Flip Mortgage Corp. v. McElhane*, 841 F.2d 531, 537 (4th Cir. 1988). *Citing Colonial Ford Truck Sales v. Schneider*, 228 Va. 671, 677, 325 S.E. 2d 91, 94 (1985). Defendant-Counterclaimant has set forth the appropriate defenses to contract formation in its answer and has alleged the elements of fraud in its counterclaim.

Plaintiff next claims that fraudulent inducement claim fails because alleged fraudulent statements were made after the parties contracted. Defendant alleged that Plaintiff made fraudulent statements before the April 21, 2008, contract was signed. *See* ¶¶ 10-13 of Second Amended Counterclaim. Plaintiff continued to make knowing false and fraudulent statements to induce Defendant to change the contract as demonstrated by Change Orders 1-4. Plaintiff argues that Virginia does not recognize fraud after the contractual duty arises and the therefore any inducement to agree to the Change Orders is not actionable in tort. Whether the Change Orders are in fact mere Changes to the April 21, 2008, contract or actual new contracts is a question of fact to be determined by the fact finder. The labeling of a document as “Change Order” has little on its nature as to whether it modifies an existing duty or gives birth to a new duty.

Plaintiff’s Sixth claim of shortcoming in Defendant’s counterclaim states that Defendant failed to allege misrepresentation of an existing fact. In ¶¶ 8 and 20-25 of the counterclaim Defendant alleges a number of statements made by Defendant AIC through Mazen Ayoubi that were known by Mazen Ayoubi to be untrue. Plaintiff states that the Defendant was merely offering opinions regarding a future event. Plaintiff held himself out as a professional architect with the knowledge skills and experience of members of his profession. Defendant could reasonably rely on Plaintiff’s representations and did. Plaintiff cannot now claim that his statements were merely possibilities as to future events, especially because he was the original architect on the building and had the design layout. He knew what the building was zoned for, knew that no design work had to be done, and understood that work sought to be done by Defendant did not require “construction management.” Finally, Plaintiff’s website certainly leaves no room for speculation as to the vastness of Plaintiff’s experience and skill. Accordingly, the assertion that Plaintiff was not sure what zoning work would need to be

completed and that he was merely speculating as to future events is a spurious argument. Moreover, Plaintiff's statements that the building would be shut down if Defendant did not agree to modifications of the contract and, therefore, additional money is needed to complete the work are nothing short of nefarious. Plaintiff's statement and conduct were an old fashioned shake down.

Plaintiff Seventh assignment of error challenges Defendant's allegation of emotional harm arguing that emotional harm is not compensable absent physical contact and citing *Hughes v. Moore*, 214 Va 27, 31, 197 S.E.2d 214, 219 (1973). *Plaintiff's Memorandum in Support of Demurrer at p. 2*. Plaintiff misstates the law and confuses the holding in *Hughes v. Moore*. Although the Court in *Hughes v. Moore*, discussed the impact rule's history and its need, up to that point, in protecting against fraudulent claims of emotional harm, it specifically repudiated the impact rule and its requirement for physical impact as the bases for proving emotional harm. 214 Va 27, 297 S.E.2d 214. Accordingly damages for emotional harm are recoverable for an intentional tort or in negligence if the emotional harm can be shown to have also resulted in physical injury. *Id.*

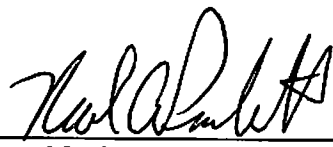
Plaintiff also challenges Defendant's claim of emotional harm on the bases that the Defendant is a business rather than an individual. Defendant sued the business entity FAZ and Mrs. Soliman individually. Mrs. Soliman counterclaimed as FAZ the business entity and in her individual capacity against Plaintiff. Accordingly, because Plaintiff alleges that Mrs. Soliman is a party to the dispute, she is counterclaiming in her individual capacity to recover for emotional anguish and harm that she has personally suffered.

Plaintiff's eighth and final issue asserts that punitive damages are not recoverable because the counterclaim fails to allege facts that would support recovery of punitive damages

and attorney's fees. The recovery of punitive damages is generally not permitted where the duty breached arises through agreement between the parties. In this case, however, the Defendant has alleged and continues to allege causes of actions sounding in tort undertaken with deliberate and malicious intent. When a cause of action sounds in contract as well as tort, recovery of punitive damages is permitted under proper allegations of malice, wantonness or oppression....(Emphasis in original). *Kamlar v. Haley*, 299 S.E.2d 514, 517, 224 Va. 699, 706 (1983) Citing *Wright v. Everett*, 197 Va. 608, 615, 90 S.E.2d 855, 860 (1956).

Based on the forgoing, Defendant-Claimant moves that Plaintiff's demurer and motion craving oyer be denied.

Fatiha Soliman  
Fatema Alzahraa Child Care &  
Early Learning Center

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of June, 2009, I caused a copy of the forgoing to be sent via email and first class mail, postage prepaid to Mr. Edward Nicholas, Esq., Vandeventer Black LLP 707 East Main Street, Suite 1700 Post Office Box 1558, Richmond, VA 23218-1558.



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