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SC Court of Appeals

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-29-1315

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

Southern States Physical Medicine and
Rehabilitation Center, LLC and Dr. Glenn
Geda,

Plaintiffs,

vs.

Chad S. Gindi, PT

Defendant.

ORDER

2017 JUL 17 PM 12:07
OFFICE OF CLERK
OF COURT
LANCASTER, SC

This matter came before the Court upon Plaintiffs' Southern States Physical Medicine and Rehabilitation Center, LLC ("Southern States") and Dr. Glenn Geda's Motion to Compel, Motion to Strike the Affidavit of Defendant Chad S. Gindi, and Motion for Summary Judgment and Declaratory Judgment. The Court heard Plaintiffs' Motions at a hearing on March 20, 2017 at the Lancaster County Judicial Center at which all parties appeared through counsel.

At the hearing, Plaintiffs withdrew all of their claims against Defendant except for the breach of contract claim as to the Sale of Assets Agreement and their cause of action for unjust enrichment as an alternative remedy. Plaintiff's Motion for Declaratory Judgment as to the Settlement Agreement also remained. Defendant withdrew his counterclaim for negligent supervision, leaving only Defendant's fraud and constructive fraud counterclaims as to both the Settlement Agreement and the Sale of Assets Agreement and his counterclaim for contribution/offset.

For the reasons that follow, Plaintiffs' Motion for Summary Judgment as to its remaining causes of action and each of Defendant's counterclaims is hereby GRANTED, Plaintiffs' Motion for Declaratory Judgment and Plaintiffs' Motion to Strike are hereby GRANTED and each of Defendant's counterclaims are hereby DISMISSED as a matter of law. This Order entered in favor

of Plaintiffs disposes of all remaining claims and counterclaims and ends the case; therefore, Plaintiffs' Motion to Compel is DENIED as moot.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of the sale of a physical therapy practice owned by Dr. Geada to Defendant Chad S. Gindi, PT ("Gindi"). Dr. Geada, a licensed chiropractor, opened a chiropractic care center in Lancaster, South Carolina in 1997. In 2000, the practice expanded to include physical therapy services and was renamed Southern States Physical Medicine and Rehabilitation Center, LLC. At all relevant times, Dr. Geada was the 100% owner of Southern States.

Gindi began working at Southern States as Head Physical Therapist in December 2006. Dr. Geada was solely responsible treating and billing for Southern States chiropractic patients. Dr. Geada contends that Gindi was responsible for treating and billing physical therapy patients as well as overseeing the other physical therapists. Gindi disputes that he was responsible for billing; however, Gindi testified in his deposition that he provided the diagnoses for his PT patients, determined the scope of services to be provided, and entered that information on a "routing slip". Gindi would indicate the services provided to each PT patient by CPT code (current procedural terminology) on the routing slip. The information on the routing slips would then be submitted to the patients' insurance providers for billing.

Sometime in 2012, two employees for Southern States discovered that Gindi engaged in improper and illegal billing practices from January 2008 to September of 2013 by submitting bills to Medicare and Tricare for individual units of physical therapy where group therapy was actually being performed. As a result, on July 25, 2013, a lawsuit was filed against Southern States, Dr. Geada and Gindi alleging violations of the False Claims Act, *Geoffrey Vickers and Jeanine Russman v. Southern States Physical Medicine and Rehabilitation Center, LLC. et. al.*, 0:13-cv-

02045-CMC ("the qui tam action"). The government intervened in the qui tam action on May 30, 2014 and an investigation followed.

Dr. Geada, Southern States, and Gindi ultimately entered into a Settlement Agreement with the government on September 2, 2014. The qui tam action and resulting Settlement Agreement were based solely upon the billing submissions for PT services. Under the terms of the Settlement Agreement, the parties agreed to pay the government a total of \$300,000.00, \$100,000.00 of which was to be paid in a lump sum and the remaining \$200,000.00 was to be paid in monthly installments thereafter. Pursuant to the express terms of the Settlement Agreement, Geada, Gindi and Southern States are jointly and severally liable to the government for the \$300,000.00. Geada and Gindi each paid a \$50,000.00 lump sum to the government¹ and began making equal monthly payments thereafter.

In December of 2014, after the qui tam action was resolved, Dr. Geada decided to sell the PT department of Southern States. Emails exchanged between the parties reflect that Dr. Geada informed Gindi of his intent to sell the PT portion of Southern States and offered him the first option to purchase the practice for a listing price of \$170,000.00 in December of 2014.

Over the course of approximately 3 ½ months, the parties negotiated the terms of a sale of the assets to Gindi. As part of the negotiations, the two agreed to incorporate the qui tam obligation to the government in the terms of Sale of Assets Agreement. During the negotiations, Gindi considered hiring a healthcare attorney to look over the Sale of Assets Agreement, but claims he ultimately decided not to hire one because he "trusted" Dr. Geada.

Gindi agreed to purchase the PT portion of Southern States for \$170,000.00, which included ½ of what remained to be paid of the parties' \$300,000.00 obligation to the government

¹ Geada paid \$50,000 on behalf of himself and Southern States and Gindi paid \$50,000 on behalf of himself for a total lump sum payment of \$100,000.00.

pursuant to the qui tam Settlement Agreement to be paid by Gindi. Gindi signed the Sale of Assets Agreement on April 1, 2015, memorializing the parties' agreement. The Sale of Assets Agreement itemized the \$170,00.00 purchase price as follows:

- \$4,899.99 for equipment and inventory;
- \$70,000.00 for goodwill; and
- \$95,100.01 for the Settlement Agreement (½ of the remaining obligation to the government)

Paragraph 10.6 of the Sale of Assets Agreement contains a merger clause, which provides the Agreement "contains the entire understanding between the parties and supersedes any prior understandings and agreements among them respecting the subject matter of [the] Agreement."

Gindi made an initial down payment of \$750.00 to Dr. Geada pursuant to the terms of the Sale of Assets Agreement, which was approximately 1% of the \$74,899.99 allocated for the equipment, inventory and goodwill. The balance of the \$170,000 purchase price was to be paid in two (2) equal monthly installments, \$1,235.83/month beginning May 1, 2015 for 60 months (5 years) for the remaining balance of \$74,150.00 (the purchase price of the PT practice) and \$1,763.76/month beginning April 24, 2014 to be applied to ½ the balance of the Settlement Agreement relating to the qui tam action.

After the sale, Gindi took over the PT practice and began operating under the name "Gindi Physical Therapy" in April 2015. With the benefit of the assets acquired from the sale, Gindi Physical Therapy realized over \$320,000.00 in gross sales in the first nine months of 2016. Pursuant to the Sale of Assets Agreement, Gindi made two (2) payments of \$1,235.83 each (for a total of \$2,471.66) toward the remaining \$74,150.00 balance for the practice. After the second payment, Gindi stopped making monthly payments all together and was in default.

To date, Gindi has paid Plaintiffs a total of \$3,221.66 toward the \$75,000.00 purchase price for the PT practice, with a principal sum of \$71,678.34 that remains outstanding. In regard to the

\$95,100.01 (\$1,763.76 per month) payment allocated for the qui tam settlement obligation to the United States, Gindi made a couple of monthly payments directly to Southern States, but ultimately quit paying Southern States and has been making the \$1,763.76/month payments directly to the government instead. Gindi testified at his deposition that he is current on his monthly obligation to the government, though he is no longer making the payments directly to Southern States in violation of the parties' Agreement.

On September 17, 2015, Dr. Geada and Southern States filed the Complaint in this matter. Among other things, Plaintiffs' Complaint alleges causes of action against Gindi for breach of contract and unjust enrichment, and Plaintiffs seek an Order for Declaratory Judgment finding the Settlement Agreement is a valid and enforceable contract.

On October 29, 2015, Gindi filed an Answer and counterclaims for fraud and constructive fraud as to both the Settlement Agreement and Sale of Assets Agreement, for contribution to recover the payments Gindi has made to the government pursuant to the qui tam Settlement Agreement, and for gross negligence for Plaintiffs' alleged "failure to supervise and oversee" Gindi's improper billing activities that resulted in the qui tam lawsuit and the \$300,000.00 joint and several obligation to the government. Despite his allegations of fraud and constructive fraud as to the Settlement Agreement, Defendant denies he is seeking to attack its validity of the Settlement Agreement. (Answer and Counterclaim ¶9).

On September 23, 2016, Plaintiffs deposed Defendant Gindi regarding the allegations in Plaintiffs' Complaint and Defendant's Answer and Counterclaim and Defendant's responses to discovery. A copy of Defendant's deposition testimony was provided to this Court. After the Deposition, on October 31, 2016, Plaintiffs filed a Motion for Summary Judgment as to all of Plaintiffs' causes of action against Defendant and as to all counterclaims asserted by Defendant

against Plaintiffs. On February 2, 2017, Plaintiffs also filed a Motion to Compel, seeking an order compelling Defendant to respond to Plaintiffs' Second Set of Interrogatories and Third Set of Requests for Production.

On February 17, 2017, Plaintiffs served a Memorandum in Support of their Motion for Summary Judgment on Defendant, which was filed on February 24, 2017. On February 21, 2017, Gindi filed a Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. Attached to and in support of his Memorandum was an Affidavit of Chad S. Gindi, also dated February 21, 2017. On February 24, 2017, Plaintiffs filed a Motion to Strike the Affidavit of Chad S. Gindi on the basis that the affidavit contradicted Defendant's prior sworn testimony and is a "sham" affidavit pursuant to Cothran v. Brown, 375 S.C. 201, 592 S.E.2d 629 (S.C. 2004). A hearing on all three motions was heard by this Court on March 20, 2017 at the Lancaster County Judicial Center at which all parties appeared through counsel.

DISCUSSION

I. Motion for Summary Judgment and Declaratory Judgment

Plaintiffs seek an order granting Summary Judgment in favor of Plaintiffs' breach of contract claim (or, in the alternative, Plaintiffs' unjust enrichment claim) and dismissing Defendant's counterclaims of fraud, constructive fraud, contribution/offset and gross negligence/negligent supervision as a matter of law. Plaintiffs also seek a declaratory judgment rendering a judicial determination that the Plaintiffs and Defendant are jointly and severally liable for payments due to the United States under the terms of the Settlement Agreement.

Summary Judgment Standard

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Quality Towing, Inc. v. City of

Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). "Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." Hedgepath v. American Telephone and Telegraph Company, 348 S.C. 340, 559 S.E.2d 327, 335 (Ct.App.2002) (citing Baughman v. American Tel. And Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991)). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Cl. App. 1999). "Once the moving party carries its initial burden, the 'opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a **genuine issue for trial.**'" (emphasis in original) Hedgepath at 335, citations omitted.

It is settled law in South Carolina that when a motion for summary judgment is supported by affidavits or deposition testimony, a party cannot rely on mere allegations in pleadings to overcome summary judgment and must produce documentary evidence or proof in addition to a general denial in a pleading. S.C. R. Civ. P. 56(e); Peterson vs. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). As such, a Defendant must provide evidence by way of facts sufficient to notify the Plaintiffs of Defendant's defense to this action and cannot rely on Defendant's Answer to overcome summary judgment.

A. Declaratory Judgment, Fraud and Constructive Fraud – Settlement Agreement

The purpose of a declaratory judgment is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. S.C. Code Ann. § 15-53-130. Defendant himself admits that pursuant to the Settlement Agreement, Plaintiffs and Defendant are

required to pay the government monthly installments to settle the civil claims discussed under the terms of the Settlement Agreement. (Ans. ¶29). Defendant also admits in his Answer that Plaintiffs and Defendant are jointly and severally liable for payments under the terms of the Settlement Agreement. Id.

The Settlement Agreement is a fully enforceable legal contract, and the contract language clearly provides that the Plaintiffs and Defendants are jointly and severally liable for the payments due thereunder. Indeed, in his Answer, Defendant **expressly denies that he is seeking to attack the validity of the Settlement Agreement.** (Ans. ¶20). In his Responses to Plaintiffs' Request to Admit dated February 29, 2016, Defendant also admitted he and Plaintiffs are jointly and severally liable for the payments to the government under the terms of the Settlement Agreement. Therefore, Defendant's claim that he entered into the Settlement Agreement under duress and relied upon some material misrepresentation of Plaintiff or Plaintiff's counsel is wholly irrelevant to this lawsuit. Defendant's counterclaims and defenses of fraud, constructive fraud and duress also relate directly to the validity of the Settlement Agreement, which the Defendant does not contest.

Rather, Defendant Gindi asserts an independent counterclaim for contribution or offset for the 50% of the \$300,000.00 obligation that he has been paying monthly to the government despite the existence of *an admittedly* valid and enforceable Settlement Agreement. For reasons addressed in Section I(B) below, Defendant's contribution/offset counterclaim is dismissed as a matter of law. Nevertheless, the contribution/offset counterclaim does not have any bearing on this Court's ability to enter a declaratory judgment on the issues requested in the Complaint. In the alternative, Defendant requests an order relieving him from his obligation under the Settlement Agreement, which this Court has no power to do if the Settlement Agreement is a valid and enforceable contract as Defendant contends it is.

The terms of the Settlement Agreement speak for itself. Because Defendant does not contest the validity of the Settlement Agreement, that he is obligated to make monthly payments to the government, or that he is jointly and severally liable with Plaintiffs for the monthly payments pursuant to the terms of the Settlement Agreement, there is no genuine issue of material fact in dispute to prevent this Court from entering an order declaring the same.

For the reasons stated above, Plaintiffs' Motion for Declaratory Judgment is hereby GRANTED. This Court further finds and declares: (1) the Settlement Agreement is a valid and enforceable contract; (2) Defendant was a party to the Settlement Agreement; and (3) Plaintiffs and Defendant are jointly and severally liable for the \$300,000.00 obligation to the government pursuant to the terms of the Settlement Agreement. For the same reasons stated above, namely that Defendant admits the Settlement Agreement is a valid and enforceable contract.² Defendant's counterclaims for fraud and constructive fraud as to the Settlement Agreement fail as a matter of law and are hereby DISMISSED. Plaintiff's Motion for Summary Judgment as to Defendant's counterclaims for fraud and constructive fraud as they relate to the Settlement Agreement is GRANTED.

B. Contribution/Offset – Settlement Agreement

As a matter of law, Defendant is barred from seeking an independent cause of action for contribution against Plaintiffs for the monies he paid the government in accordance with the Settlement Agreement. The False Claims Act and the South Carolina Contribution Among Joint Tortfeasors Act prohibits a qui tam defendant from seeking contribution for a violation of the False Claims Act.

² There can be no valid contract if the elements of fraud are present. Yet the Defendant specifically alleges that the Settlement Agreement is a valid contract. Defendant's position that the Settlement Agreement is a valid and enforceable contract was confirmed and reiterated by counsel for Defendant at the hearing on Plaintiffs' Motion.

Federal law precludes a False Claims Act (FCA) defendant from pursuing a claim that will have the equivalent effect of contribution or indemnification. Mortgages, Inc. v. United States Dist. Court, 934 F.2d 209, 1991 U.S. App. LEXIS 10450 (9th Cir. Ct. App. 1991) (“There is no right of indemnity or contribution among participants in a scheme to defraud the government in violation of the False Claims Act”); United States ex rel. Battiatia v. Puchalski, 906 F. Supp. 2d 451, 2012 U.S. Dist. LEXIS 155054 (D.S.C. 2012); *see also* United States ex re. Michaels v. Agape Senior Cmty., Inc., 2013 U.S. Dist LEXIS 1715 (D.S.C. Dec. 5, 2013); United States ex rel. Slavatore v. Michael Fleming, 2015 U.S. Dist LEXIS 38436 (W.D. Pa. Feb. 24, 2015) (cross claim dismissed where recovery only possible based upon finding of liability under the FCA); Heart Doctors, P.S.C. v. Layne, 2006 U.S. Dist. LEXIS 71396 (E.D. Ky. Sept. 13, 2006) (FCA barred contribution claim by qui tam defendant against third party not party to settlement agreement); United States ex rel. Wildhirt v. AARS Forever, Inc., 2013 U.S. Dist. LEXIS 133982 (E.D. Ill. Sept 19, 2013) (contribution or indemnity for a defendant's liability resulting from FCA violations forbidden); United States ex rel. head v. Kanc Co., 688 F. Supp. 2d 146 (D.D. C. 2009) (counterclaim impermissible if it depends on finding that the defendant is liable under the FCA).

In Mortgages, defendants in a qui tam action for a violation of the False Claims Act filed third party complaints against the qui tam plaintiffs, alleging state law claims, including breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation and conspiracy. Mortgages, 934 F.2d at 211. Pursuant to each of the state law claims, the defendants sought as relief full indemnification and/or contribution from the plaintiffs for any recovery of judgment in favor of the United States in the FCA action, claiming petitioners were responsible for the fraud upon the government. Id.

Examining the purposes of the FCA and the legislative history, the court found “the FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with ‘unclean hands’” and “Congress did not intend to create a right of action for contribution or indemnification under the FCA.” *Id.* at 212-213. As such, the 9th Circuit Court of Appeals determined that the district court erred when it denied the petitioners’ motion to dismiss the counterclaims filed by defendants:

Because there is no basis in the FCA or federal common law to provide a right to contribution or indemnity in a FCA action, we conclude that *there can be not right to asset state law counterclaims that, if prevailed on, would end in the same result.*

Id. at 214. (emphasis added).

Recently, the District Court of South Carolina adopted the Mortgages opinion, also holding that a qui tam defendant may not assert any counterclaim for dependent damages against a qui tam plaintiff (a relator). United States ex rel. Battiata v. Puchalski, 906 F. Supp. 2d 451, 2012 U.S. Dist. LEXIS 155054 (D.S.C. 2012). The facts in Puchalski are similar to Mortgages in that defendants in a qui tam action for a violation of the False Claims Act filed counterclaims against the qui tam relators, alleging state law claims, including breach of fiduciary duty, indemnity and contribution. *Id.* at 455-56. There, the South Carolina District Court dismissed the counterclaims because the state law claims were all “dependent on a finding that Defendants are liable to the United States for a violation of the FCA and seek recovery in the nature of a claim for contribution or indemnity.” *Id.* However, taking the analysis a step further, the court in Puchalski went on to suggest in *dicta* that dismissal of dependent counterclaims is appropriate even if there has not been a determination of the defendant’s liability under the FCA. *Id.* at 458, FN2.

In another case, the District Court for the District of Massachusetts applied the Mortgages decision in the context of a FCA defendant (Dynamic Resource Corporation or “DRC”) whose

contribution among joint tortfeasors in South Carolina. Therefore, Gindi's claim arises solely under the South Carolina Contribution Among Tortfeasors Act ("the Act"), S.C. Code Ann. §§ 15-38-10 to -70. See M&T Chemicals, Inc. v. Barker Indus., Inc., 296 S.C. 103, 106, 370 S.E.2d 886, 888 (Ct. App. 1988) (reluctantly finding no common law right to contribution in South Carolina prior to the Act's 1988 enactment). "Because the Act is in derogation of the common law, it must be strictly construed." G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). The Act clearly excludes contribution for an intentional tort: "there is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." S.C. Code Ann. § 15-38-20(C).

Here, Gindi alleges an independent cause of action for contribution relating to his obligation to the government for a violation of the FCA. There is no question that a violation of the FCA is an intentional tort that is excluded from the Act. Therefore, there is no legal basis or remedy that exists that a court or jury could award this defendant.

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment seeking dismissal of Defendant's counterclaim for contribution/offset is hereby GRANTED and Defendants counterclaims for contribution/offset is hereby DISMISSED as a matter of law.

C. Breach of Contract- Sale of Assets Agreement

The issue before this Court is simply whether the Sale of Assets Agreement is a binding and enforceable contract. The remaining two elements (breach or unjustifiable failure to perform and damages suffered by the plaintiff) are uncontested by the defendant. Gindi admitted in his Answer, Responses to Plaintiffs' Requests to Admit, and his deposition that he signed and entered into the Sale of Assets Agreement with Plaintiff Southern States. Gindi also admitted that he quit

making payments in violation of the terms of the Agreement, but he denies the contract is enforceable, alleging fraud, constructive fraud, and duress (for the first time in his deposition).

Plaintiffs seek an order dismissing Gindi's counterclaims for fraud and constructive fraud as a matter of law and granting summary judgment in favor of Plaintiffs on their breach of contract claim, finding no evidence to support any legal defense of fraud, constructive fraud or duress. Plaintiffs further seek a judgment against Defendant for the contract balance, together with the 10% contractual default damages for failure to make the required monthly installment payments and statutory pre-judgment interest, as accrued.

To recover for a breach of contract the plaintiff must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Casualty Insurance Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962). The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Cl. App. 1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." Id.

Defendant Gindi entered into a contract with Plaintiffs to purchase the physical therapy department of Southern States for a total of \$170,000.00 (\$75,000 was allocated to the purchase price of the business and the remainder was for ½ of the liability to the government pursuant to the qui tam Settlement Agreement). To date, Gindi paid Plaintiffs a total of \$3,221.66 toward the \$75,000 purchase price of the physical therapy practice, which does not even satisfy the amount

allocated in the Agreement for the equipment and inventory. Gindi refused to make any further payments toward the purchase price of the business, forcing Dr. Geada and Southern States to initiate this lawsuit.

Gindi argues that the Sale of Assets Agreement is void and unenforceable, that he signed it under duress, that Dr. Geada made fraudulent representations inducing him to sign the Agreement, and he is entitled to continue operating the physical therapy practice without further compensating Plaintiffs. However, I find Gindi failed to provide this Court with even a scintilla of evidence to support a defense of duress, fraud or constructive fraud or to rebut Plaintiffs' breach of contract claim. To the contrary, Plaintiffs have provided the Court with substantial evidence to support all necessary elements of their breach of contract claim.

i. Fraud and Constructive Fraud- Sale of Assets Agreement

Plaintiffs' are entitled to summary judgment as to their breach of contract claim because Gindi's counterclaims/defenses for fraud and constructive fraud fail as a matter of law.

The elements that must be proven to recover in an action for fraud are: (1) a representation, (2) falsity, (3) materiality, (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury. Kahn Construction Co. v. South Carolina National bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). Constructive fraud has the same legal effect as actual fraud, except that constructive fraud is distinguished from fraud by the absence of the element of intent to deceive. Singleton v. Mullins Lumber Co., 234 S.C. 330, 108 S.E.2d 414 (1959). Failure to prove any one of the foregoing elements is fatal to recovery. Id. Specifically, a plaintiff must set forth sufficient facts to show that each of these nine elements is present in the

complaint or the complaint will be "fatally defective." Mutual Savings & Loan Ass'n v. McKenzie, 274 S.C. 630, 633, 266 S.E.2d 423 (1980). Standards for alleging and proving fraud and constructive fraud are the same whether the claim of fraud is a cause of action or an affirmative defense. Hansen v. DHI Laboratories, Inc., 319 S.C. 79, 450 S.E.2d 624 (Ct. App. 1994).

As to the first element of fraud, it is well established that a "representation" must be a statement which concerns an existing fact; broken promises do not amount to fraud. Tom Hughes Marine Inc. v. American Honda Motor Co., 291 F.3d 321 (4th Cir. 2000) (mere showing that a party failed to keep promises insufficient to demonstrate actionable fraud; recourse for unkept promises confined to action in contract). Here, Gindi testified that Dr. Geada fraudulently represented to him that he would assist Gindi with the transition of the PT business by helping him obtain insurance contracts with certain for several weeks prior to the sale of the practice and prior to the execution of the Sale of Assets Agreement. Gindi stated that Geada "volunteered to help me", but claims that Dr. Geada failed to do so and Gindi had to complete all the "credentialing paperwork" for the insurance providers on his own.

Specifically, Gindi claims he needed lease information on the "credentialing application" for Medicare, and Dr. Geada would not give that to him. However, it is undisputed that the Sale of Assets Agreement does not require Dr. Geada to assign the lease of the existing practice to Gindi or to assist Gindi with obtaining an office space. Gindi also acknowledged that he did not request for those terms to be incorporated into the Sale of Assets Agreement.

Therefore, assuming Gindi's version of the facts are true and assuming Dr. Geada broke a promise to help him with the insurance "credentialing" prior to the closing, such a promise does not constitute a legal "representation", and Gindi has no recourse pursuant to the terms of the Agreement. The Sale of Assets Agreement clearly defines the rights of the parties, excludes any

provision regarding any consulting obligation on the part of Dr. Geada and expressly “supersedes any prior understandings and agreements” among the parties. Id.

Second, the representation must be material, meaning it must be sufficiently important or significant to an objective reasonable person to induce that person to enter the contract. Clubreath v. Investors Syndicate, 203 S.C. 213, 221, 26 S.E.2d 809 (1943). The hearer must also be ignorant of the falsity; there is no cause of action if the plaintiff knew that the misrepresentation was false because there could not have been any reliance on the truth of the statement. Moorhead v. First Piedmont Bank & Trust Co., 273 S.C. 356, 256 S.E.2d 414 (1979). Here, Dr. Geada’s alleged promise to assist with the “credentialing” or insurance paperwork was not “material” to Gindi’s decision to sign the Sale of Assets Agreement for the same reason Gindi could not have relied on the promise—Gindi knew Dr. Geada failed to deliver on his promise prior to signing the Sale of Assets Agreement, but he chose to sign it anyway. Indeed, when questioned about Dr. Geada’s refusal to provide certain information for the insurance companies, Gindi testified that he “didn’t have a choice” but to sign the Agreement because Geada wouldn’t provide the information “until I signed his Agreement”. The “credentialing applications” Gindi complains Dr. Geada would not help him with are all dated March of 2015, prior to the April 1 closing; and Gindi ultimately secured the insurance contracts and currently accepts reimbursements from those providers.

Gindi’s counterclaims for fraud and constructive fraud also fail as a matter of law because Gindi had no right to rely on Dr. Geada’s promise. There is no right to rely in an arm’s length transaction between “mature, educated people” absent a confidential or fiduciary relationship, especially where the plaintiff should have used precaution and protection to safeguard his interests. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). In general, “mere

respect for another's judgment or trust in his character is usually not sufficient to establish [a fiduciary] relationship." Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). Additionally, where the plaintiff would have undertaken the transaction regardless of whether the representation was true, then there is no reliance. Warren v. Peeples, 183 S.C. 238, 190 S.E. 740 (1937).

Gindi claims that he signed the Agreement because he "trusted Dr. Geada" and looked up to him as "the gentleman who employed me for eight plus years." The record reflects that Gindi has eight years of post-secondary education, a doctorate in Physical Therapy and prior experience with the legal system. Gindi admitted he contemplated hiring a healthcare attorney to review the Agreement, but ultimately decided not to do so. Furthermore, Gindi admits that he read the Agreement before he signed it and he understood he was intended to be bound by the Agreement. As such, Gindi's trust in Dr. Geada did not create a fiduciary relationship such that Gindi had right to rely on any representation of Dr. Geada. Indeed, there was in fact no reliance at all because Gindi undertook the transaction despite knowing the promise was false or unfulfilled. All of the "credentialing" assistance was to take place during the "transition period" prior to the execution of the Agreement.

At minimum, Gindi's counterclaims are "fatally defective" for failure to plead fraud and constructive fraud with any degree of specificity and must be dismissed pursuant to SCRCF 12(b)(6). Furthermore, there is no evidence in the record to establish at least 4 of the 9 necessary elements of fraud. There is no issue of material fact to be resolved by a jury, the facts as Defendant testified to at his deposition are legally insufficient to constitute a cause of action for fraud or constructive fraud.

For the reasons stated above, Plaintiffs' Motion for Summary Judgment as to Defendant's counterclaims for fraud and constructive fraud is hereby GRANTED and Defendant's counterclaims for fraud and constructive fraud are DISMISSED as a matter of law.

ii. Additional Fraud/Constructive Fraud Allegations- Plaintiffs' Motion to Strike

Through an affidavit, Gindi asserted alternative theories relating to the alleged misrepresentation in an attempt to create an issue of fact as to his fraud and constructive fraud counterclaims relating to the Sale of Assets Agreement. On February 24, 2017, Plaintiffs filed a Motion to Strike Gindi's affidavit on the ground that it is a sham affidavit.

Where a party submits a competing affidavit that attempts to create an issue of fact, the court may properly disregard the party's subsequent conflicting affidavit or sworn statement for purposes of summary judgment. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). In distinguishing between a sham affidavit versus one that merely corrects or clarifies an issue previously addressed by the party, our courts consider the following factors: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to the fact prior to previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the latter affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted. Id.

Here, Gindi alleged a counterclaim for fraud and constructive fraud against Plaintiffs, claiming Plaintiff Gcada fraudulently induced him to enter into the Sale of Assets Agreement. Gindi's Answer and Counterclaim failed to identify with any specificity the content or circumstances surrounding the alleged fraud, generally alleging that "Plaintiff Gcada knowingly

or in reckless disregard of the truth, made false and material representations to Defendant Gindi with the intention of inducing him into entering the Sale of Assets Agreement.” (Ans. ¶117).

On March 3, 2016 (over one year prior to his Affidavit), Gindi served responses to Plaintiffs’ First Set of Interrogatories. In response to Plaintiffs’ Interrogatory No. 7, which asks Defendant to set forth the factual basis of the allegation that Geada made false representations inducing Gindi to enter into the Sale of Assets Agreement, Gindi responded as follows:

Dr. Geada forced Defendant to rush into signing the agreement as he stated ‘it was his only option’, and ‘no one else would hire him.’ Dr. Geada used scare tactics and representations about the business to persuade him to immediately sign the Agreement. Additionally, the Plaintiff included the settlement with OIG in the Sale of Assets Agreement which was not part of the sale of the business.

Gindi never supplemented or amended his responses to Plaintiffs’ Interrogatories.

On September 23, 2016, Plaintiffs deposed Gindi regarding the allegations in his Answer and responses to discovery requests. In response to Plaintiffs’ questions relating to the alleged fraudulent misrepresentation, Defendant’s testimony mirrored his answer to Plaintiff’s Interrogatory No. 7. Gindi also claimed at his deposition that Dr. Geada made promises to him to help fill out applications secure certain contracts with insurance providers prior to the sale and that Dr. Geada did not do so. This was the sum total of Gindi’s testimony relating to the alleged misrepresentations by Dr. Geada that formed the basis of Gindi’s fraud and constructive fraud counterclaims and defenses to the Sale of Assets Agreement.

On October 31, 2016, Plaintiffs filed their Motion for Summary Judgment as to each of their claims and Defendant’s counterclaims, including Defendant’s counterclaims for fraud and constructive fraud. A hearing on Plaintiffs’ Motion for Summary Judgment was originally scheduled on February 23, 2017 before Judge Burch. On February 17, 2017, Plaintiffs served Gindi a Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, detailing their arguments

relating to Defendant's fraud and constructive fraud counterclaims, which was supported by excerpts of Defendant's prior sworn deposition testimony. Defendant's answers to Interrogatories and Defendant's Responses to Plaintiffs' Requests to Admit. On February 21, 2017, Defendant filed a Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, which was supported by an Affidavit of Chad S. Gindi. The February 23, 2017 hearing was continued at the request of counsel for Defendant, and Plaintiffs' Motions were heard by this Court on March 20, 2017.

In his Affidavit, Gindi alleges for the first time that Dr. Geada induced him into purchasing the PT practice by promising him that Southern States would operate in the same building as the PT practice just as it had before the sale and that the two businesses would refer patients to each other. Specifically, Gindi claims Dr. Geada fraudulently "represented to me that Dr. Geada and I would continue to function together. Patients would be referred from one side to the other as they always have. We would split the utility expenses of the building. This was absolutely not true." (Gindi Aff. pp. 8-9; see also Gindi Aff. pp.5-6).

At the hearing, Defendant argued that the Affidavit is not contradictory but instead explains Gindi's prior discovery responses and sworn testimony. Defendant contends Plaintiffs' deposition questions were somehow insufficient or inadequate to elicit testimony from Gindi regarding the basis of the fraud allegations. Defendant also argues the Affidavit explains Defendant's response to Interrogatory Number 7 that Dr. Geada used "representations about the business...to persuade [Gindi] to immediately sign the Agreement."

The Court is not persuaded by Defendant's argument that the Affidavit is not contradictory. Gindi's Answer fails to contain any level of detail sufficient to put Plaintiffs on notice of the basis for his fraud and constructive fraud counterclaims. Therefore, Plaintiffs attempted to discover the

basis for Gindi's allegations through written discovery and deposition testimony. This Court reviewed the deposition testimony of Gindi in its entirety. I find Plaintiffs thoroughly deposed Gindi in connection with each and every allegation set forth in Gindi's Answer and Counterclaims as well as Gindi's discovery responses. Gindi was afforded a full and fair opportunity to explain the basis of his fraud claims in his Answers to Interrogatories and during his deposition, and he made no mention of the new allegations contained in his Affidavit. Therefore, I find the assertions in Gindi's Affidavit relating to his expectation that Southern States' would remain in the building and refer patients to Gindi contradict his prior sworn testimony and the position consistently asserted by him throughout the proceedings that the bases of his fraud allegations relate to Dr. Geada's assistance with insurance "credentialing" and his pressuring Dr. Gindi to purchase the practice. As such, Gindi may not ambush Plaintiffs two days before hearing on Plaintiffs' Motion for Summary Judgment by offering a sham affidavit for the purpose of creating an issue of fact.³

Moreover, the importance of Gindi's new fraud theory to this litigation is obvious. Whether the alleged fraud constitutes a representation of a preexisting fact that Gindi could have reasonably relied upon goes to the very essence of Defendants' counterclaims. Plaintiffs have argued that, under Gindi's prior version of the facts, there is no legal cause of action for fraud because a promise to help Gindi secure contracts or "credentialing" with certain insurance companies is legally insufficient to form a basis for at least four (4) of the (9) necessary elements of fraud, particularly because Gindi testified that Dr. Geada didn't follow through on his promise prior to the sale but

³ Although unnecessary for the resolution of Plaintiffs' Motion to Strike, this court finds that viewing the facts alleged in Gindi's affidavit in the light most favorable to Gindi, and assuming Gindi's new explanation regarding the alleged misrepresentations are true, any promise by Dr. Geada not to relocate the chiropractic business is insufficient to withstand summary judgment. Such terms were not incorporated into the Sale of Assets Agreement, which contained a merger clause, and a promise to do something in the future is not a "representation" and is legally insufficient to establish the necessary elements of fraud and constructive fraud.

he chose to sign the Sale of Assets Agreement anyway. (See Pls' Memo in Support of Motion for Summary Judgment).

Gindi's new version of the facts relating to Geada's promises to stay in the building and for the chiropractic business to "operate as one entity" with Gindi's new PT practice requires an entirely new application of the law to the facts. Furthermore, Gindi had access to these newly alleged facts when he responded to discovery requests and at his deposition—Gindi's Affidavit alleges Dr. Geada relocated in violation of his promise to in the same building as Gindi "as soon as the purchase was completed". (Gindi Aff. p. 5, ¶16). There is no evidence indicating Gindi was confused when he was questioned at his deposition regarding the alleged fraudulent misrepresentations or when he provided written discovery responses relating to the same. Gindi was on notice of these "facts" prior to the lawsuit being filed and had ample opportunity to set forth the basis of his claims.

Finally, the timing of the Affidavit in the context of the discovery in this case is particularly troubling. Gindi's Affidavit was filed nearly five (5) months after his deposition, four (4) months after Plaintiffs' filed their Motion for Summary Judgment, just three (3) days after Defendant was served with Plaintiffs' Memorandum in Support of the Motion for Summary Judgment, and two (2) days before the originally scheduled hearing on Plaintiffs' Motion. Every factor under Cothran is present in this case. This is a clear textbook example of a sham affidavit that must be disregarded by the Court to protect the integrity of the discovery process, truthful fact finding and the justice system itself.

Due to the nature and extent of the contradictory and/or new and different facts from those previously asserted, Gindi's affidavit fatally defective and is stricken in its entirety. Therefore, the Affidavit is not considered by this Court for the purpose of ruling on Plaintiffs' Motion for

Summary Judgment as to Defendants defenses and counterclaims of fraud, constructive fraud and duress relating to the Sale of Assets Agreement. Plaintiffs' Motion to Strike is hereby GRANTED.

iii. Duress- Sale of Assets Agreement

The facts underlying Gindi's assertion at his deposition that he did not enter into the Sale of Assets Agreement "freely and voluntarily" because he was under duress fails as matter of law. As a threshold matter, Gindi failed to affirmatively plead duress as a defense to Plaintiff's Breach of Contract cause of Action as required by Rule 12(c), SCRPC. As such, that defense is not before this Court, and Plaintiffs' Motion for Summary Judgment as to their Breach of Contract claim is hereby GRANTED without consideration of that issue. However, the Court acknowledges that had Defendant properly asserted duress as an affirmative defense, there is no evidence in the record to support a defense of duress as a matter of law.

A party is under duress if "improper external pressure or influence... practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 178, 442 S.E.2d 197, 202 (Ct. App. 1994) (citing Cherry v. Shelby Mut. Plate Glass & Cas. Co., 191 S.C. 177, 4 S.E.2d 123 (1939)). The elements of duress are: (1) the person was coerced to enter into the contract, (2) that person was put in such fear that he was bereft of the quality of mind essential to making of a contract; and, (3) that the contract was thereby obtained as a result of this state of mind. Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009).

Here, the sum total of the evidence Gindi offers to support his defense that he was under duress when he signed the Sale of Assets Agreement is his own testimony that he was under "extreme stress" and "pressure" to sign the Agreement. Defendant testified at his deposition that Dr. Geada did not help him with the business transition as he had expected and that Dr. Geada

would not give him an extension to sign the Agreement as the March 31, 2015 closing date approached. Gindi acknowledged he sent a text Dr. Geada on March 10, 2015, 20 days before the closing, where he wrote "after careful consideration I decided to continue with the sale", but claimed in his deposition that it is evidence of duress because it was sent at 1:12 AM and "time was running out." Gindi also testified that he felt he had no choice but to sign the Agreement because Dr. Geada told him no one was going to hire him and "convinced me that I would not be able to work anywhere else". Gindi denied Dr. Geada threatened him or his family physically to induce him to sign the Agreement.

Accepting Gindi's testimony as true, I find Defendant failed to identify a scintilla of evidence to support a legal defense of duress. To the contrary, Plaintiffs submitted evidence that Dr. Geada first presented Gindi with an opportunity to purchase the physical therapy practice in December of 2014, and the Sale of Assets Agreement wasn't executed until April 1, 2015, approximately 3 ½ months later. The parties negotiated and communicated about the terms of the Agreement for months. There is no evidence Dr. Geada made any wrongful threat that destroyed Gindi's free agency or that Gindi had no reasonable alternative but to sign the Sale of Assets Agreement. Gindi's explanation that Dr. Geada pressured him into signing the Agreement because Dr. Geada convinced him that no one would hire him is legally insufficient to create a genuine issue of material fact as to the validity of the Sale of Assets Agreement. Gindi testified that he was simply concerned that he would no longer have a job if Dr. Geada got rid of the PT department, and he acknowledged that Dr. Geada does not make any hiring decisions for any other physical therapy practice other than Southern States. Gindi had over 3 months' notice that Dr. Geada planned to sever the PT department from Southern States; he was free to start his own PT practice without purchasing Southern States or to find a job at another physical therapy center.

iv. Additional Allegations- Sale of Assets Agreement

In his Answer, Gindi attacks the Sale of Assets Agreement on an additional ground, alleging that "Defendant Gindi did not purchase any part of the business of the Plaintiff, other than the assets set forth on Exhibit A of the Sale of Assets Agreement" and that "[t]he Sale of Assets Agreement requires the Defendant to pay the Plaintiff 'goodwill' however, goodwill was never a part of this transaction." Answer ¶ 81.

However, Defendant failed to produce any evidence supporting that allegation. In fact, contrary to his pleadings, Defendant admitted under oath that he purchased the goodwill in addition to the equipment when he signed the Sale of Assets Agreement:

Q: Okay. Did you believe goodwill was something that you were purchasing?

A: Yes.

Q: Okay. So you—you agreed to purchase the 70,000 of the goodwill part of this agreement?

A: Yes.

(Gindi Dep. 81:4-16).

Therefore, the Defendant's allegation regarding goodwill must not be considered by this Court as it directly contradicts Defendant's sworn deposition testimony. It is well settled that the allegations Defendant's Answer are not evidence that can create an issue of fact. Peterson vs. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). In applying the facts to the defenses and counterclaims asserted by the defendant, this court must consider the Defendant's own sworn testimony over the general allegations in Defendant's Answer. Therefore, there is no genuine issue of material fact that the terms as stated in the Sale of Assets Agreement constitute the parties' entire Agreement.

Viewing the facts in the light most favorable to the Defendant in this action, there are no facts or other evidence before the Court that can support Defendant's defenses and counterclaims for, fraud, constructive fraud or duress as a matter of law, and there is no genuine issue of material fact precluding a finding that Defendant breached the Sale of Assets Agreement; therefore, Plaintiffs are entitled to summary judgment as a matter of law as to their breach of contract claim pursuant to Rule 56, SCRPC. For these reasons, Plaintiffs' Motion for Summary Judgment as to Plaintiffs' breach of contract cause of action is hereby GRANTED, and Defendant's counterclaims for fraud and constructive fraud are hereby DISMISSED as a matter of law.⁴

D. Gross Negligence- Negligent Supervision

In his Answer and Counterclaim, Defendant asserted a counterclaim against Plaintiffs for negligent supervision for failing to supervise Gindi while he engaged in the illegal billing practices that resulted in the qui tam investigation and subsequent Settlement Agreement. At the hearing before this Court on Plaintiffs' Motions, Defendant Gindi, by and through the representations of his counsel, conceded to Plaintiffs' Motion for Summary Judgment as to Defendant's negligent supervision counterclaim and withdrew same. For that reason, Plaintiffs' Motion for Summary Judgment on Defendant's counterclaim for negligent supervision is hereby GRANTED and Defendant's counterclaim for negligent supervision is DISMISSED.

CONCLUSION

Accordingly, for the reasons set forth herein, and based on the deposition transcripts and briefs submitted to the Court and the and affidavits and other Exhibits attached thereto, it is **ORDERED, ADJUGED AND DECREED** that the Plaintiffs' Motion for Summary Judgment is

⁴ Having found the Sale of Assets Agreement is a valid and enforceable contract, this Court need not rule on Plaintiff's alternative cause of action for Unjust Enrichment.


GRANTED as to Plaintiffs' Breach of Contract cause of action against Defendant and each of Defendant's counterclaims are hereby **DISMISSED** as a matter of law.

Having granted Plaintiffs' Motion for Summary Judgment, I find as follows:


1. The Sale of Assets Agreement is a valid and enforceable Agreement, including Defendant's obligations to pay \$1,763.76 per month, which represents his remaining ½ portion of the \$300,000.00 qui tam settlement obligation to the government.
2. There is due and owing to Plaintiffs
 - a. The principal balance of \$71,678.34 of the remaining balance for the purchase of the PT practice.
 - b. \$3,089.58 in contractual damages.⁵
 - c. \$13,084.38 in interest, which has accrued at the prejudgment interest rate of 8.75% per annum, July 1, 2015 - June 30, 2017, 730 days at the per diem rate of \$17.92.⁶

It is further ordered that the Clerk of Court of Lancaster County be authorized and directed to enter a Judgment against Chad S. Gindi in the amount of **\$84,762.71**.

AND IT IS SO ORDERED.



Hon. D. Craig Brown
Presiding Judge
12th Judicial Circuit


June 7, 2017

⁵ The sale of Assets Agreement entitles Plaintiff to contractual damages of 10% of each late monthly payments. From July 1, 2015 to July 1, 2017, Defendant is delinquent on 25 monthly payments of \$1,235.83 for a total of \$30,895.75. Plaintiffs are entitled to \$3,089.58 in contractual damages.

⁶ "The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). Here, the Sale of Assets Agreement provides monthly payments in the amount of \$1,235.83 to be applied to the purchase price of the PT practice were to begin on May 1, 2015. Defendant made two payments and defaulted on July 1, 2015. Pre-judgment interest is calculated from the date of Defendant's default.