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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-013700 05/09/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
G. Verbil
Deputy

GREG HOYT SCOTT A HOLCOMB

v.

DAVID FARCA, et al. ROBERT S REDER

UNDER ADVISEMENT RULING

Plaintiff Greg Hoyt ("Hoyt") asserts claims against Defendant TOH Design Studio, LLC ("TOH") and Defendants David Farca and Mavi Farca (collectively, "Farca") for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and consumer fraud in violation of the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521 *et seq*. (the "CFA"). Second Amended Complaint ("Complaint") at ¶¶ 45 - 70. Hoyt's claims all arise out of the failure to successfully complete the renovation and redesign of a house Hoyt owns in San Jose del Cabo (the "Cabo House.").

Farca seeks summary judgment on all of Hoyt's claims against him. *See generally* Defendant David Farca's and Mavi Farca's Motion for Summary Judgment ("Farca's MSJ"). In support of his requested relief, Farca asserts he was not a party to the contract between Hoyt and TOH for the renovation of the Cabo House. Defendant David Farca's and Mavi Farca's Motion for Summary Judgment ("Farca's MSJ") at p. 1. Because he was not a party to any contract with Hoyt, Farca asserts, he not only cannot be liable for TOH's "alleged contractual obligations," but "cannot be liable for consumer fraud" and cannot be said to have been "unjustly enriched." *Id*. at pp. 1-2. Farca supports his motion for summary judgment with his own declaration in which he asserts, *inter alia*, that he never entered into "any transaction or agreement," written or oral, with Hoyt, and that the contract on which Hoyt's claims are based "is a verbal agreement between

[Hoyt] and TOH…" Declaration of David Farca at ¶¶ 1-2, 5-6, attached to Defendants David Farca's and Mavi Farca's Statement of Facts in Support of Their Motion for Summary Judgment ("Farca's SOF"). Farca also submits, in support of his position, copies of correspondence, invoices, and sales orders for furniture, tile, cabinetry, and other goods and services relating to renovation of the Cabo House; all of these letters, invoices and sales orders bear the "TOH" letterhead. Exhibits B-G to Farca's SOF; Exhibit 2 to Defendants David Farca's and Mavi Farca's Response to Plaintiff's Statement of Facts in Support of Response to the Farcas' Motion for Summary Judgment and Cross Motion for Summary Judgment and Supplemental Statement of Facts in Support of Their Motion for Summary Judgment ("Farca's Supplemental SOF").

In response, Hoyt asserts that genuine issues of material fact exist surrounding whether Farca was a party to the contract Hoyt entered for the Cabo House renovation. Plaintiff's Response to Defendants David and Mavi Farcas' Motion for Summary Judgment and Alternative Rule 56(f) Motion for Continuance ("Hoyt's Response") at p. 1. In support of this assertion, Hoyt presents his own declaration in which he states that he entered the agreement with Farca personally as well as with TOH.[1] Declaration of Greg Hoyt at ¶ 6, attached as Exhibit 2 to Plaintiff's Controverting and Separate Statement of Facts in Support of His Response to Defendants David and Mavi Farca's Motion for Summary Judgment ("Hoyt's SOF"). Although Farca argues that Hoyt's sworn statements to this effect lack credibility, the Court cannot weigh witness credibility in determining whether to grant judgment as a matter of law. *See*, *e.g.*, *Newman v. Sun Valley Crushing Co*., 173 Ariz. 456, 458, 844 P.2d 623, 625 (App. 1992).

Hoyt further supports his assertion that Farca was a party to the agreement for the renovation of the Cabo House with a copy of an email Farca sent him on December 15, 2015 in which Farca makes statements - - including "Please know that I deeply regret putting you in this situation and that I will come through for you" and "I will also make it up to you and compensate you however you see fit" - - that a reasonable factfinder could interpret as an admission by Farca that he was personally responsible to Hoyt. *See* Reply Memorandum in Support of Plaintiff's Cross Motion for Partial Summary Judgment at p. 6. *See also* Hoyt's SOF ¶ 70. The Court finds

[1] Farca argues that "the Court should ignore Hoyt's Declaration," citing the "sham affidavit" rule. Defendant David and Mavi Farca's Supplemental Reply in Support of Their Motion for Summary Judgment and Response to Cross Motion for Summary Judgment at p. 4. At his deposition, however, Hoyt testified that his agreement was with Farca personally. *See* Transcript of February 8, 2017 Deposition of Greg Hoyt at p. 36, attached as Exhibit 1 to Farca's Supplemental SOF. Because Hoyt's deposition testimony on this point is consistent with his declaration, the Court fails to see how the "sham affidavit" rule applies here. *See Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, 442, 153 P.3d 1069, 1071 (App. 2007) ("sham affidavit" rule prevents parties from "thwart[ing] the purposes of Rule 56" by "creating issues of fact through affidavits that contradict their own depositions") (citation and internal quotations omitted).

that the conflicting evidence establishes a factual issue precluding summary judgment as to whether Hoyt's agreement for the renovation of the Cabo House was with TOH, Farca, or both.

In support of his request for summary judgment on Hoyt's contract claims, Farca asserts that the mere fact that he is a member of TOH, a limited liability company, does not make him personally liable for TOH's debts and obligations. Farca's MSJ at p. 6, *citing* A.R.S. § 29-651. This assertion, while true, is irrelevant here, because Hoyt does not base his claims against Farca on the latter's status as a member of TOH. Instead, Hoyt asserts that Farca is personally liable because he "affirmatively contracted with Hoyt" and then "caused the breaches of the contract." Plaintiff's Supplemental Response to Defendants David and Mavi Farca's Motion for Summary Judgment and Plaintiff's Cross Motion for Partial Summary Judgment ("Hoyt's Cross-MSJ") at p. 7.

In support of his request for summary judgment on Hoyt's contract claims, Farca notes the absence of any written contract signed by himself and Hoyt. *See* Defendants David and Mavi Farcas' Reply in Support of Their Motion for Summary Judgment and Response to Plaintiff's Request for a Rule 56(f) Continuance ("Farca's Reply") at p. 3 ("If there was a contract between Hoyt and the Farcas, Hoyt would have attached it to the Amended Complaint or his Response - - he did not because there is none."). While it is true that no signed, written contract exists between Hoyt and Farca, it is also true that no signed, written contract exists between Hoyt and TOH, either. The absence of a written contract therefore does not support Farca's position; on the contrary, the absence of a written document identifying the parties to the contract supports Hoyt's assertion that factual issues exist as to whether the party contracting with Hoyt was TOH, Farca, or both.

Hoyt asserts that he is entitled to summary judgment in his favor on his contract claims against Farca, arguing that the "undisputed evidence" establishes "all of the necessary elements for contract formation." Hoyt's Cross-MSJ at p. 4. In support of his assertion that he entered into a contract with Farca personally as well as with TOH, Hoyt asserts that he was "induce[d]" to enter the agreement for the renovation of the Cabo House by his "long" friendship with Farca and the "promises and representations" Farca made "related to the project." *Id*. Evidence that Hoyt's personal relationship with Farca induced him to enter the contract for the renovation of the Cabo House does not, by itself, establish as a matter of law that Farca was a member of the contract in his individual capacity. *Cf. Morris v. Achen Constr. Co*., 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987) (holding that claim against contractor's employee for fraudulent inducement did not arise out of contract for purposes of A.R.S. § 12-341.01 because "there is no contractual relationship between" plaintiffs and contractor's employee). On the contrary, the evidence presented by Farca, including Farca's sworn statement that he "did not enter into any transaction or agreement with Greg Hoyt," Declaration of David Farca at ¶ 5, attached to Farca's SOF, as well as the fact that TOH's letterhead appears on the invoices and sales orders relating to the

Cabo House renovation project, establish factual issues precluding summary judgment in favor of either Hoyt or Farca on Hoyt's contract claims against Farca.

Farca asserts that he is entitled to summary judgment on Hoyt's claim for unjust enrichment. Farca's MSJ at p. 7. In support of his assertion, he argues that he and his wife "were never parties to any transaction with Plaintiff - - only TOH was involved with Plaintiff." *Id.* A claim for unjust enrichment does not, however, require proof of a contract between the parties, and, in fact, presupposes that no such contract exists. *See Loiselle v. Cosas Mgmt. Group, LLC*, 224 Ariz. 207, 211, 228 P.3d 943, 947 (App. 2010) ("[T]o bring a successful unjust enrichment claim, a party must show the absence of any remedy at law.") (citation and internal quotations omitted). Farca's assertion that he entered no agreement with Hoyt, even if true, would not establish Farca's entitlement to summary judgment on Hoyt's unjust enrichment claim.

In the alternative, Farca asserts that he is entitled to summary judgment on Hoyt's unjust enrichment claim because "there is no evidence to show" that Farca "received any personal benefit from" the contract between Hoyt and TOH. Farca's MSJ at p. 7. While Farca is correct in asserting that "[a] claim for unjust enrichment requires…evidence that the defendant has actually been enriched," *id.*, the present record does not permit the Court to find, as a matter of law, that Farca has not been enriched. Hoyt has presented evidence that he paid Farca over $200,000 for the renovations to the Cabo House that were never completed, including payments for furniture and other materials that were either never delivered or, when delivered, were found to be of lower quality than what Hoyt had paid for. Declaration of Robert Toubman at ¶¶ 20-21, 24, 27, 30-31, 39, 41 and Declaration of Greg Hoyt at ¶¶ 10-12, 15, 17-18, 20, 22, 24, attached as Exhibits 1 and 2 to Hoyt's SOF. Hoyt's evidence that the amount he paid exceeds what he received in connection with the Cabo House renovation raises questions of fact about what became of all of Hoyt's money. Farca has presented no evidence, not even his own affidavit, to establish that he personally received none of the $200,000 that Hoyt paid for the Cabo House renovations.[2] The Court is therefore unable to find, as a matter of law, that Farca was not personally enriched by the funds that Hoyt paid for the renovation project, and so will deny Farca's request for judgment as a matter of law on Hoyt's unjust enrichment claim against him.

[2] Hoyt has presented evidence that TOH's inventory and assets have been sold to pay TOH's debts, including tax obligations for which Farca could have been personally liable. Plaintiff's Supplemental Separate Statement of Facts in Support of His Response to Defendants David and Mavi Farca's Motion for Summary Judgment and Plaintiff's Cross Motion for Partial Summary Judgment at pp. 54-57 ¶¶ 158-59. To the extent that TOH's inventory included materials for which Hoyt had paid and not received, the sale of those materials and use of the proceeds to pay off TOH's tax debts would have benefited Farca personally.

Hoyt argues that he is entitled to summary judgment on his unjust enrichment claim against Farca. In support of his position, he asserts that Farca "was enriched by Hoyt's payment" of over $200,000, which Farca retained "without performing services for which the payment was made." Hoyt's Cross-MSJ at p. 9. The Court cannot resolve Hoyt's unjust enrichment claim against Farca as a matter of law, however, in view of the disputed factual issues regarding whether Hoyt has a contractual relationship with Farca. The absence of a remedy at law is an element of a claim for unjust enrichment. *See Loiselle*, 224 Ariz. at 211, 228 P.3d at 947. The merits of Hoyt's unjust enrichment claim against Farca cannot be determined until Hoyt's contract claims against Farca are resolved. As noted above, factual disputes prevent the Court from resolving those contract claims as a matter of law.

Farca asserts that he is entitled to summary judgment on Hoyt's CFA claim. In support of his position, Farca asserts that "the only contracts and transactions at issue are between [Hoyt] and TOH." Farca's MSJ at p. 9. As Hoyt correctly points out, however, a defendant need not be a party to a contract to be held liable under the CFA. Reply Memorandum in Support of Plaintiff's Cross Motion for Partial Summary Judgment at p. 8, *citing Watts v. Medicis Pharmaceutic Corp*., 239 Ariz. 19, 28, 365 P.3d 944, 953 (App. 2016) (CFA "does not expressly require a direct merchant-consumer transaction"). Instead, the Act prohibits the use "*by any person*" of deceptive acts in connection with the sale or advertisement of merchandise. A.R.S. § 44-1522(A) (emphasis added). Even accepting as true Farca's disputed assertion that he was not a party to any contract with Hoyt, his status as a non-party to the contract would not, by itself, insulate him from liability under the CFA. *See also State v. Sgrillo*, 176 Ariz. 148, 149, 859 P.2d 711, 712 (App. 1993) (CFA "forbids deceptive acts in connection with the sale of any merchandise regardless of whether the deceiver is the seller") (internal quotations omitted).

In the alternative, Farca asserts that he is entitled to summary judgment on Hoyt's CFA claim because Hoyt cannot show that Farca "intended Hoyt to rely on an alleged false representation," or that Farca made a promise with "present intent to defraud Hoyt." Farca's Reply at p. 5.

Unfulfilled promises cannot support a fraud claim unless the promises were made with the present intent not to perform. *See, e.g., McAlister v. Citibank (Ariz.), a Subsidiary of Citicorp.*, 171 Ariz. 207, 214, 829 P.2d 1253, 1260 (App. 1992). Whether a promise was made with present intent not to perform need not be established by direct evidence. *See State v. Maxwell*, 95 Ariz. 396, 399, 391 P.2d 560, 562 (1964) ("[F]raudulent intent…is often difficult to prove by direct evidence.") (citation and internal quotations omitted). *See also State v. Sullivan*, 205 Ariz. 285, 287, 69 P.3d 1006, 1008 (App. 2003) ("An intent to defraud may be, and often is, deduced from circumstantial evidence."). Instead, a defendant's intent at the time a promise is made may be inferred from the defendant's subsequent conduct, including his failure to take steps to carry out his promises when such steps would reasonably be expected. *See Maxwell*, 95

Ariz. at 399, 391 P.2d at 562 ("In many cases" fraudulent intent "must be inferred from the acts of the parties, and inferences may arise from a combination of acts, even though each act or instance, standing by itself, may seem unimportant.") (citation and internal quotations omitted).

Hoyt has presented evidence that Farca: (1) prepared false documentation to be shown to Hoyt to mislead him about the status of the progress of the Cabo House, (2) accepted money from Hoyt to pay particular vendors and suppliers and then used the money for purposes other than what was represented, (3) falsely assured Hoyt that all contractors and vendors had been paid in full, and (4) supplied linens for the Cabo House project were of "much lower quality" than what he had promised Hoyt. Declaration of Robert Toubman at ¶ 40 and Declaration of Greg Hoyt at ¶¶ 12-13, 17, attached as Exhibits 1 and 2 to Hoyt's SOF. A reasonable factfinder could draw the inference, from this evidence of Farca's conduct after Hoyt entered the agreement for the Cabo House renovation, that the promises Farca made to induce Hoyt to enter that agreement were made with no present intent to perform. *See Southern Union Co. v. Southwest Gas Corp*., 180 F.Supp.2d 1021, 1031 (D.Ariz. 2002) ("In proving fraud…rarely does a plaintiff have direct evidence of a defendant's fraudulent intent. Therefore, the subsequent conduct of a defendant, such as his failure to immediately carry out his pledge, has some evidentiary value to show that a defendant made the promise without the intent to keep the obligation.") (citation and internal quotations omitted). Farca is therefore not entitled to judgment as a matter of law on Hoyt's CFA claim against him.

Hoyt seeks summary judgment in his favor on his CFA claim against Farca. In support of his position, he argues that "[i]t cannot be disputed that David Farca personally made false promises, misrepresentations, and engaged in deceptive conduct in connection with the sale of the materials or services to Hoyt…" Hoyt's Cross-MSJ at p. 15. As Farca correctly points out in response, however, in order to prevail on his CFA claim, Hoyt must establish that Farca "intended Hoyt to act on an alleged false representation." Defendant David and Mavi Farca's Supplemental Reply in Support of Their Motion for Summary Judgment and Response to Plaintiff's Cross Motion for Summary Judgment at p. 6. *See also Kuehn v. Stanley*, 208 Ariz. 124, 129, 91 P.3d 346, 351 (App. 2004) ("To succeed on a claim of consumer fraud under the CFA, a plaintiff must show," *inter alia*, "consequent and proximate injury resulting from" false promise or misrepresentation, and "[a]n injury occurs when a consumer relies, even unreasonably, on false or misrepresented information.").

Although the Arizona Court of Appeals has held that "reliance is a required element under Arizona's consumer fraud statute," *Kuehn*, 208 Ariz. at 129, 91 P.3d at 351 *citing* A.R.S. § 44-1522(A), Hoyt does not address the "reliance" element in his cross-motion for summary judgment or in the contemporaneously-filed statement of facts. *See generally* Hoyt's Cross-MSJ; Plaintiff's Supplemental Separate Statement of Facts in Support of His Response to Defendants David and Mavi Farca's Motion for Summary Judgment and Plaintiff's Cross Motion for Partial

Summary Judgment. Hoyt's failure to address the "reliance" element in his cross-motion for summary judgment, by itself, warrants a finding that Hoyt has failed to establish all of the elements of his CFA claim, and therefore has failed to establish his entitlement to judgment as a matter of law on that claim. *See Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396, 212 P.3d 85, 88 (App. 2009) (party seeking summary judgment must establish absence of genuine issue of material fact as to each element of its claims).

Earlier in these proceedings, in the response he filed back in September 2016 to Farca's MSJ, Hoyt presented evidence that he entered the agreement for the renovation of the Cabo House in reliance on representations made by Farca. *See* Hoyt's SOF at p. 4 ¶ 21 and Declaration of Greg Hoyt at ¶ 7 attached as Exhibit 2 thereto (stating that Hoyt "only agreed to have David Farca provide these services and materials because of his personal oral promises and representations…about the high-quality services and materials David Farca would provide in a timely manner"). This evidence does not, however, establish that Farca's representations were false *at the time they were made, i.e.*, prior to the commencement of the renovation project. While a reasonable factfinder could certainly draw such an inference, the Court cannot find that Farca's failure to keep the promises on which Hoyt relied in entering the agreement for the Cabo House renovation establishes as a matter of law that the promises were false at the time they were made.

Hoyt has presented evidence that, after he entered the agreement for the Cabo House renovation, Farca continually lied and engaged in deceptive practices throughout the course of the renovation project. He asserts, for example, that Farca "made multiple misrepresentations to Hoyt, including when directly asked by Hoyt about payments to vendors"; "directed employees to lie to Hoyt about the [renovation project]"; "ordered a TOH accountant to create a fake invoice as part of his scheme to avoid paying taxes and duties" for which "Hoyt had already paid"; and "charged Hoyt" based on quotes from vendors "and later attempted to renegotiate those quotes" with the vendors "after Hoyt had already paid" the original quoted price. Hoyt's Response at p. 12.

Hoyt has not, however, pointed to any evidence to support a finding that he relied to his detriment on these false statements and deceptive practices that occurred after he had already entered the agreement for the renovation project. *Kuehn*, 208 Ariz. at 129, 91 P.3d at 351 (plaintiff alleging CFA claim must show, *inter alia*, "consequent and proximate injury," which occurs "when a consumer relies…on false or misrepresented information."). The Arizona Court of Appeals has held that evidence of false statements made to a buyer *after* the buyer enters a binding agreement is insufficient to establish a CFA claim because the buyer did not rely on such statements *at the time the buyer entered the agreement*. *See Kuehn*, 208 Ariz. at 130, 91 P.3d at 352 (after entering contract to purchase real property, buyers obtained second appraisal reflecting that property was worth less than had been represented; affirming summary judgment against

buyers on their CFA claim against seller and lender, the Court noted that buyers "received the [second] appraisal report only after they were already contractually bound to purchase" the property and so could not have "relied on the appraisal report"). Pursuant to *Kuehn*, evidence that Farca made false and deceptive statements to Hoyt after Hoyt entered the agreement for the renovation of the Cabo House could not establish a CFA claim in the absence of evidence of detrimental reliance on those statements. Since Hoyt has pointed to no evidence of detrimental reliance after he entered the agreement with TOH, false statements or deceptive acts by Farca after Hoyt entered the agreement for the renovation project fail to establish Hoyt's entitlement to judgment as a matter of law on his CFA claim.

Based on the evidence in the record, a reasonable factfinder could draw the inference that Farca acted in violation of the CFA by making false statements with the intent that Hoyt rely on those statements in entering the renovation agreement, and that Hoyt did in fact rely on those statements to his detriment. A reasonable factfinder could also, however, draw the opposite conclusion. A reasonable factfinder could accept Farca's argument that all of the work and effort that Farca and TOH put into the renovation project shows that the promises Farca made to induce Hoyt to enter the agreement were made in good faith and with the intent to fulfill those promises. The Court therefore cannot find, as a matter of law, that the statements Farca made to induce Hoyt to enter the agreement establish a violation of the CFA. Evidence that Farca employed false and deceptive practices after Hoyt entered the agreement cannot support a finding of a violation of the CFA in the absence of evidence of the requisite detrimental reliance by Hoyt, which Hoyt has failed to present. The Court therefore finds that Hoyt has failed to establish his entitlement to judgment as a matter of law on his CFA claim against Farca.

Hoyt asserts that he is entitled to judgment as a matter of law on the issue of TOH's liability, though not damages, on all of his claims. At the Oral Argument on March 10, 2017, TOH did not dispute its liability to Hoyt for breach of contract. TOH argued, however, that it is not liable for breach of the covenant of good faith and fair dealing because it did not deal with Hoyt "in bad faith."

A party breaches the covenant of good faith and fair dealing that is implied in every contract "if he or she acts in a manner that denies the other party the reasonably expected benefits of the contract." *Coulter v. Grant Thornton, LLP*, 241 Ariz. 440, 448, 388 P.3d 834, 842 (App. 2017) (internal quotations omitted). Hoyt has presented evidence that TOH acted in ways that denied him the reasonably expected benefits of the Cabo House renovation agreement, including evidence that Farca delivered linens "of a much poorer quality" than "the very high quality" linens that he had promised Hoyt and for which Hoyt had paid. Hoyt's SOF at p. 9 ¶¶ 61-62. Farca has not disputed Hoyt's evidence on this point, except to say that it is "irrelevant" (which it is not) and "self-serving" (which it is, but so what? Evidence isn't inadmissible simply because it's self-serving), and that "Farca was not doing anything personally, but merely as an

agent of TOH." Farca's Supplemental SOF at pp. 11-12 ¶¶ 60-62. In the absence of any evidence to controvert Hoyt's evidence that he received linens of a much lower quality than what he had been promised and had paid for, the Court finds no genuine issue of material fact as to whether Hoyt was denied the reasonably expected benefits of his contract with TOH. The Court therefore finds that Hoyt is entitled to judgment as a matter of law on the issue of TOH's liability for breach of the covenant of good faith and fair dealing.

The existence of a contract between Hoyt and TOH - - which TOH does not dispute - - precludes summary judgment in Hoyt's favor on his unjust enrichment claim against TOH. *See Loiselle*, 224 Ariz. at 211, 228 P.3d at 947. Further, the Court finds that Hoyt has failed to establish his entitlement to judgment as a matter of law on his CFA claim against TOH, for the same reasons that Hoyt has failed to establish his entitlement to judgment as a matter of law on that same claim against Farca individually.

In accordance with the foregoing,

IT IS ORDERED denying Defendant David Farca's and Mavi Farca's Motion for Summary Judgment.

IT IS FURTHER ORDERED granting in part and denying in part Plaintiff's Cross-Motion for Partial Summary Judgment. The Cross-Motion is granted to the extent of determining that Defendant TOH Design Studio, LLC is liable to the Plaintiff on the Plaintiff's claims for breach of contract and breach of the covenant of good faith and fair dealing, but not as to the amount of damages on either of those claims. The Cross-Motion is denied as to the Plaintiff's claims for unjust enrichment and consumer fraud.

IT IS FURTHER ORDERED setting a telephonic Status Conference on **June 7, 2017 at 9:00 a.m.** (**15 minutes allotted**) before this Division. Counsel for the Plaintiff shall initiate the joint call to the Court at 602-372-3839.