5-4-2021

Bernard Parks Jr. and BPJ Enterprises, Inc., Order on Carter & Associates Enterprises, Inc.'s Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction

John J. Goger
Senior Judge, Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BERNARD PARKS, JR. and BPJ ENTERPRISES, INC., Plaintiffs, v. KELLY KING, CIAL, LLC, OAKWOOD DEVELOPMENT GROUP, LLC, CARTER & ASSOCIATES ENTERPRISES, INC., CARTER & ASSOCIATES, LLC, COHW SUMMERHILL GL, LLC, COHW SUMMERHILL FS, LLC, COHW SUMMERHILL GA AVE, LLC, CARTER HOLDINGS ENTERPRISES, II, LLC, CHE SUMMERHILL, LLC, OAKWOOD SUMMERHILL, LLC, OAKWOOD SUMERHILL, LLC AND JOHN DOES 1-8, Defendants.	CIVIL ACTION FILE NO. 2020CV342680

ORDER ON CARTER & ASSOCIATES ENTERPRISES, INC.'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Carter & Associates Enterprises, Inc.'s Motion to Dismiss, filed January 29, 2021, and Plaintiff's Motion for Preliminary Injunction, filed March 1, 2021. Having reviewed the record and considered the

arguments of counsel during an April 16, 2021 hearing, the Court enters the following order.

1. INTRODUCTION

At its heart, this dispute concerns the contrasting claims of Plaintiffs Bernard Parks, Jr. and his company BPJ Enterprises, Inc. ("BPJ") and Defendants Kelly King and her company CIAL, LLC ("CIAL") regarding the ownership of Defendant Oakwood Development Group, LLC ("Oakwood").[1] This ownership dispute came to the fore when Oakwood was selected to serve as the minority partner in a major re-development project with Defendant Carter & Associates Enterprises, Inc. ("Carter") that involved Atlanta's Turner Field and the surrounding area (the "Turner Field Project").[2]

2. SUMMARY OF UNDERLYING FACTUAL ALLEGATIONS

[1] Hereinafter, King, CIAL and Oakwood will collectively be referred to as the "Oakwood Defendants."

[2] Initially, Carter & Associates, Enterprises, Inc. was the only Carter-related defendant named by Plaintiffs. In its answer, this Carter entity stated it was, "investigating which Carter entity or entities entered into the agreements comprising the Turner Field Project and whether Carter and Associates Enterprises, Inc. is the proper party to this action." (Carter Ans., n. 1.) Similarly, the joint answer filed by the Oakwood Defendants claimed they were not the correctly named as the parties that developed the Turner Field Project. (Oakwood Defs. Answer, Sixteenth Defense.)

On April 15, 2021, the day before the hearing on these two motions, the Defendants filed Affidavits outlining the names of the specific Carter-related and Oakwood-related entities that actually entered into the deal for the Turner Field Project. Later that day, Plaintiffs filed a Second Amended Complaint, naming these additional Carter-related and Oakwood-related entities as Defendants.

So that the record is clear, this order refers to Carter and Oakwood in the general sense as was used by the parties in briefing these two preliminary motions.

As the Court will initially be considering a Rule 12(b)(6) motion to dismiss, this statement of facts will generally be outlined from the Plaintiffs' perspective. See Webb v. Bank of Am., N.A., 328 Ga. App. 62, 63, (2014) ("In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor").

a. The Formation of Oakwood.

Parks founded Oakwood Development Group, LLC ("Oakwood") with the intent of creating a minority-owned company to pursue "government-related projects in the Metro Atlanta area, particularly in the commercial real estate development sector." (2nd Am. Compl., ¶ 17.) Oakwood was only one of Parks' business ventures, and he needed an executive to oversee the company's daily operations while he focused on business development and strategic planning. (Id., ¶¶ 22, 25.) He selected Kelly King, a high school acquaintance who had experience in the real estate sector, to help oversee Oakwood. (Id., ¶¶ 23-25.) Parks claims he made the purposeful decision to provide King with an equity stake in Oakwood, not simply hire her as an employee. (Id., ¶ 26.) Parks and King agreed that he would have a 75% percent equity stake in Oakwood and King would hold the remaining 25%. (Id., ¶ 27.)

b. The Relationship between Parks, King and Taylor and Competing Versions of the Oakwood Operating Agreement.

Scott Taylor is a high-ranking executive with Carter. (Id., ¶ 12.) Carter describes itself as a "leading national real estate investment, development, and advisory firm" that is headquartered in Atlanta. (Carter Ans., p. 1.) Parks and Taylor sometimes discussed business strategies. (2nd Am. Compl., ¶¶ 19, 28.) After King joined Oakwood, Parks had discussions with Taylor about "the best way to position Oakwood for maximum growth." (Id., ¶ 28.) According to Parks, Taylor advised Parks to make King a majority member of Oakwood so that the company would qualify as a "double minority, i.e. African American and female-owned." (Id.)

Parks followed Taylor's advice and made King, via CIAL, a 51% majority owner of Oakwood while Parks, via BPJ Enterprises, would have a 49% ownership share. (Id., ¶ 29.) Parks alleges that on January 2, 2015 both he and King signed an operating agreement, bearing a July 14, 2014 effective date ("Parks Version of the Oakwood OA"). (2nd Am. Compl., ¶ 30, Ex. A.) Attached to Plaintiffs' initial Complaint was a partially executed copy of the Parks Version of the Oakwood OA that only reflected King's signature. (Compl., ¶ 23, Ex. A.)

King disputes Plaintiffs' allegations regarding the formation of Oakwood. (Oakwood Defs. Ans. ¶¶ 15, 21, 23.) Her answer states, "[a]t the time of Oakwood's incorporation, July 10, 2014, Parks and King were having preliminary discussions

regarding joint ownership of Oakwood as well as the specific ownership interest[s] . . .” (Id., ¶¶ 15, 21.) However, King claims Parks was hesitant to execute the operating agreement, and the two continued their ownership discussions during the following several months until early January of 2015. (Id.) On January 2, 2015, King alleges the two reached an agreement that she, through her company CIAL, would be the 100% owner of Oakwood. (Id., ¶¶ 15, 21.) Attached to the Oakwood Defendants’ answer is a copy of the Oakwood operating agreement she executed as the sole owner and which she claims governs Oakwood (“King Version of the Oakwood OA”). (Id., ¶ 21, Ex. A.)

Carter denied Plaintiffs’ allegation that Parks and King came to an agreement about the ownership of Oakwood. (Carter Ans., ¶ 23.) Further, Carter filed its motion to dismiss which stated, upon information and belief, “Parks *never* executed a copy” of the agreement Plaintiffs attached to their initial complaint (emphasis in original). (Carter MTD, p. 5.)

After the Oakwood Defendants filed their answer and Carter filed its answer and motion to dismiss, Plaintiffs amended their complaint to include the fully executed Parks Version of Oakwood OA. (Am. Compl., ¶ 23, Ex. A; 2nd Am. Compl., ¶ 30, Ex. A.).

c. Oakwood Secures Business Deals in the Affordable Housing Sector.

While Oakwood was formed to pursue opportunities in commercial real-estate development, it also performed some work in the affordable housing sector. (2nd Am. Compl., ¶¶ 34-42.) Specifically, sometime in 2014, an agreement was formalized for Oakwood to co-develop affordable housing projects with New Columbia Residential ("New Columbia"). (Id., ¶ 36.) Parks had a longstanding relationship with New Columbia's founder and principal Noel Kahalil that Parks was able to leverage into a deal benefiting Oakwood. (2nd Am. Compl., ¶ 34.) As a result of projects completed with New Columbia, Oakwood became entitled to certain developer fees. (Id., ¶ 37.)

Oakwood also teamed with Hunt Companies to assist in a project for Atlanta Housing Authority concerning the re-development of Herndon Homes, a former low-income housing project. (2nd Am. Compl., ¶ 39.) Oakwood was responsible for the construction and development all the single-family homes built in connection with the project. (Id., ¶ 41.) Parks alleges he was instrumental in securing this opportunity for Oakwood. (Id., ¶ 35.)

d. Oakwood, Carter and the Re-development of Atlanta's Turner Field.

In 2013, the City of Atlanta (the "City") and the Atlanta Fulton County Recreational Authority ("AFCRA"), which owned Turner Field and many surrounding parcels of land desired to re-develop the area and sought proposals from different developers about their visions for improving the area. (Id., ¶ 44.)

Carter describes the Turner Field Project, as it ultimately came to be developed, as "an 83-acre mixed use project that includes the development of 35 acres into a mixed use neighborhood including corporate office uses, traditional multi-family apartments, specialty and neighborhood retail and private student apartments." (Carter Ans., p. 2.) Carter claims that presently over $510 million has been invested or is planned to be invested within or nearby the development. (Id.)

Carter requested that Oakwood become its partner for the re-development bid. (2nd Am. Compl., ¶ 44.) Plaintiffs claim that Oakwood was a "compelling partner for Carter" because, consistent with Taylor's earlier advice to Parks, Oakwood was "a majority African American and female owned company." (Id., ¶ 47.) Plaintiffs further claim this particular opportunity to partner with Carter was largely due to relationship Parks had fostered with Taylor. (Id., ¶ 45.)

According to Plaintiffs, if their bid was successful, as the deal was initially structured, Oakwood and Carter would be required to make a $30 million dollar capital contribution. (Id., ¶ 50.) Plaintiffs contend a "standard" or "traditional" minority participation interest in a development project would be 33% which would have required Oakwood to contribute $10 million to the Turner Field Project. (Id.) Because Oakwood was unable to contribute this amount, "it was forced to accept a reduced rate of 10% of the Turner Field Project," such that the "equity commitment, land ownership and receipt of developer fees" would be divided with 90% attributed

to Carter and 10% to Oakwood.[3] (Id., ¶¶ 50-53.) Carter and Oakwood memorialized their agreement in a non-binding letter of intent ("LOI"). (Id., ¶ 54.).

e. Plaintiffs Allege Carter Devised a Scheme to Hide Parks' Involvement in the Turner Field Project.

Plaintiffs allege, "[d]evelopers bidding on the Turner Field Project . . . had to be sensitive to how the redevelopment project would be received (and perceived) by residents of the surrounding neighborhoods." (2nd Am. Compl., ¶ 56.) For reasons not clearly specified in the record, it is undisputed that "[s]ome neighborhood organizers expressed . . . opposition to Parks' involvement . . ." (2nd Am. Compl., ¶ 57; King Ans., ¶ 49; Carter Ans., ¶ 49.)

Plaintiffs contend Carter, acting through Taylor, devised a scheme that would allow it to publicly claim Parks was not associated with the Turner Field Project, while privately promising Parks he would remain tied to the deal. (2nd Am. Compl, ¶¶ 57-58.) Parks acquiesced to the plan that he "not publicly associate himself" with the deal, but he claims to have never agreed that his interest in Oakwood or the Turner Field Project would be diminished. (Id., ¶¶ 59-60.)

f. Georgia State University Joins the Carter / Oakwood Bid, and their Joint Proposal was Selected by the City and AFCRA.

[3] Carter contends the Turner Field Project involved numerous written agreements, and Plaintiffs' pleadings offer an oversimplified description of the deal. (Carter Ans., ¶ 46.)

Before the successful bid was announced, there was a major turn of events that dramatically altered the deal. (Id., ¶ 62.) Georgia State University ("GSU") joined the Carter/Oakwood bid and agreed to acquire all of the real estate necessary for the Turner Field Project. (Id., 63.) Accordingly, Plaintiffs assert "the Carter/Oakwood joint venture would need to contribute only $3 million instead of $30 million" for the Turner Field Project such that Oakwood would have been able to make the required one-third capital contribution necessary to participate as a "traditional" minority partner. (Id., ¶¶ 63-64.) Carter admits GSU joined the deal and agreed to purchase the necessary real estate but denies the financial implications outlined by Plaintiffs.[4] (Carter Ans., ¶ 55.) Attached to Carter's Answer is the formal response of Carter/GSU/Oakwood to the City's and AFCRA's Request for Proposal, and it indicates the proposal was submitted on or around November 20, 2015. (Carter Ans., ¶ 38, Ex. A.)

In light of GSU's participation, Parks tried to renegotiate the amount of Oakwood's minority stake, but Carter refused to change the deal's terms. (Compl.,

[4] Carter claims its expertise in the area of public-private partnership projects led to GSU's participation in the deal.

> It was because of this expertise that Carter . . . was able to secure an exclusivity agreement with the [GSU] Foundation to form a public-private partnership to acquire and redevelop the parcel of land housing Turner Field. [Cit.] Carter envisioned that [GSU] would be the most likely end-user for this tract of land given its need for athletic facilities, dormitories, and is proximity to the University. Carter's successful negotiation of the exclusivity agreement secured the success of the Turner Field Project.

(Resp. to Pls. Mot. for Injunc. Relief, pp. 2-3.)

¶ 57; Carter Ans. ¶ 57.) During these renegotiation attempts, the City and AFRCA accepted the Carter / Oakwood / GSU team's proposal. (2nd Am. Compl., ¶ 56.)

g. Carter and King Conspire to Oust Parks from the Turner Field Project and Oakwood.

Plaintiffs claim that because of Parks' vocal efforts to increase Oakwood's stake in the deal, "Carter realized that [it] needed to push Parks out of the Turner Field Project" while King separately viewed the problems with Parks and the Turner Field Project as an opportunity for her to take full ownership of Oakwood. (2nd Am. Compl., ¶ 73.) Accordingly, Plaintiffs allege Carter and King conspired to remove Parks from both the Turner Field Project and Oakwood, and they used the concerns over neighborhood opposition to Parks' involvement with the project to disguise their efforts. (Id., ¶¶ 74-78.)

Plaintiffs claim Carter and King attempted to lure Parks into signing agreements disclaiming his role in Oakwood and the Turner Field Project, but he declined. (Id., ¶¶ 77-79.) Plaintiffs further claim when their efforts to entice Parks to sign these documents failed, they drafted their own documents hiding Parks' role in these re-development efforts. Specifically, on December 30, 2016, shortly before the closing on the Turner Field Project, both Taylor and King signed a letter agreement affirming that Parks was not authorized to act in any capacity for Oakwood on the Turner Field Project. (Carter Ans., ¶ 68; Ex. C.) Also, Parks contends Carter and King drafted an entirely new operating agreement for Oakwood

reflecting King as the sole owner which King signed and which is the contract being submitted to the Court as the King Version of the Oakwood OA (2nd Am. Compl., ¶ 78.) Plaintiffs asserts that he and the Defendants all understood this was a "dummy agreement" meant to pacify any neighborhood opposition regarding Parks. (Pls. Mot. for Injunc. Relief, p. 10.) Plaintiffs further claim that, "[a]lthough King and Parks understood and agreed this operating agreement did not supersede, rescind or in any way alter the terms of [Parks Version of Oakwood OA], King has now seized upon the existence of the document to claim that Plaintiff BPJ Enterprises has never been a Member of Oakwood." (2nd Am. Compl., ¶ 78.)

h. Parks Claims he Secured the Funds Necessary for Oakwood to Close on the Turner Field Project.

As closing for the Turner Field Project approached, Parks claims Oakwood lacked the funds necessary for its $300,000 contribution, and King relied on Parks to find the money. (2nd Am. Compl., ¶¶ 80-81.) Parks alleges he "took $300,000 that was "owed to him and, on behalf of Oakwood had it redirected into the Turner Field Project." (Id., ¶ 82.) The funds were transmitted via a wire transfer. (2nd Am. Compl., ¶ 173.) While Plaintiffs' pleadings offer no specifics as to who provided the $300,000, reviewing the Defendants' respective answers, these funds came from Kahalil, the founder of New Columbia. (Carter Ans., ¶ 73; Ex. D; King /CIAL Ans., ¶ 73.) Carter admits it received a wire of $300,000 from Kahalil as Oakwood's share

of the capital contribution due at closing, but, according to Carter, it used only $225,330 and returned the excess. (Carter Ans., ¶¶ 71, 73; Ex. D.)

According to Plaintiffs, once the Carter and King secured Parks' financial assistance with the closing, Defendants "accelerated their efforts" to remove Parks from the Turner Field Project and from Oakwood. (2nd Am. Compl., ¶ 85.) Parks claims Carter and King excluded Parks from all communications regarding the Turner Field Project whereas they had previously "sought his guidance and input." (Id.) Plaintiffs also claim King froze Parks out of all the company systems and "went on to cancel, and or transfer to other entities, many development deals that Parks had sourced for Oakwood" including "certain aspects of the Turner Field Project, the Herndon Home Project and deals with New Columbia." (Id., ¶ 86.)

III. CASE HISTORY

The Turner Field Project closed in early January of 2017. However, Plaintiffs did not file their complaint until November 19, 2020, almost four years later. They named Carter, King, CIAL, Oakwood and a number of John Does as Defendants. Plaintiffs described the John Doe defendants as entities formed by the Defendants to funnel development fees and other revenue as the Turner Field Project moves towards completion. (Compl., ¶ 7.)

On January 29, 2021, Carter filed an Answer and the instant Motion to Dismiss. The Oakwood Defendants filed their answer on February 4, 2021. On

March 1, 2021, Plaintiffs filed their Amended Verified Complaint apparently attempting to address some of the issues raised by Carter's motion. That same day Plaintiffs also filed a Motion for Preliminary Injunction.

On April 15, 2021, one day before the hearing on the instant motions, Carter filed the Affidavit of Scott Stringer, an officer of Carter who averred that Carter had never signed any agreements related to the Turner Field Project and had never received or distributed any fees related thereto. (Stringer Aff., ¶ 7.) He identified a number of Carter- and Oakwood-related entities that were tied to the Turner Field Project, including Carter & Associates, LLC, COHW Summerhill GL, LLC, COHW Summerhill FS, LLC, COHW Summerhill GA AVE, LLC, Carter Holdings Enterprises II, LLC, CHE Summerhill, LLC, and Oakwood Summerhill, LLC. (Id., ¶¶ 9-10; 13.) That same day, the Oakwood Defendants filed King's Affidavit identifying various Carter-related and Oakwood-related entities involved in the Turner Field Project. (King Aff., ¶¶ 5-8.) Later that same evening, Plaintiffs filed their Second Amended Complaint, naming additional Carter- and Oakwood-related entities as Defendants.[5]

IV. LEGAL ANALYSIS

a. Carter's Motion to Dismiss.

[5] See n. 2, *supra*.

Plaintiffs have lodged the following claims against Carter: aiding and abetting the breach of fiduciary duty; tortious interference with a business relationship; unjust enrichment; quantum meruit; Georgia RICO violations, and conspiracy to commit Georgia RICO violations. They also seek an accounting as well as a preliminary injunction and imposition of a constructive trust. Carter contends Plaintiffs have failed to state a claim upon which relief can be granted as to each of these claims.

Carter's motion to dismiss is based upon O.C.G.A. § 9-11-12(b)(6). According to the well-established standard,

> a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Glob. Payments, Inc. v. InComm Fin. Servs., Inc., 308 Ga. 842, 842–843 (2020) (Citation and punctuation omitted).

Georgia law further provides, "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." O.C.G.A. § 9-11-10(c). "Thus, in ruling on a motion to dismiss, a trial court is authorized to consider exhibits

attached to and incorporated into the complaint." Lord. v. Lowe, 318 Ga. App. 222, 223 (2018) (Citation omitted).

i. Aiding and Abetting Breach of Fiduciary Duty and Tortious Interference with Business Relationship

Plaintiffs allege that King and CIAL owed them a fiduciary duty and Carter intentionally sought to and did procure a breach of that duty.[6] They have asserted two claims based upon this same conduct, aiding and abetting the breach of a fiduciary duty and tortious interference with a business relationship. (2nd Am. Compl., ¶¶ 115-119, 121-124.)

Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19 (2006) outlines the elements of an aiding and abetting the breach of fiduciary duty claim.

> [R]egardless of whether denominated 'aiding and abetting a breach of fiduciary duty,' 'procuring a breach of fiduciary duty,' or 'tortious interference with a fiduciary relationship,' Georgia law authorizes a plaintiff to recover upon proof of the following elements: (1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure;[13] (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

[6] Initially Carter argued, based on the Plaintiff's original complaint which only presented a copy of the Oakwood operating agreement that was not fully executed, Plaintiffs were unable to establish King/CIAL owed any fiduciary duty to Plaintiffs. (Carter MTD, pp. 5-6; 11-12.) However, in light of Plaintiffs' amended complaint that both alleges the Parks Version of the Operating Agreement was signed by all parties and attaches a copy of that fully executed agreement, the finds this argument is no longer viable under Rule 12(b)(6).

Id. at 25-26. These are the same general elements as a tortious interference claim.[7]

As part of the first element necessary to establish liability under either cause of action, the alleged wrongdoer must have acted without privilege. In the context of a tortious interference claim, Georgia courts have determined only one who is an "intermeddler or stranger to the business relationship at issue" acts without privilege and can tortiously interfere with a contract or business relationship. ASC Const. Equipment USA, Inc. v. City Commercial Real Estate, Inc., 303 Ga. App. 309, 313 (2010). The Court of Appeals has applied this same approach to privilege when considering claims for aiding and abetting the breach of a fiduciary duty. American Mgmt. Servs. East, LLC v. Fort Benning Family Communities, LLC, 333 Ga App. 664, 687-688 (2015) (physical precedent only). See also U.S. Capital Funding VI, Ltd. v. Patterson Bankshares, Inc., 137 F.Supp. 3d 1340, 1378 (2015) (pursuant to Georgia law, stranger doctrine applies to claim of aiding and abetting the breach of fiduciary duty).

[7] Adv. Tech. Servs., Inc. v. KM Docs, LLC, 330 Ga. App. 188, n. 6 (2014) provides,

> [t]he elements of tortious interference with contractual relations, business relations, or potential business relations are:
>
> (1) improper action or wrongful conduct by the defendant without privilege;
> (2) the defendant acted purposely and with malice with the intent to injure;
> (3)the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and
> (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Carter argues this doctrine applies, claiming it is not a stranger to the contract or business relationship at issue and was, thus, acting with privilege sufficient to bar these two claims. (Carter MTD, pp. 12-15.) The Court agrees.

In the seminal case of Atlanta Market Ctr. Mgmt. Co. v. McLane, 269 Ga. 604 (1998), the Georgia Supreme Court approved an expansive approach to determining who is properly considered a stranger, determining that just because one is not a party to a contract they are automatically deemed a stranger to the contract.

> [I]in order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract. In other words, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships.

Id., 609 (1998) (Citations omitted.) In this same vein, when considering a tortious interference claim, a defendant acts with privilege if they have a legitimate economic interest or relationship to a contract with which they are alleged to have interfered. Disaster Servs., Inc. v. ERC P'ship, 228 Ga. App. 739, 741 (1997).

Here, Plaintiffs expressly allege King and CIAL breached their fiduciary duty to Plaintiffs in ways that specifically included the Turner Field Project.[8]

[8] Specifically, Plaintiffs allege King and CIAL breached their fiduciary duties to Plaintiffs when they:

> (i) improperly conspired with Carter to deprive Plaintiffs of the benefit of their interest in Oakwood and funds they contributed to the Turner Field Project; (ii) conspired with Carter to transfer Oakwood's interest in the Turner Field Project to entities other than Oakwood and in which Plaintiffs held no interest; (iii) failed to account to Plaintiffs accurately regarding Oakwood's interest in the Turner Field Project . . .

(2nd Am. Compl., ¶ 103.)

Accordingly, Plaintiffs are hard-pressed to argue that Carter, who Plaintiffs themselves acknowledge was Oakwood's partner in the Turner Field Project, is a stranger to the business relationship at issue. Therefore, the Court finds Plaintiffs have failed to state a claim upon which relief can be granted for these two business interference torts.

ii. Unjust Enrichment and Quantum Meruit

With regard to the alternate equitable claims of unjust enrichment and *quantum meruit*, the Court agrees with Carter that these claims are precluded by the contract between Oakwood and Carter. (Carter MTD, pp. 15-16, 18.)

As an alternate theory of relief, Plaintiffs seek to recover from all Defendants on a theory of unjust enrichment. Plaintiffs generally allege all "Defendants have unjustly benefited from Plaintiffs' provision of capital and other services for the Turner Field Project and their improper denial of the benefits bestowed by Plaintiffs' interest in Oakwood . . . (emphasis added.)" (2nd Am. Compl., ¶ 133.)

> Unjust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for. 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 (2009) (Citations and punctuation omitted.) Here, the only potentially failed contract referenced in the

pleadings concerns the Oakwood operating agreement to which Carter was not a party.

Plaintiffs' pleadings clearly assert Oakwood had an agreement with Carter to serve as its minority partner in the Turner Field Project. (Id., ¶¶ 51-53.) Plaintiffs allege Parks "sourced" the $300,000 required for the closing pursuant to that agreement.[9] (Id., ¶¶ 51-53, 80.) They also allege that in exchange for this 10% capital contribution Oakwood would receive a corresponding amount of land ownership, developer fees and other revenues from the Turner Field Project. (Id., ¶¶ 51-53.) Plaintiffs own pleadings reflect that Parks argued vociferously and unsuccessfully to alter that agreement once GSU joined the Carter/Oakwood bid. (2nd Am. Compl., ¶¶ 66-67.)

In Tidikis v. Network for Med. Commc'n & Research, 274 Ga. App. 807, 811 (2005), an alternate unjust enrichment claim failed where the benefit plaintiff allegedly provided defendants was conferred pursuant to a contract none of the parties disputed. Similarly, here the capital and services Plaintiffs provided for the benefit of Carter and the Turner Field Project were performed pursuant to an agreement between Carter and Oakwood that is not being challenged. Accordingly,

[9] Plaintiffs expressly state, "Parks' funds served as Oakwood's capital contribution to the Turner Field Project." (Am. Compl., ¶ 74.)

the Court finds Plaintiffs have failed to state a claim for unjust enrichment against Carter.

Plaintiffs have also asserted an alternate claim for *quantum meruit* against all Defendants. *Quantum meruit* "is an equitable doctrine based on the concept that no one who benefits from the labor and materials of another should be unjustly enriched thereby." Memar v. Jebraeilli, 303 Ga. App. 557, 560 (2010). A claim for *quantum meruit* differs from a claim for unjust enrichment because it involves an "implied contract" and requires a showing that the claimant anticipated compensation. Yoh v. Daniel, 230 Ga. App. 640, 642 (1998). However, like unjust enrichment, the existence of an express contract prohibits a *quantum meruit* recovery which is equitable in nature. See Dooley v. Dun & Bradstreet Software Servs., Inc., 225 Ga. App. 63, 66 (1997)("[a] claimant may not recover under the theory of quantum meruit when an express contract covers all the claimed rights and responsibilities of the parties").

Plaintiffs' response to Carter's Motion to Dismiss make clear that the beneficial services they provided to Carter in relation to the Turner Field Project were performed as representatives of Oakwood. (Pls. Resp. to Carter's MTD, p. 22.) As discussed above, Plaintiffs' pleadings clearly affirm the existence of a contract between Carter and Oakwood regarding the Turner Field Project. Therefore, Plaintiffs' pleadings fail to state a claim for *quantum meruit*.

iii. Georgia RICO and Conspiracy to Violate Georgia RICO

In Z-Space, Inc. v. Dantanna's CNN Ctr., LLC, 349 Ga. App. 248, 252 (2019), the Georgia Court of Appeals offered a useful summary of Georgia's RICO statute.

> The Georgia civil RICO statute prohibits a person from obtaining money or participating in an "enterprise" through a 'pattern of racketeering activity.' O.C.G.A. § 16-14-4 (a), (b). The term 'racketeering activity' means the commission of at least one of the enumerated types of crimes listed in the RICO statute, also known as predicate offenses. O.C.G.A. § 16-14-3 (5) (A), (C). [Cit.] As is relevant here, a 'pattern' means '[e]ngaging in at least two acts of racketeering activity.' O.C.G.A. § 16-14-3 (4) (A).

Carter claims that Plaintiffs have failed to plead the predicate offenses required for a civil RICO claim. (Carter, MTD, pp. 18-21.) As predicate offenses, Plaintiffs have alleged theft by taking and/or theft by deception as well as wire fraud.

Theft Offenses. O.C.G.A. §16-8-2 provides, "a person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property. . ." O.C.G.A. § 16-8-3(a) provides, "[a] person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property."

Here, the subject of the alleged theft is the $300,000 that Parks "sourced" and "redirected" to help close the Turner Field Project. (2nd Am. Compl., ¶¶ 79-82, 147, 149.) Defendants argue the pleadings do not support a theft because Plaintiffs fail

to allege that the funds belonged to them. Rather, Plaintiffs allege that a third party who was indebted to Parks supplied the funds on behalf of Parks. (Id. at ¶ 82.) Without much in the way of authority, Defendants contend these funds were not the property of Parks and, thus, could not be stolen from him. (Carter MTD, pp. 19-20.) Little information is alleged about this $300,000, and, the Court is unable to declare based on the pleadings alone that Plaintiffs could offer no evidence within the framework of their complaint to support their theft claims.

Wire Fraud. Z-Space also describes the use of mail and wire fraud as a predicate offenses under Georgia's RICO statute. "Mail and wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." Id.

In attacking Plaintiffs' mail and wire fraud pleadings, Carter crafts an argument, stitching together federal cases from all over the country spanning the last 35 years. (Carter MTD, pp. 20-21.) The gist of Carter's argument is that federal courts have indicated concerns that mail and wire fraud allegations are being used too broadly in efforts to impose federal RICO liability on what are essentially soured business transactions.[10]

[10] Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000) generally outlines the policy concerns at the heart of Carter's argument.

> [w]e are cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice. This caution is designed to preserve a distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity. We have reserved

Specifically, Carter argues Plaintiffs have failed to plead how the wire fraud claim was "integral" to the Defendants' fraudulent scheme. Carter primarily relies on United States v. Hewes, 729 F.2d 1302, 1322 (11th Cir. 1984). "We refuse to expand [federal mail fraud statute] to criminalize any use of the mails by parties to a fraudulent scheme. The proof must show that the use of the United States mail played an 'integral' rather than incidental or tangential role in the fraudulent scheme. (Citation and punctuation omitted)." Carter cites this short passage from Hewes without any context. The case itself concerned an appeal from a criminal conviction that occurred after a full-blown trial, and the application of this general notion in the context of Rule 12(b)(6) motion to dismiss is unclear. Again, based on the pleadings alone, construing them liberally and granting every inference to Plaintiffs, the Court finds the Georgia RICO count has sufficiently stated a cause of action upon which relief may be granted.

Carter contends that because Plaintiffs failed to state a viable RICO claim, their claim for conspiracy to violate Georgia's RICO claim also fails. (Carter MTD, p. 21.) See generally Fuller v. Home Depot Servs., LLC, 512 F. Supp.2d 1289, 1295 (N.D. Ga. 2007)(dismissing plaintiff's RICO conspiracy claim because

RICO liability for ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. (Citations and punctuation omitted).

plaintiff failed to sufficiently state a substantive RICO claim against defendant). Based on Carter's reasoning, the conspiracy claim also survives this Rule 12(b)(6) motion to dismiss.

iv. Accounting

Plaintiffs expressly seek "an equitable accounting relating to the Turner Field Project and Oakwood's use, allocation, disbursement, receipt, and appropriation of funds . . ." Carter outlines three separate reasons why Plaintiffs have failed to state a claim for an accounting. (Carter MTD, pp. 22-23.)

First, Carter asserts Plaintiffs have failed to outline a circumstance that would permit an equitable accounting. However, O.C.G.A. § 23-2-70(2) allows for "[e]quity jurisdiction over matters of account" in "[c]ases where accounts are complicated and intricate." Here, the pleadings suggest an incredibly large re-development project with many facets and sub-deals where money could be flowing back to Oakwood in the form of fees and other revenues.

Second, Carter asserts Plaintiffs have an adequate remedy at law that would bar this equitable relief, citing Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 261 (1977). Herring provides, "[a]n equitable accounting is not a proceeding to which every litigant has a right. An equitable accounting is granted only in carefully prescribed and determined circumstances such as when an accounting at law is inadequate." Carter vaguely asserts that monetary damages are sufficient to make

Plaintiffs whole and argues any accounting claim should be directed solely against Oakwood. (Carter MTD, pp. 7; 22-23.) However, construing the pleadings liberally, Carter conspired with King to push Plaintiffs out of Oakwood, thus separating them from Turner Field Project and the revenues it could generate. (2nd Am. Compl, ¶¶ 57-58, 67, 73-74.) Further, the pleadings suggest that after having expressly disavowed that Parks would play any role in the Turner Field Project, Carter knew that Parks was responsible for providing the funds Oakwood used to close the deal. (2nd Am. Compl., ¶ 85.) Plaintiffs have also alleged that, unlike Parks, King was subservient to Carter which led Carter to conspire with her so that it could more easily dominate her in the Turner Field Project. (Id., ¶ 71-72.) Carter admits sometime in 2018, after Plaintiffs had been frozen out of the deal, Oakwood assigned a portion of its interest in the Turner Field Project back to Carter, ending or diminishing an income stream for Oakwood. (Carter Ans., ¶ 77.) The pleadings provide little information about this transaction. Giving every reasonable inference to their pleadings and the peculiar circumstances they outline, the Court is unable to determine at this stage of the proceedings that Plaintiffs have an adequate remedy at law for Carter's alleged misconduct.

Finally, Carter argues an accounting is inappropriate because Plaintiffs are unlikely to prevail on the merits of their claims. (Carter MTD, p. 23) See Riverview Condo. Ass'n v. Fed. Bank, FSB, 285 Ga. App. 7 (2007)(equitable accounting claim

is dependent upon whether alleged facts demonstrate "that on an accounting the petitioner will likely be entitled to recover judgment for some amount.") The Court finds this argument, requiring it to evaluate Plaintiffs' likelihood of prevailing on their claims, is inappropriate for a motion to dismiss under O.C.G.A. § 9-11-12(b)(6). Global Payments.

v. Preliminary Injunction and Constructive Trust

As detailed below, in the exercise of its discretion, the Court has determined not to enter a preliminary injunction. However, Plaintiffs have expressly sought the entry of a permanent injunction. (2nd Am. Compl., ¶ 91.) As the Court finds Plaintiffs could, within the framework of their complaint, present evidence to support the entry of a permanent injunction or the imposition of a constructive trust, it finds the outright dismissal of this count to be inappropriate at this stage of the proceedings.

vi. Punitive Damages and Attorney's Fees

Carter's sole argument for dismissal of the punitive damage and attorney's fees claims was based on their derivative nature. (Carter MTD, p. 24.) ABH Corp., v. Montgomery, 356 Ga. App. 703, 706 (2020). As underlying claims remain in the case that could support the award of punitive damages and/or attorney's fees, these derivative claims survive dismissal.

b. Plaintiff's Motion for Preliminary Injunction.

Plaintiffs ask the Court to enjoin Defendants from: (1) transferring any developer fees derived from the Turner Field Project by directing that all such fees be held in escrow to be distributed only by agreement of the parties or by Court order, (2) selling or conveying any land, property or parcels in which Oakwood and Carter (or any entities affiliated therewith) hold a joint interest and (3) taking any other actions whatsoever that could in any way harm or be adverse to the interests of the Plaintiffs. (Pls. Mot. for Prelim. Inj., p. 3.)

i. Standard of Review for Granting Injunctive Relief

"Whether an interlocutory injunction is warranted is a matter committed to the discretion of the trial court." TMX Fin. Holdings, Inc. v. Drummond Fin. Serv., LLC, 300 Ga. 835, 836 (2017). In exercising that discretion, a court should balance the following four factors:

> (1) whether there exists a substantial threat that a moving party will suffer irreparable injury if the injunction is not granted; (2) whether the threatened injury to the moving party outweighs the threat and harm that the injunction may do to the party being enjoined; (3) whether there is a substantial likelihood that the moving party will prevail on the merits at trial; and (4) whether granting the interlocutory injunction will not disserve the public interest.

Id. All four of these factors need not be demonstrated in order to secure an interlocutory injunction; however, "a trial court must keep in mind that an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised." Id. at 836-837.

ii. *Evaluation of the Four Factors.*

Substantial Threat of Irreparable Injury. The Court finds Plaintiffs have failed to offer persuasive evidence they face a substantial threat of irreparable injury. "[I]in seeking injunctive relief a plaintiff must show that he is in great danger of suffering an imminent injury for which he does not have an adequate and complete remedy at law. Am. Mgmt. Servs. E., LLC v. Fort Benning Family Communities, LLC, 313 Ga. App. 124, 127 (2011). The Turner Field Project closed in January of 2017, and Plaintiffs claim that Defendants began their "abrupt" freeze-out of Plaintiffs almost immediately thereafter. (2nd Am. Compl., ¶85.) The record suggests but does not detail the sporadic attempts to resolve the dispute in the interim; however, Plaintiffs have offered no wholly satisfactory explanation why they delayed almost four years to formally pursue their claims. This extreme delay belies Plaintiffs' claims they face irreparable harm. In this respect, the Court adopts the reasoning of Tough Mudder, LLC v. Mad Cap Events, LLC, No. 6:12-CV-354-ORL-31, 2012 WL 1946073, at *2 (M.D. Fla May 30, 2012) which held, "the failure to act quickly undercuts the sense of urgency that ordinarily accompanies [a motion for preliminary injunctive relief] and suggests that there is no real threat of irreparable harm."

Balancing of Harms. Plaintiffs' attempts to minimize the impact their requested injunction would have on Carter or Oakwood are unconvincing. (Pls. Mot.

for Injunc. Relief, p. 19.) Oakwood is only a small interest holder in the Turner Field Project, yet Plaintiffs seek to have all the development fees the project generates placed in an escrow account. The Court finds such an injunction would threaten far greater harm to Carter and Oakwood and the other Defendants than the harm faced by Plaintiffs should an injunction not issue. The Court is not convinced Plaintiffs' late-minute suggestion for a neutral arbiter to monitor and disburse funds from the escrow account would alleviate the serious potential harm to the Defendants.[11]

Substantial Likelihood that Plaintiffs Will Prevail on the Merits. The success of Plaintiffs' claims will largely hinge on the ability to demonstrate that Parks, through BPJ, had an ownership interest in Oakwood. Dueling versions of the Oakwood operating agreements create a key dispute in this matter, and Defendants have directly challenged the authenticity of the Parks Version of the Oakwood OA. A matter of concern for this Court is the Plaintiffs' failure to provide the fully executed copy of the Parks Version of the Oakwood OA when their complaint was originally filed. Their decision to initially present the Court with a partially executed version of such an important document when a fully executed version was available has not been explained in a manner that is meaningful or convincing.

[11] In considering the potential harm an injunction could cause Defendants, the Court notes that Plaintiffs came to the injunctive hearing unprepared to address their ability or willingness to post security as a prerequisite to the entry of the requested injunction. O.C.G.A. § 9-11-65(c).

Moreover, another key factor in the case is Plaintiffs' assertion that the $300,000 used to fund Oakwood's capital contribution at the closing of the Turner Field Project came from Parks. The allegations in the Plaintiffs' pleadings about the origin of these fees are vague. Plaintiffs do not even identify who provided the money, merely sating, "Parks took $300,000 that was owed to him and, on behalf of Oakwood, had it redirected to the Turner Field Project." (2nd Am. Compl., ¶ 82.) Not only do Plaintiffs' allegations lack specificity, they were disputed. In their joint answer, the Oakwood Defendants assert the $300,000 was wired to Carter "as a result of discussions and a prior business relationship between Kahalil and King." (Oakwood Defs. Ans., ¶ 73.)

In light of questions about the authenticity of the Parks Version of the Oakwood Operating Agreement and the origin of funds used to close on the Turner Field Project, the Court is unable to determine the likelihood that Plaintiffs will prevail on the merits of their claims at trial.

Public Interest. The Court finds the requested injunction could cause a disruption or delay in the forward progress of the Turner Field Project that would disserve the public interest. (Stringer Aff., ¶¶ 14-16, 18.)

Considering these four factors, most particularly those factors regarding the threat of irreparable harm and the likelihood of Plaintiffs to prevail on the merits of their claims, the Court declines to enter Plaintiffs' requested preliminary injunction.

V. CONCLUSION

In light of the foregoing it is hereby ordered that:

(1) Carter's Motion to Dismiss be **GRANTED IN PART** as to Plaintiff's claims against Carter for Aiding and Abetting the Breach of Fiduciary Duty, Tortious Interference with Business Relationship, Unjust Enrichment, and Quantum Meruit and **DENIED IN PART** as to all of Plaintiffs' remaining claims against Carter and

(2) Plaintiffs' Motion for a Preliminary Injunction be **DENIED**.

So ordered this 4th day of May, 2021.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Metro Atlanta Business Case Division
Superior Court of Fulton County
Atlanta Judicial Circuit

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