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12/21/2023 11:52 AM
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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

DAVID L. HUGHES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 22-0648-BC**
	)	
OLE SOUTH/CRAIGHEAD JOINT VENTURE, CRAIGHEAD DEVELOPMENT, LLC and OLE SOUTH PROPERTIES, INC.,	)	**JURY DEMAND**
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter came before the Court on December 8, 2023, upon Defendants' Motion for Summary Judgment. In their motion, Defendants assert that Plaintiff cannot establish an enforceable agreement to demonstrate his claims for breach of contract, promissory estoppel, or conversion, and that Plaintiff cannot establish a material misrepresentation or reasonable reliance to support his claim for fraud. Further, that all of his claims, including unjust enrichment, fail based on the doctrine of judicial estoppel. The primary issue is whether the parties agreed that Plaintiff's $150,000 per year salary would be offset from his 25% share of the net profits from a townhome development project.

The Court has carefully considered the parties' submissions, relevant caselaw, as well as the argument of counsel, and is ready to rule.

FINDINGS OF FACT

This case arises from verbal discussions between David Hughes ("Plaintiff") and William Hostettler, Sr. ("Hostettler") concerning two residential subdivision projects in Davidson County, Tennessee. Defendant Craighead Development, LLC ("Craighead"), a general contractor, had two

50% members at all times material to this case: Hostettler and Carl Neuhoff. Defendant Ole South Properties, Inc. ("Ole South") is a homebuilding company wholly owned by John Floyd. Defendant Ole South/Craighead Joint Venture ("Joint Venture") has 50% partners: Craighead and Ole South. It was the owner and developer of a 42-home townhome project known as Hamilton Run ("Hamilton Run project").

Non-party Parkhaven Communities, LLC ("Parkhaven") was formed for the purpose of developing a multi-home residential community for adults over the age of 55 in Hermitage, Tennessee ("Parkhaven project"). Parkhaven's members are as follows: Plaintiff (25%), Neuhoff (25%), Floyd (25%), Hostettler (20%), and Hostettler's two children (2.5% each). Craighead was the general contractor for the Parkhaven project. In early 2017, Plaintiff met with Hostettler and Neuhoff to discuss Plaintiff working as a project manager for the Parkhaven project. Plaintiff became a 25% partner in Parkhaven and accepted a salary of $150,000 per year. According to the original Operating Agreement for Parkhaven, Plaintiff became a 25% member on July 31, 2017. Notably, there was no language in the Parkhaven Operating Agreement that Plaintiff's salary would be offset from his 25% share in the net profits.

On or about February 6, 2017, Plaintiff started work for the Parkhaven project. However, there were delays on construction, and in May 2017, Hostettler asked if Plaintiff wanted to work on the Hamilton Run project. The details of this conversation are disputed by the parties, but the gist is that Plaintiff expected to be compensated the same way as the Parkhaven project.

The Hamilton Run project occurred from May 2017 through its completion in June 2019. Upon completion of the project, the Joint Venture prepared a net profit summary and distributed the summary to Plaintiff, which set out that the Joint Venture earned $1,573,063.83 in net profits and that Plaintiff's 25% share was $393,265.96. However, the Joint Venture made an

offset/reduction based upon the salary paid to Plaintiff for the Parkhaven project, concluding that he was owed $33,819.11. To date, Plaintiff has not received the $33,819.11.

On June 19, 2019, an Amended and Restated Operating Agreement for Parkhaven was executed demonstrating an intent to offset Plaintiff's salary from his share of net profits. (Ex. D to Compl., ¶ 5.1(b)).

Plaintiff was terminated from the Parkhaven project on February 7, 2022. Plaintiff filed this action on May 6, 2022.

CONCLUSIONS OF LAW

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Tenn. R. Civ. P. 56.04; *Rye v. Women's Care Cntr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). In determining if summary judgment is appropriate, trial courts must decide "(1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (emphases in original). A disputed fact is "material" if it is one that "must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Id.* at 215. Irrelevant or unnecessary facts are not material. *Rye*, 477 S.W.3d at 251. Disputed, material facts do not include "mere legal conclusions" to be drawn from those facts. *Byrd*, 847 S.W.2d at 215. A "genuine issue" exists when "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

In deciding a motion for summary judgment, the court must "take the strongest legitimate view of the evidence in favor of the nonmoving party." *Id.* at 210. Further, the court does not weigh competing evidence, but overrules a motion for summary judgment when there is a genuine dispute as to any material fact. *Id.* at 211. "Mere conclusory generalizations will not create a material factual dispute." *Davis v. Campbell*, 48 S.W.3d 741, 747 (Tenn. 2001). "[I]f . . . the evidence and inferences to be reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual issues in dispute and the question can be disposed of as a matter of law." *Id.* (internal citations omitted). Conversely, "[i]f reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists." *Id.*

Judicial Estoppel

Defendants argue that all Plaintiffs' claims, including his claim of unjust enrichment, are barred by the doctrine of judicial estoppel. Specifically, Defendants point to Plaintiff's various loan applications and personal finance statements that Plaintiff signed from April 2018 through December 2020, but did not disclose his interest in Hamilton Run as an asset.

Application of judicial estoppel in Tennessee has been narrowed to circumstances in which "a party has attempted to contradict by oath a sworn statement previously made." *Kershaw v. Levy*, 583 S.W.3d 544, 548 (Tenn. 2019) (quoting *Cracker Barrel Old Country Store v. Epperson*, 284 S.W.3d 303, 315 (Tenn. 2009)). Generally, "a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts . . . ." *Id.* (citing *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999). "The sworn statement is not merely evidence against the litigant, but (unless explained) precludes

him from denying its truth," and "[i]t is not merely an admission, but an absolute bar." *Marcus*, 993 S.W.2d at 602 (quoting *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 318 (Tenn. 1924)).

In *Kershaw*, the Tennessee Supreme Court recently analyzed the doctrine of judicial estoppel, providing that:

> [t]he purpose of judicial estoppel "is not to protect the parties from allegedly dishonest conduct by the adversary." John S. Nichols, *Safeguarding the Truth in Court: The Doctrine of Judicial Estoppel*, 13 S.C. Law. 32, 34 (2002) (citations omitted). Rather, "the doctrine acts to ensure the integrity of the judicial process." *Id.*; *see also Allen v. Neal*, 217 Tenn. 181, 396 S.W.2d 344, 346 (1965) (citation omitted) (describing judicial estoppel as "not [based] on prejudice to adverse party by reason thereof, as in the case of equitable estoppel."); *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 266 S.W. 313, 317 (1924) ("[J]udicial estoppel ... has nothing to do with other parties to the suit; nor does it matter whether they even knew of the sworn statement."). Thus, unlike equitable estoppel, which "focuses on the relationship between the parties," judicial estoppel "focuses on the relationship between a litigant and the judicial system." 31 C.J.S. *Estoppel and Waiver* § 189 (June 2019 Update); *see also Cracker Barrel Old Country Store v. Epperson*, 284 S.W.3d 303, 315 (Tenn. 2009) (comparing judicial estoppel with equitable estoppel).

Kershaw, 583 S.W.3d at 548-49. The doctrine does not apply when there is "an innocent inconsistency or apparent inconsistency that is actually reconcilable." *Id*. at 549. (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 68 (footnote omitted)). Rather, the two sworn statements "must be totally inconsistent—that is, the truth of one . . . must necessarily preclude the truth of the other. . . ." *Id*. (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 68). Further, "because Tennessee limits judicial estoppel to sworn statements, its application in this State is usually warranted only if there are directly contradictory statements of *fact*." *Id*. (emphasis in original) (citations omitted). Statements made in prior proceedings will not prevent a litigant from establishing the truth in a later proceeding where the litigant can show that the prior statements were made "inconsiderately, by mistake, or without full knowledge of the facts." *In re Est. of Boote*, 198 S.W.3d 699, 720 (Tenn. Ct. App. 2005) (quoting *Tate v. Tate*, 148 S.W. 1042, 1054 (Tenn. 1912)). Litigants are

entitled to have an opportunity to explain that a prior statement was inadvertent, made inconsiderately, or based on a mistake of fact or law before the doctrine of judicial estoppel can be applied. *Id*. (citing *State ex rel. Scott v. Brown*, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996); *State ex rel. Ammons v. City of Knoxville*, 232 S.W.2d 564, 567-68 (Tenn. Ct. App. 1950). Application of the doctrine of judicial estoppel presents a question of law for the Court, *Frazier v. Pomeroy*, No. M2005-00911-COA-R3-CV, 2006 WL 3542534, at *10 (Tenn. App. 2006).

The Court finds that the doctrine of judicial estoppel does not apply to bar Plaintiff's claims. The prior loan applications and personal financial statements were not made under oath as part of a prior judicial proceeding. Further, the Court does not find that the two statements are totally inconsistent that would bar Plaintiff from bringing this action.

Count I: Breach of Contract

Defendants argue that Plaintiff cannot establish the existence of any enforceable agreement between the parties. Specifically, that Plaintiff does not know who he contracted with on the Hamilton Run project and the purported contract is not sufficiently definite to be enforceable.

A contract "must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration free from fraud or undue influence, not against public policy and sufficiently definite to be enforced." *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005) (quoting *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). In determining mutuality of assent, courts must apply an objective standard based upon the parties' manifestations, not their secret intentions. *Id*. (citing *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 866 (Tenn. Ct. App. 2002)); *see also Am. Bd. of Craniofacial Pain v. Am. Bd. of Orofacial Pain*, 633 S.W.3d 598, 602 (Tenn. Ct. App. 2020) (citing 1 WILLISTON ON CONTRACTS § 3:4 (4th ed.)). Tennessee has

long recognized that a contract can be express, implied, written or oral. *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002). To prove a claim for breach of contract, a plaintiff must have evidence supporting (1) the existence of an enforceable contract, (2) breach of the contract by the defendant, and (3) damages caused by the breach. *ARC Lifemed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). To survive a motion for summary judgment on a breach of contract claim, Plaintiff must point to evidence in the record from which a reasonable jury could find that each of the elements of the claim are satisfied.

In his First Amended Complaint filed on November 1, 2022, Plaintiff alleges that he entered into a contract with the Joint Venture for the Hamilton Run project. (First Am. Compl. ¶¶ 27-33). Defendants admitted that "Plaintiff agreed to be compensated at 25% of the net profits from the Hamilton Run Townhomes Project, with Plaintiff's salary being treated as a draw/credit against his portion of net profits," and that "Plaintiff and Defendants consented to this arrangement." (Answer to First Am. Compl., ¶¶ 13-14). It is clear that the parties had some sort of agreement that Plaintiff would work on the Hamilton Run project and receive 25% of the net profits, albeit whether his salary would be treated as a draw or credit against those profits is disputed. The issue is whether the parties had a meeting of the minds sufficient to create a binding and enforceable contract.

In their Motion, Defendants argue that Plaintiff does not know who he contracted with as he testified at different times that he contracted with either Craighead or the Joint Venture. Further, that Plaintiff's deposition testimony that Hamilton Run would be the same deal as Parkhaven does not form any sort of enforceable agreement between the parties. Specifically, that the agreement for Hamilton Run could not be the same deal as Parkhaven because Parkhaven was not yet in existence and Plaintiff was never a member of the developer entity at Hamilton Run.

The Tennessee Supreme Court has held that mutual assent to a contract's material terms is an essential element of contract formation and enforcement:

> It is black letter law that in order for a contract to be consummated, the parties must mutually assent to the material terms. *See* Arthur M. Kaufman & Ross M. Babbitt, *The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road*, 22 Franchise L.J. 101, 102 (2002). Tennessee courts have referred to this requirement as a "meeting of the minds." *Staubach Retail Servs.–S.E., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005) (quoting *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). A meeting of the minds is determined "by assessing the parties' manifestations according to an objective standard." *Moody Realty Co. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. Ct. App. 2007); *see also Paragon Refining Co. v. Lee*, 98 Tenn. 643, 644–49, 41 S.W. 362, 363–64 (1897); *Black's Law Dictionary* 124 (8th ed. 2004) ("In modern contract law, mutual assent is determined by an objective standard—that is, by the apparent intention of the parties as manifested by their actions."). The traditional common-law rule is that where mutual assent is lacking, no contract was ever formed. *See Higgins v. Oil, Chem. & Atomic Workers Int'l Union, Local No. 3–677,* 811 S.W.2d 875, 879 (Tenn.1991) ("The facts of this case, plainly and simply, fail to establish mutual assent. Hence, no contract between the parties ever arose."); *accord Restatement (Second) of Contracts* § 7 & cmt. c (1981); *see generally* 21 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 4:5, at 277–78 (2006).

Wofford v. M.J. Edwards & Sons Funeral Home Inc., 490 S.W.3d 800, 809–10 (Tenn. Ct. App. 2015) (quoting *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508, 528 (Tenn. 2012)). "[T]he meeting of the minds ... [is] to be determined ... not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances." *In re Est. of Josephson*, No. M2011-01792-COA-R3CV, 2012 WL 3984613, at *2 (Tenn. Ct. App. Sept. 11, 2012) (citing *Huestis*, 237 S.W.2d at 675). Whether a meeting of the minds occurred is a question of fact. *Id.* (citing 17B C.J.S. Contracts § 1008 (2012)).

In determining whether the necessary elements of a contract exist, if an intent to come to a definite agreement can be shown, the contract should be construed to constitute an agreement rather than to defeat one. *Homebuilders McGee & Story, LLC v. Buckner*, No. M2005-02643-

COA-R3CV, 2007 WL 969395, at *3–4 (Tenn. Ct. App. Mar. 30, 2007) (citing *Neilson & Kittle Canning Co. v. F.G. Lowe & Co.*, 149 Tenn. 561, 260 S.W. 142, 143 (Tenn. 1924)). A contract includes not only promises set out in expressed words, but also all such implied provisions as are indispensable to effectuate the intentions of the parties and as arise from the language of the contract and the circumstances under which it is made. *Id*. (citing *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329, 47 S.Ct. 368, 71 L.Ed. 663 (1927)).

Here, there is a genuine issue of material fact as to whether the parties had a meeting of the minds, and, therefore, an enforceable contract. Plaintiff points to his deposition testimony as well as the initial Parkhaven Operating Agreement to show that the parties agreed to pay him 25% of the net profits without an offset for his salary. The original Parkhaven Operating Agreement dated July 31, 2017 does not contain language regarding a salary offset or deduction. Only until after the issue arose did Parkhaven execute an Amended Operating Agreement resolving that issue. Plaintiff testified that his compensation for his work on the Hamilton Run project would be "the same deal we got at Parkhaven." Thus, based on the evidence in the record, a jury could find a meeting of the minds and an enforceable contract.

As to Defendants' argument that Plaintiff testified at different times who he contracted with and conceded in his deposition testimony that there was not a meeting of the minds, the Court does not find that dispositive in light of the other testimony and evidence in the record. The Court finds that the record presents a genuine issue of material fact on whether the parties had a meeting of the minds and entered into a binding, enforceable contract. Thus, summary judgment is inappropriate on this claim and is denied.

Count II: Fraud/Intentional Misrepresentation

Under Tennessee law, fraud and fraudulent misrepresentation are the same cause of action. *Fulmer v. Follis*, No. W2017-02469-COA-R3-CV, 2018 WL 6721248, at *4 (Tenn. Ct. App. Dec. 20, 2018) (citing *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 904 n.1 (Tenn. 1999); *Huddleston v. Harper*, No. E2014-01174-COA0R3-CV, 2015 WL 3964791, at *4 (Tenn. Ct. App. June 30, 2015)). The elements of a claim for fraudulent misrepresentation are:

> (1) the defendant misrepresented an existing or past fact; (2) the representation was false when it was made; (3) the representation concerned a material fact; (4) the false representation was made knowingly or without belief in its truth or recklessly; (5) the plaintiff reasonably relied on the misrepresented fact; (6) the plaintiff suffered damage caused by the misrepresentation.

Id., at *4 (citations omitted). If the claim is one for promissory fraud, "then the misrepresentation must 'embody a promise of future action without the present intention to carry out the promise [.]'" *Dog House Invs., LLC v. Teal Properties, Inc.*, 448 S.W.3d 905, 916 (Tenn. Ct. App. 2014) (quoting *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990); *Keith v. Murfreesboro Livestock Mkt., Inc.*, 780 S.W.2d 751, 754 (Tenn. Ct. App. 1989)). "'When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy.'" *Id*. (citing *Houghland v. Security Alarms & Servs., Inc.*, 755 S.W.2d 769, 774 (Tenn. 1988)). "Fraud is never presumed, and where it is alleged facts sustaining it must be clearly made out." *Id*. (quoting *Homestead Group, LLC. v. Bank of Tennessee*, 307 S.W.3d 746, 751 (Tenn. Ct. App. 2009)). In order for the plaintiff to demonstrate the lack of present intent or that the statement was false when made, the plaintiff must do so "by evidence other than subsequent failure to keep the promise or subjective surmise or impression of the promisee." *Stacks v. Saunders*, 812 S.W.2d 587, 593 (Tenn. Ct. App. 1990) (quoting *Farmers & Merchants Bank v. Petty*, 664 S.W.2d 77, 81 (Tenn. Ct. App. 1983)).

Defendants argue that Plaintiff cannot establish a material misrepresentation because Plaintiff has offered nothing more to support his claim other than Defendant's nonperformance. Further, that Plaintiff cannot establish reasonable reliance because Plaintiff had access to Hamilton Run's financials. Plaintiff does not point to any other evidence in the record other than his testimony that the deal would be the same as Parkhaven; he has not pointed to any direct or circumstantial evidence to infer that any Defendants made representations without present intent to perform other than either the failure to keep the promise or the subjective impression of the promisee, which is insufficient to establish Plaintiff's claim. *See Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat. Ass'n*, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992) (citing *Stacks*, 812 S.W.2d at 593). This claim is therefore dismissed.

Count III: Promissory Estoppel

Defendants argue that Plaintiff cannot establish the existence of an unambiguous promise to support his promissory estoppel claim.

Tennessee courts describe the doctrine of promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Adams v. Delk Indus., Inc.*, No. 3:19-CV-00878, 2021 WL 354096, at *13 (M.D. Tenn. Feb. 2, 2021) (citing *Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982) (quoting Restatement (First) of Contracts § 90)). To succeed on their promissory estoppel claim, Plaintiffs are required to show (1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment. *Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007). A claim of promissory estoppel is not dependent upon

the existence of an express contract between the parties. *EnGenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12, 19 (Tenn. Ct. App. 1997). "The key element in finding promissory estoppel is, of course, the promise." *Amacher v. Brown–Forman Corp.*, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991). Tennessee does not liberally apply the doctrine of promissory estoppel; to the contrary, it limits application of the doctrine to "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud." *Chavez*, 245 S.W.3d at 406 (citing *Shedd v. Gaylord Entertainment Co.*, 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003).

The Court finds there is insufficient evidence in the record to support a promissory estoppel claim. While Plaintiff's testimony that his share in the net profits from the Hamilton Run project should be the same as the Parkhaven project and other evidence is sufficient to proceed on his breach of contract claim, the Court does not find it sufficient to proceed on a promissory estoppel claim. In light of this and the above demonstrating that promissory estoppel claims should not be liberally construed and to avoid an unjust result, and considering the Court's dismissal of Plaintiff's fraud claim for failure to point to evidence demonstrating an inference of fraud, the Court finds insufficient evidence in the record to support Plaintiff's promissory estoppel claim. *See Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 407 (Tenn. Ct. App. 2007) (reversing award of damages for promissory estoppel claim due in part to lack of "allegations in the present case of any conduct by the defendant that verges on actual fraud" and "there are no indications that the defendant's decision was based on improper motive, or that it obtained an unconscionable advantage by its actions"); *see also Robinson v. City of Clarksville*, 673 S.W.3d 556, 582 (Tenn. Ct. App. 2023). Therefore, it should be dismissed.

Count V: Conversion

Defendant asserts that Plaintiff cannot establish that the Defendants exercised dominion over his property.

Conversion is the appropriation of tangible property to a party's own use in exclusion or defiance of the owner's rights. *Barger v. Webb*, 216 Tenn. 275, 278, 391 S.W.2d 664, 665 (1965); *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988). "Conversion is an intentional tort, and a party seeking to make out a prima facie case of conversion must prove (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights." M*arks, Shell, & Maness v. Mann*, No. M2002-00652-COA-R3CV, 2004 WL 1434318, at *3 (Tenn. Ct. App. June 23, 2004) (quoting *H & M Enterprises, Inc. v. Murray*, No. M1999-02073-COA-R3-CV, 2002 WL 598556, at *2-3 (Tenn. Ct. App. April 17, 2002)).

While the Court sees Plaintiff's claims as more of a breach of contract issue than one arising from tort, the Court declines to dismiss this claim in light of the fact that Plaintiff has not received the $33,819.11 that was indisputably owed to him based upon the calculation of net profits provided to Plaintiff in June 2019. Plaintiff also points to deposition testimony from Defendants' bookkeeper, David Rizor, that the "excess" of $33,819.11 from Plaintiff's share of the net profits of Hamilton Run belonged to Plaintiff. (3.7.23 Rizor Depo., 137:21-24). Thus, the Court declines to dismiss this claim.

Conclusion

Based on the foregoing, the Court finds there are genuine issues of material fact preventing dismissal of Plaintiff's claim for breach of contract, but not fraud/intentional misrepresentation and promissory estoppel, for which Defendants are entitled to judgment as a matter of law.

Therefore, it is ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment is DENIED in part and GRANTED in part and Plaintiff's claims for Count II fraud/intentional misrepresentation and Count III promissory estoppel are hereby DISMISSED.

Plaintiff's claims for breach of contract, unjust enrichment, and conversion will proceed to trial the week of May 13, 2024.

IT IS SO **ORDERED.**

s/ Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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