3-11-2019

JOHN SOUZA et al., ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Elizabeth E. Long
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

JOHN SOUZA and PARADISE MEDIA VENTURES, LLC Plaintiffs, v. DR. JEFFREY GALLUPS, MILTON HALL SURGICAL CENTER, LLC d/b/a ENT INSTITUTE, and JOHN BERBERIAN Defendants.	CIVIL ACTION FILE NO. 2016CV275265 Business Case Div. 2

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The above styled matter is before the Court on: (1) Defendants Dr. Jeffrey Gallups and Milton Hall Surgical Associates, LLC's (collectively the "Gallups Defendants") Motion for Summary Judgment; and (2) Defendant John Berberian's Motion for Summary Judgment or Alternatively to Strike Allegations or Alternatively for Judgment on the Pleadings. Having considered the entire record, the Court finds as follows:

SUMMARY

Defendant Dr. Jeffrey Gallups ("Gallups") is a medical doctor and the Chief Executive Officer of Defendant Milton Hall Surgical Associates, LLC d/b/a ENT Institute ("ENT Institute"), an otolaryngology practice that provides ear, nose, and throat related medical services.[1] Plaintiff John Souza ("Souza") is a former investment bank finance executive and

[1] Defendants Dr. Jeffrey Gallups and Milton Hall Surgical Associates, LLC's Statement of Undisputed Material Facts as to Which No Genuine Issue Exists ("Gallups Defs' SMF"), ¶1; Plaintiffs' Response to Defendants Dr. Jeffrey Gallups and Milton Hall Surgical Associates, LLC's Statement of Undisputed Material Facts and Statement of Additional Material Facts ("Pls' Resp. to Gallups Defs' SMF"), p. 2 at ¶1; Defendant John Berberian's Statement of Undisputed Material Facts as to Which There is No Genuine Issue to Be Tried and Theories of

entrepreneur who assists businesses in developing growth strategies.[2] Co-Plaintiff Paradise Media Ventures, LLC ("Paradise") is Souza's wholly-owned company.[3]

Souza and Gallups met in early 2013 and thereafter discussed ideas and opportunities to grow the ENT Institute's practice.[4] Souza had an acquaintance, Defendant John Berberian ("Berberian"), who was a marketer for WellCorpRx LLC ("WellCorpRx").[5] According to Souza, Berberian claimed to have a lucrative "allergy business" in Los Angeles and the two began discussing potential business opportunities with ENT Institute.[6] Souza asserts he later learned that Berberian was actually operating as a distributor for United Allergy Services ("UAS).[7] Souza contends Berberian misrepresented WellCorpRx's capacity to serve as an allergy services provider to hide allegedly the conflict of interest posed by Berberian's commission agreement with UAS.

In June of 2014, Souza had Gallups and Berberian each sign nearly identical non-disclosure agreements ("NDA" or "NDAs"). Gallups signed the NDA on behalf of ENT Institute and Berberian signed the NDA on behalf of WellCorpRx.[8] The NDAs state that ENT Institute and WellCorpRx, respectively, would not "attempt to do business with, or otherwise solicit any business contact or relationship created or referred by [Paradise] during the term of [the] agreement" and would not disclose any "confidential information" as defined under the NDAs. That same month, Souza introduced Gallups and Berberian and the three began discussing

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Recovery ("Def Berberian's SMF"), p. 3 at ¶5; Plaintiffs' Response to Defendant Berberian's Statement of Undisputed Material Facts and Statement of Additional Material Facts ("Pls' Resp. to Def Berberian's SMF"), p. 3 at ¶5, p. 14 at ¶9.

2 Gallups Defs' SMF, ¶3; Pls' Resp. to Gallups Defs' SMF, p. 2 at ¶3, p. 12 at ¶9.

3 Gallups Defs' SMF, ¶3; Pls' Resp. to Gallups Defs' SMF, p. 2 at ¶3.

4 Gallups Defs' SMF, ¶4; Pls' Resp. to Gallups Defs' SMF, p. 3 at ¶4.

5 Id.; Def Berberian's SMF, ¶4.

6 Pls' Resp. to Def Berberian's SMF, p. 11 at ¶1.

7 Pls' Resp. to Def Berberian's SMF, p. 12-13 at ¶5.

8 Gallups Defs' SMF, ¶¶ 5-6; Pls' Resp. to Gallups Defs' SMF, pp. 3-4 at ¶¶ 5-6; Def Berberian's SMF, ¶4; Pls' Resp. to Def Berberian's SMF, pp. 2-3 at ¶4, p. 14-15 at ¶¶ 11-12, pp. 19-20 at ¶¶25-26.

opportunities involving the provision of allergy testing services to ENT Institute.[9]

Souza asserts that during discussions with Gallups and Berberian the parties discussed the possible implementation of allergy services at ENT Institute through Berberian's company (a revenue-sharing arrangement whereby ENT Institute would pay Souza and Berberian) and the potential for nationwide expansion of the program if it was successful.[10] Souza also allegedly introduced to Gallups and Berberian a plan whereby Gallups could triage his current patients into allergy and immunotherapy in addition to his existing practice.[11] Souza asserts his "plan" was for ENT Institute to serve as a pilot program for integrating allergy testing and immunotherapy services into ENT practices before expanding the program nationally if it proved to be successful.[12]

The parties communicated throughout the summer of 2014 and Souza, Berberian, and Gallups allegedly met in July 2014 to discuss the "details of their business plan."[13] Souza claims that at that meeting it was agreed that WellcorpRx would provide allergy testing services for the "deal" and that WellcorpRx would provide more than $500,000 in funding for the project.[14] The parties also allegedly confirmed that ENT Institute would pay a portion of revenue derived from allergy testing services provided by WellcorpRx to a management service organization ("MSO") which would then pay Souza and Berberian.[15] Souza claims that in subsequent communications he also disclosed his ideas about identifying practice locations, the timeline for rolling out the new services, revenue growth targets, and physician compensation.[16]

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9 Gallups Defs' SMF, ¶5; Pls' Resp. to Gallups Defs' SMF, p. 3-4 at ¶5; Def Berberian's SMF, ¶2.
10 Pls' Resp. to Def Berberian's SMF, p. 3 at ¶6, p. 16 at ¶15.
11 Pls' Resp. to Def Berberian's SMF, p. 16 at ¶16.
12 Pls' Resp. to Def Berberian's SMF, p. 17 at ¶17.
13 Pls' Resp. to Def Berberian's SMF, p. 20 at ¶27.
14 Id.
15 Id.
16 Pls' Resp. to Def Berberian's SMF, p. 21 at ¶28.

Berberian formed Pinnacle MSO, LLC ("Pinnacle") on August 21, 2014 but listed himself as the sole member.[17] Pinnacle entered into an agreement with ENT Institute on September 13, 2014, under which Pinnacle would be compensated based on the services provided by UAS to ENT Institute ("Pinnacle MSO Agreement").[18] On September 29, 2014, ENT Institute and UAS entered into an allergy services agreement under which ENT Institute's practices began to provide allergy services through UAS.[19] During this period and for months thereafter the parties continued to discuss and negotiate various terms of their business arrangement and other opportunities (including genetic testing services and a medical food program) and exchanged various draft agreements. However, through the rest of 2014 and into 2015 the parties' discussions and business relationship continued to devolve and ultimately no final agreement was ever reached as to Souza's interest in any business arrangement or in any entity.

Nevertheless, Souza maintains that he, Gallups, and Berberian "entered a joint venture in which Souza was chief strategist and whereby Souza and Berberian would be compensated through the Pinnacle MSO for revenues [ENT Institute] generated through its arrangement with UAS."[20] According to Souza, Berberian misrepresented the role of WellCorpRx and UAS in order to have a larger stake in the venture, admitted to third parties that he had no intention of paying Souza per the parties' arrangement, often did not respond to Souza's requests for updates, and at some point began actively working to exclude Souza from the deal.[21]

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17 Gallups Defs' SMF, ¶7; Pls' Resp. to Gallups Defs' SMF, p. 4 at ¶7; Pls' Resp. to Def Berberian's SMF, pp. 3-4 at ¶8.

18 Gallups Defs' SMF, ¶8; Pls' Resp. to Gallups Defs' SMF, p. 5 at ¶8; Pls' Resp. to Def Berberian's SMF, pp. 3-4 at ¶¶ 8-9.

19 Pls' Resp. to Gallups Defs' SMF, p. 51 at ¶110.

20 Pls' Resp. to Gallups Defs' SMF, pp. 8-9 at ¶¶ 14-15.

21 *See, e.g.*, Pls' Resp. to Gallups Defs' SMF, p. 12 at ¶3, p. 13 at ¶6, p. 20 at ¶27, p. 21 at ¶30, p. 26 at ¶43, p. 29 at ¶51, pp. 33-36 at ¶¶62-66, p. 46 at ¶93.

Souza alleges Berberian profited from his business arrangement with the Gallups Defendants through funds Berberian's holding company (non-party JBJB Holdings) received from Pinnacle and through commissions he received from UAS.[22] Souza asserts the Gallups Defendants also profited from ENT Institute's implementation of the UAS allergy services program[23] while "Souza received nothing for the work he performed for the joint venture."[24]

Procedural History

Souza initially sued Berberian and Pinnacle in a separate action that was filed on February 27, 2015 ("2015 Action").[25] Based on most of the same allegations summarized above, Souza asserted the following claims in the 2015 Action: (1) declaratory judgment (seeking a declaration that Souza "is a full member of [Pinnacle] with a twenty-one [sic] ownership interest")[26]; (2) breach of contract and specific performance (alleging Defendants breached "the parties' agreement…by failing to make any payments of the funds received from the Gallups practice" and seeking specific performance "requiring Defendant (unless he is removed from power) to make the payments as agreed")[27]; (3) breach of fiduciary duty (alleging that "[a]s the majority member in [Pinnacle], Defendant owe[d] Plaintiff a fiduciary duty" but instead Defendant had "operated and controlled [Pinnacle] for his own benefit to the detriment of Souza" and "acted to deprive Souza of his membership interest")[28]; (4) accounting (seeking an equitable and legal accounting of all funds relating to Pinnacle)[29]; (5) tortious deprivation of interest/quasi-conversion (alleging "Defendant" had "intentionally deprived Souza of his membership interest

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22 Pls' Resp. to Gallups Defs' SMF, p. 50 at ¶¶ 105-106.
23 Pls' Resp. to Gallups Defs' SMF, pp. 50-51 at ¶¶107-108.
24 Pls' Resp. to Gallups Defs' SMF, p. 51 at ¶109.
25 Souza v. Berberian et al., Superior Court of Fulton County, No. 2015CV257652.
26 2015 Action, Verified Complaint for Declaratory Judgment, Breach of Contract, Specific Performance, Breach of Fiduciary Duty, Tortious Deprivation, Attorney's Fees, and Punitive Damages ("2015 Action Complaint"), ¶49.
27 2015 Action Complaint, ¶¶ 53-56.
28 2015 Action Complaint, ¶¶ 58-61.
29 2015 Action Complaint, ¶66.

in Pinnacle")[30]; (6) attorney's fees[31]; (7) punitive damages[32]; (8) breach of fiduciary duty (alleging "Berberian had a duty to disclose all material information to Souza and failed to do so")[33]; (9) unjust enrichment and quantum meruit (alleging "Berberian and ENT Institute have been enrichment while [Souza] has not been compensated a single dollar" and that Souza "is entitled to be compensated for the value of his services")[34]; (10) breach of contract (alleging Berberian breached the NDA)[35].

In the 2015 Action, this Court granted judgment as a matter of law to Berberian and Pinnacle on all claims other than those for unjust enrichment, quantum meruit, and attorney's fees. Souza filed a Notice of Appeal; the Court of Appeals of Georgia affirmed this Court's ruling.[36] Specifically, the appellate court held summary judgment was proper on all of Souza's "contract-based claims", finding "the parties' continued negotiations demonstrate[d] that they had not reached agreement on all material terms" and the record "d[id] not show with reasonable certainty what the parties intended to do."[37] The appellate court also affirmed summary judgment on Souza's claim for breach of the NDA, finding that contract was between Paradise and WellCorpRx, both non-parties to the 2015 Action, and that the NDA "on its face did not prohibit the conduct of Berberian and Souza individually."[38]

On May 16, 2016 (six days after Souza filed his Notice of Appeal in the 2015 Action), Souza and Paradise initiated this lawsuit against the Gallups Defendants. Upon receipt of the Court of Appeals' Remittitur, the 2015 Action and the case at bar proceeded separately but in

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30 2015 Action Complaint, ¶68.
31 2015 Action Complaint, ¶¶ 70-71.
32 2015 Action Complaint, ¶¶ 73-74.
33 2015 Action, First Amended Complaint, ¶¶ 4, 11, 16-19.
34 2015 Action, First Amended Complaint, ¶¶ 25-26.
35 2015 Action, First Amended Complaint, ¶¶ 29-35.
36 *See generally* Souza v. Berberian, 342 Ga. App. 165, 165, 802 S.E.2d 401, 402 (2017).
37 Id. at 168-69.
38 Id. at 169-70.

tandem until December 8, 2017 when Souza voluntarily dismissed without prejudice the 2015 Action. On January 25, 2018, by consent order Berberian was added to this lawsuit as a party Defendant. Plaintiffs then filed a Second Amended Complaint on May 4, 2018, asserting the following claims: (1) unjust enrichment/quantum meruit (against the Gallups Defendants); (2) unjust enrichment/quantum meruit (against Berberian); (3) fraud (against Berberian); (4) promissory estoppel (against all Defendants); (5) breach of fiduciary duty (against all Defendants); (6) attorney's fees (against all Defendants); and (7) punitive damages (against all Defendants).

In the instant motions, the Gallups Defendants and Berberian, respectively, move for summary judgment as to all claims asserted against them.

ANALYSIS

A. Standard on Motion for Summary Judgment

Summary judgment should be granted only when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). "A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case." Scarbrough v. Hallam, 240 Ga. App. 829, 830, 525 S.E.2d 377, 378 (1999) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475–76 (1991). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [O.C.G.A. §9-11-56], must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e).

"[A]t the summary judgment stage, courts are required to construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences." Smith v. Tenet Health Sys. Spalding, Inc., 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014) (citations and punctuation omitted). *See* Word v. Henderson, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion"). However, "[m]ere speculation, conjecture, or possibility [are] insufficient to preclude summary judgment." State v. Rozier, 288 Ga. 767, 768 (2011) (quoting Rosales v. Davis, 260 Ga. App. 709, 712, 580 S.E.2d 662, 665 (2003)); *see* Pafford v. Biomet, 264 Ga. 540, 544, 448 S.E.2d 347, 350 (1994); Ellison v. Burger King Corp., 294 Ga. App. 814, 819, 670 S.E.2d 469, 474 (2008).

B. Federal Anti-Kickback Act, 42 U.S.C. §1320a-7b(b)

Although not addressed in Defendants' Motions for Summary Judgment and their related briefs, at a January 15, 2019 summary judgment hearing before this Court, Defendant Berberian asserted for the first time that a federal anti-kickback statute, 42 U.S.C. §1320a-7b(b), precluded Plaintiffs' requested relief in this action.

Sometimes referred to as the "Anti-Kickback" or "Medicare fraud" statute, this federal law generally prohibits the payment or receipt of any remuneration to induce referrals to healthcare providers for services paid in whole or in part by federal healthcare programs unless the remuneration falls within established exceptions or "safe harbors." *See generally* 42 U.S.C. §1320a-7b(b); *see, e.g.*, United States v. Borrasi, 639 F.3d 774, 782 (7th Cir. 2011); U.S. ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045, 1048 (N.D. Ill. 2002); U.S. ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045, 1048 (N.D. Ill. 2002); U.S. ex rel.

Conner v. Salina Reg'l Health Ctr., Inc., 459 F. Supp. 2d 1081, 1090 (D. Kan. 2006). Because in this litigation Plaintiffs seek compensation in equity (unjust enrichment/quantum meruit) for the role they played in bringing the UAS/ENT Institute/Pinnacle business arrangement to fruition and seek their share of fees that went through Pinnacle and/or UAS for the allergy testing referrals contemplated under that arrangement, Defendants argue Plaintiffs do not fall under any statutory safe harbor and their requested relief is prohibited by the federal Anti-Kickback statute.

Following the hearing, the Court allowed the parties an opportunity to brief the issue. Having considered the supplemental briefs that have been submitted, the Court agrees with Plaintiffs that raising the issue for the first time at the summary judgment hearing was improper in that it denied Plaintiffs fair notice and an opportunity to develop a factual record, particularly given that the matter was first raised after discovery closed and depositions had already been taken.

> [A] purpose of the requirement that affirmative defenses be pleaded is to prevent surprise and to give the opposing party fair notice of what must be met as a defense. To allow a party to raise the issue for the first time orally at a hearing on a summary judgment motion without any notice to the opposing party is contrary to this rationale.

Hansford v. Robinson, 255 Ga. 530, 530, 340 S.E.2d 614, 615 (1986) (citation omitted).

Because Defendants did not timely raise any defense under the Anti-Kickback statute, it cannot be the basis for awarding summary judgment. Moreover, it appears that only some of the allergy services provided through the UAS/ENT Institute/Pinnacle business arrangement were paid through federal health care programs and may be implicated under the federal statute. Thus, the statue would not be entirely dispositive of the claims and issues before the Court even if properly raised.

C. Gallups Defendants' Motion for Summary Judgment

1. Claims asserted against Gallups, Individually

The Court finds that all claims asserted against Gallups individually fail as a matter of law as the record demonstrates that Gallups' interactions with Plaintiffs were carried out in his capacity as Chief Executive Officer and on behalf of ENT Institute. *See* O.C.G.A. §14-10-7(b) ("[T]he members or shareholders of any professional association organized pursuant to this chapter shall not be individually liable for the debts of, or claims against, the professional association unless such member or shareholder has personally participated in the transaction for which the debt or claim is made or out of which it arises"). *See also* Earnest v. Merck, 183 Ga. App. 271, 273, 358 S.E.2d 661, 663 (1987) ("All corporate bodies perforce must operate through individuals. The mere operation of corporate business does not render one personally liable for corporate acts...The corporate veil may be pierced where the parties themselves have disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control") (citing Trans-State, Inc. v. Barber, 170 Ga. App. 372, 374, 317 S.E.2d 242, 244 (1984)). Accordingly, summary judgment is GRANTED to Defendant Gallups as to all claims asserted against him individually.

2. Claims asserted against ENT Institute

a. Unjust Enrichment and Quantum Meruit

"[U]njust enrichment applies when as a matter of fact there is no legal contract...but where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensate for." Engram v. Engram, 265 Ga. 804, 806, 463 S.E.2d 12, 15 (1995) (quoting Smith v. McClung, 215 Ga. App. 786, 789(3), 452 S.E.2d 229 (1994)).

> "The theory of unjust enrichment is basically an equitable doctrine that the benefitted party equitably ought to either return or compensate for the conferred benefits when there was no legal contract to pay." (Citations omitted.) Hollifield v. Monte Vista Biblical Gardens, 251 Ga.App. 124, 130(2)(c), 553 S.E.2d 662 (2001). "The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received." (Citation and punctuation omitted.) Id. at 131(2)(c), 553 S.E.2d 662. For unjust enrichment to apply, "the party conferring the labor and things of value must act with the expectation that the other will be responsible for the cost." Id. Otherwise, that party, like one who volunteers to pay the debt of another, has no right to an equitable recovery. Id.

Morris v. Britt, 275 Ga. App. 293, 294, 620 S.E.2d 422, 424 (2005). "[A] claim for unjust enrichment is not a tort, but an alternative theory of recovery if a contract claim fails." Wachovia Ins. Servs., Inc. v. Fallon, 299 Ga. App. 440, 449, 682 S.E.2d 657, 665 (2009) (quoting Tidikis v. Network for Med., etc., 274 Ga. App. 807, 811(2), 619 S.E.2d 481 (2005)).

The essential elements for a quantum meruit claim are: "(1) the performance of valuable services; (2) accepted by the recipient or at his request; (3) the failure to compensate the provider would be unjust; and (4) the provider expected compensation at the time services were rendered." Amend v. 485 Properties, 280 Ga. 327, 329, 627 S.E.2d 565, 567 (2006) (citation omitted). "Quantum meruit, unlike unjust enrichment, relies upon an implied promise of compensation." Cochran v. Ogletree, 244 Ga. App. 537, 539, 536 S.E.2d 194, 197 (2000). *See* Watson v. Sierra Contracting Corp., 226 Ga. App. 21, 28, 485 S.E.2d 563, 570 (1997) ("Quantum meruit is not available when there is an express contract; however, if the contract is void, is repudiated, or can only be implied, then quantum meruit will allow a recovery if the work or service was accepted and if it had value to the recipient").

Here, it is undisputed that Souza introduced Gallups and Berberian with the intent of discussing and pursuing potential business opportunities. There is evidence in the record that for several months between June 2014 and February 2015, Souza participated in various meetings

and discussions with the Gallups Defendants and Berberian as well as their respective agents to negotiate and develop those business opportunities. Plaintiffs allege Souza introduced to the Gallups Defendants and Berberian a plan for ENT Institute to triage patients into allergy and immunotherapy services and also shared his plan for the Gallups Defendants to serve as a pilot program for integrating allergy testing and immunotherapy services into ENT practices before expanding the program nationally if it proved to be successful. Plaintiffs also claim that Souza disclosed his ideas about identifying practice locations, the timeline for rolling out the new services, revenue growth targets, and physician compensation.[39]

Although no enforceable agreement was ever reached as to Souza's interest in the business arrangements being discussed, the parties' communications plainly indicate an intent that Souza would be compensated in some fashion. Ultimately UAS provided allergy testing services to the ENT Institute's practices and Berberian and the ENT Institute profited as a result. Construing the evidence in the light most favorable to Plaintiffs, the Court finds triable issues remain as to Plaintiffs' unjust enrichment/quantum meruit claim. Accordingly, summary judgment is DENIED with respect to those claims as asserted against Defendant ENT.

b. Promissory estoppel

"In Georgia, the doctrine of promissory estoppel is codified at O.C.G.A. §13-3-44." Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 438, 620 S.E.2d 644, 649 (2005). That code section provides in relevant part:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

O.C.G.A. §13-3-44(a).

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[39] Pls' Resp. to Def Berberian's SMF, p. 21 at ¶28.

Thus, "[t]o prevail on a promissory estoppel claim, plaintiffs must show that (1) defendant made certain promises, (2) defendant should have expected that plaintiffs would rely on such promises, (3) the plaintiffs did in fact rely on such promises to their detriment, and (4) injustice can be avoided only by enforcement of the promise." Sparra v. Deutsche Bank Nat. Tr. Co., 336 Ga. App. 418, 421, 785 S.E.2d 78, 83 (2016) (quoting Canterbury Forest Assn. v. Collins, 243 Ga.App. 425, 428(2), 532 S.E.2d 736 (2000)). Importantly, "a claim predicated on a theory of promissory estoppel may lie even though the promise was made in a contract that is not legally enforceable." Hendon Properties, LLC, 275 Ga. App. at 439 (citations omitted). See also Davidson v. Maraj, 609 F. App'x 994, 1001 (11th Cir. 2015) ("A promise enforceable by promissory estoppel 'need not meet the formal requirements of a contract,' but 'it must, nonetheless, have been communicated with sufficient particularity to enforce the commitment'") (quoting Mooney v. Mooney, 245 Ga. App. 780, 538 S.E.2d 864, 868 (2000)).

Here, although no enforceable agreement establishing Souza's interest in any venture was reached and this Court has previously found the NDA unenforceable against the Gallups Defendants, the Court finds questions of material fact preclude summary judgment on Plaintiffs' promissory estoppel claim. Plaintiffs allege that, through the NDA and during the course of the parties' dealings, the ENT Institute promised that it would not attempt to do business with, or otherwise solicit any business contact or relationship created or referred by Paradise during the term of the NDA. Plaintiffs claim that based on that promise and to their detriment Souza dedicated his time and efforts developing the planned venture whereby UAS would provide allergy testing services to the ENT Institute. The record presents a jury question as to this claim. Accordingly, summary judgment is DENIED to Defendant ENT Institute on Plaintiffs' claim for promissory estoppel.

c. Breach of fiduciary duty

"It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017) (quoting Nash v. Studdard, 294 Ga. App. 845, 849-850 (2), 670 S.E.2d 508 (2008)). "[A] fiduciary duty exists 'where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal, and agent, etc.'" Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 297, 763 S.E.2d 899, 911 (2014) (citing O.C.G.A. §23-2-58).

> A confidential relationship may exist between business people, depending on the facts. However, the mere circumstance that two people have come to repose a certain amount of trust and confidence in each other as the result of business dealings is not, in and of itself, sufficient to find the existence of a confidential relationship.

Parello v. Maio, 268 Ga. 852, 853, 494 S.E.2d 331, 333 (1998) (citations omitted); O'Neal v. Home Town Bank of Villa Rica, 237 Ga. App. 325, 330, 514 S.E.2d 669, 675 (1999) (accord). *See, e.g.*, Burns v. Dees, 252 Ga. App. 598, 607, 557 S.E.2d 32, 39 (2001) (where long time employee sued the estate of his deceased employer based on an alleged "joint venture relationship", affirming summary judgment against the employee on his breach of fiduciary duty claim where record did not reflect any enforceable joint venture contract and the employee did not demonstrate the existence of either the contract or a fiduciary relationship which might establish the employer's duties).

Here, the record simply does not demonstrate a confidential or fiduciary relationship between Souza and the Gallup Defendants or between Souza and Berberian. Gallups and Berberian were Souza's professional acquaintances. During the relevant period the parties were

discussing and negotiating, at times acrimoniously, a potential business relationship that ultimately never resulted in any final agreement on material terms as to any business relationship in which Souza had an interest.[40] Thus, summary judgment is GRANTED to Defendant ENT Institute on the breach of fiduciary duty claim.

d. Attorney's Fees

Insofar as substantive claims remain for adjudication against Defendant ENT Institute, Plaintiffs' "derivative" claim for an award of attorney's fees and costs also survives. *See* Racette v. Bank of Am., N.A., 318 Ga. App. 171, 181, 733 S.E.2d 457, 466 (2012); DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 52(5), 668 S.E.2d 737 (2008). Summary judgment is DENIED to Defendant ENT Institute on the claim for attorney's fees.

e. Punitive Damages

Given the Court's rulings above, the only substantive claims that remain against Defendant ENT Institute are Plaintiffs' claims for unjust enrichment, quantum meruit, and promissory estoppel. Because all of these claims sound in equity and/or contract and none sound in tort or raise issues of willful misconduct or fraud, Plaintiffs' claim against ENT Institute for punitive damages fails as a matter of law. *See* O.C.G.A. §51-12-5.1(b) ("Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences"). *See, e.g.*, Layer v. Clipper Petroleum, Inc., 319 Ga. App. 410, 420, 735 S.E.2d

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[40] *See, e.g.*, Smith Serv. Oil Co. v. Parker, 250 Ga. App. 270, 270–71, 549 S.E.2d 485, 486 (2001) ("Unless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect") (quoting Hartrampf v. C & S Realty Investors, 157 Ga. App. 879, 881(1), 278 S.E.2d 750 (1981)); Cochran v. Ogletree, 244 Ga. App. 537, 538, 536 S.E.2d 194, 196 (2000) ("[T]he writing was formative in nature only, i.e., a promise to make an agreement. No binding contract ever came into existence, because it is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject-matter, and in the same sense") (citation punctuation omitted).

65, 74 (2012) (affirming summary judgment on punitive damages claim where plaintiff's "complaint for breach of contract, quantum meruit and breach of the [implied] covenant of good faith and fair dealing raised contract claims only" and plaintiff "pointed to no evidence of fraud"); Parsells v. Orkin Exterminating Co., 172 Ga. App. 74, 75, 322 S.E.2d 91, 93 (1984) (holding punitive damages were unavailable where the plaintiff failed to demonstrate a cause of action in fraud). Thus, summary judgment is GRANTED to ENT Institute on the punitive damages claim.

D. Defendant Berberian's Motion for Summary Judgment

Defendant Berberian, here, moves for summary judgment as to all claims asserted against him. In addition to raising many of the same arguments asserted by the Gallups Defendants in their summary judgment motion, Berberian also argues Georgia's preclusion doctrines bar Plaintiffs' claims.

1. Collateral estoppel and res judicata

Based on this Court's and the appellate court's rulings in the 2015 Action, Berberian asserts collateral estoppel and/or res judicata bars all claims against him in this action related to any purported contractual obligations, including the formation of any business.

> The doctrine of res judicata prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action. Res judicata prevents a plaintiff from instituting a second complaint against a defendant on a claim that has already been brought, after having previously been adjudged not to be entitled to the recovery sought on that claim. Three prerequisites must be satisfied before res judicata applies-(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction.

Karan, Inc. v. Auto-Owners Ins. Co., 280 Ga. 545, 546, 629 S.E.2d 260, 262 (2006). *See* O.C.G.A. §9-12-40 ("A judgment of a court of competent jurisdiction shall be conclusive

between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside").

> [T]he related doctrine of collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike res judicata, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim.

Etowah Envtl. Grp., LLC v. Walsh, 333 Ga. App. 464, 469–70, 774 S.E.2d 220, 225 (2015) (quoting Body of Christ Overcoming Church of God v. Brinson, 287 Ga. 485, 486, 696 S.E.2d 667 (2010)).

Here, Plaintiffs urge collateral estoppel and res judicata are not applicable because in order for either doctrine to apply, a "final judgment" must have been entered in a previous case. *See* Bhindi Bros. v. Patel, 275 Ga. App. 143, 144, 619 S.E.2d 814, 816 (2005) ("[I]n order for res judicata to apply, a final judgment must have been entered in the prior suit") (citing Atlanta J's, Inc. v. Houston Foods, Inc., 237 Ga. App. 415, 418(2), 514 S.E.2d 216 (1999)); Malloy v. State, 293 Ga. 350, 353–54, 744 S.E.2d 778, 782 (2013) ("Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit'") (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). A judgment is generally "final when it disposes of the entire controversy, leaving nothing for the trial court to do in the case." Bhindi Bros., 275 Ga. App. at 144 (citation omitted). Because Souza voluntarily dismissed the 2015 Action pursuant to O.C.G.A. §9-11-41(a) after it was remanded by the Court of Appeals, Plaintiffs argue there was no "final judgment" and, thus, res judicata and collateral

estoppel are inapplicable. *See* O.C.G.A. §9-11-41(a)(3) ("A dismissal under this subsection is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication upon the merits").

However, in Roth v. Gulf Atl. Media of Georgia, Inc., 244 Ga. App. 677, 536 S.E.2d 577 (2000) the Court of Appeals of Georgia held that a partial grant of summary judgment that is not expressly entered as a "final judgment" but which is appealed and affirmed on appeal may have preclusive effect even when the lawsuit is subsequently voluntarily dismissed. In Roth, the plaintiff had previously sued his employer and its majority shareholder in superior court alleging fraudulent inducement and breach of contract. Id. at 677. The superior court granted summary judgment to the employer and majority shareholder on the fraudulent inducement claims, finding the plaintiff could not demonstrate an essential element of fraud—justifiable reliance. Id. That judgment was affirmed on appeal. Id. After the case was remanded for adjudication of the remaining claims, the superior court dismissed the breach of contract claim as asserted against the majority shareholder. Id. at 678. The plaintiff then voluntarily dismissed the lawsuit without prejudice under O.C.G.A. §9-11-41(a) but later refiled the same fraud and breach of contract claims against the employer and majority shareholder in state court. Id.

In affirming the state court's grant of summary judgment to the employer and majority shareholder on res judicata grounds, the appellate court noted:

> It is true that under O.C.G.A. § 9-11-54(b) a judgment as to one or more but fewer than all of the claims or parties is not a final judgment and lacks res judicata effect unless the trial court expressly directs the entry of a final judgment and determines that there is no just reason for delaying the finality of the judgment. But if a grant of partial summary judgment is not made final under O.C.G.A. § 9-11-54(b), the party against whom summary judgment was granted has the option to either appeal or not appeal at that time. ***And if the party chooses to appeal, then the appellate decision on the summary judgment ruling is binding under O.C.G.A. §9-11-60(h).***

Id. at 679.[41] The Court of Appeals held that, because the plaintiff chose to appeal the superior court's grant of summary judgment on the fraudulent inducement claims and the judgment was affirmed on appeal, "th[e] [appellate] court's affirmance of the summary judgment ruling constitute[d] a binding final adjudication that prevent[ed] [the plaintiff] from relitigating the fraud claims" in the subsequent state court action. Id. at 680.

Here, because Souza appealed this Court's summary judgment ruling in the 2015 Action and that judgment was affirmed on appeal, that ruling has a preclusive effect with respect to claims and issues that were actually adjudicated on the merits as between Souza and Berberian and their "privies."

2. Unjust Enrichment, Quantum Meruit, and Promissory Estoppel

For the same reasons set forth in Part C(2)(a) and (b), *supra*, the Court finds questions of material fact preclude summary judgment with respect to Plaintiffs' claims against Berberian for unjust enrichment, quantum meruit, and promissory estoppel. Notably, the unjust enrichment and quantum meruit claims survived summary judgment in the 2015 Action and promissory estoppel was never asserted in the 2015 Action. Further, those claims do not depend on the existence of any enforceable contractual obligations. Defendant Berberian's Motion for Summary Judgment on the unjust enrichment, quantum meruit, and promissory estoppel claims is DENIED.

3. Breach of Fiduciary Duty

For the same reasons set forth in Part C(2)(c), *supra*, the Court finds Plaintiffs' claim for breach of fiduciary duty against Berberian fails as a matter of law. Moreover, in the 2015 Action Souza asserted a claim for breach of fiduciary duty against Berberian on many of the same

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[41] O.C.G.A. §9-11-60(h) provides: "The law of the case rule is abolished; but generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be."

grounds as are raised in this action and summary judgment was granted and affirmed on that claim such that Plaintiffs are barred from reasserting it in this action against Berberian. Berberian's Motion for Summary Judgment on the breach of fiduciary duty claim is GRANTED.

4. Fraud

In order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017) (citing Sun Nurseries, Inc. v. Lake Erma, LLC, 316 Ga.App. 832, 835 (1), 730 S.E.2d 556 (2012).

Here, Plaintiffs allege that during the parties' discussions and negotiations Berberian knowingly made false representations and omitted material facts about the "deal" being negotiated. Souza claims he relied upon those representations and omission in agreeing to introduce Berberian and Gallups and in continuing to help Defendants develop and roll out the business UAS/Pinnacle/ENT Institute. Although Souza amended his pleadings in the 2015 Action to assert a fraud claim after the case was remanded by the Court of Appeals, insofar as there was no adjudication of that claim in the prior action it is not barred by res judicata. Further, having considered the entire record the Court finds that questions of material fact preclude summary judgment on the fraud claim including whether there was any reliance by Souza on those representations and omissions and whether any such reliance was justifiable. Thus, Defendant Berberian's Motion for Summary Judgment is DENIED with respect to the fraud claim.

5. Attorney's Fees and Punitive Damages

Insofar as substantive claims remain for adjudication against Berberian, including a claim for fraud, Plaintiffs' "derivative" claims for attorney's fees and costs and punitive damages also survive. *See* Racette, 318 Ga. App. at 181; DaimlerChrysler Motors Co., 294 Ga. App. at 52(5). Thus, summary judgment is DENIED to Defendant Berberian on the claims for attorney's fees and costs and punitive damages.

CONCLUSION

Given all of the above, the Court hereby: GRANTS summary judgment to Defendant Gallups on all claims asserted against him; GRANTS IN PART and DENIES IN PART summary judgment to Defendant ENT Institute as set forth above; and GRANTS IN PART and DENIES IN PART summary judgment to Defendant Berberian as set forth above.

Since claims remain in this action, the parties are ORDERED to submit a fully consolidated pretrial order within thirty (30) days of the entry of this order. Upon receipt of the pretrial order, the Court will enter a pretrial scheduling order that will govern the final adjudication of the remaining claims.

SO ORDERED this 11th day of March, 2019.

Elizabeth E. Long

ELIZABETH E. LONG, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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