STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Dr. Kaoru Pridgen, Plaintiff, v. Colonial Family Practice, LLC; Varsity Family Care Partners, LLC; Family Care Partners d/b/a Family Care Partners Management, LLC; Dr. Clay Lowder; Thomas W. Watson; and Dr. Gary R. Katz; Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO. 2018-CP-40-02545 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANT VARSITY FAMILY CARE PARTNERS, LLC**

Dr. Kaoru Pridgen ("Plaintiff") filed this lawsuit on May 9, 2019, asserting claims including: (i) sex discrimination in violation of Title VII, (ii) violation of the Equal Pay Act, (iii) breach of contract, (iv) civil conspiracy, (v) negligent misrepresentation, (vi) breach of contract accompanied by a fraudulent act, and (vii) promissory estoppel. *See* Compl. (May 9, 2019); *see also* Am. Compl. (Mar. 14, 2019). Defendants deny these allegations.

This matter is before the Court on a Motion for Summary Judgment filed by Defendant Varsity Family Care Partners, LLC ("Varsity"). This Motion was filed on August 30, 2019. Plaintiff filed a response in opposition to Varsity's Motion on December 3, 2019. Varsity's Motion was heard by the Court on December 5, 2019. Based on the parties' briefing and oral arguments, the Court hereby GRANTS Varsity's Motion for Summary Judgment and dismisses Varsity from this case with prejudice.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine

issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "[A] court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim; rather, . . . the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, "a court cannot ignore facts unfavorable to [the nonmovant], and it must determine whether a verdict for that party would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

"To survive summary judgment, the evidence presented [by the non-movant] must amount to more than mere speculation and conjecture." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) (Hearn, J., concurring in part and dissenting in part) (*citing McKnight v. S.C. Dep't of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009)). "[I]dle speculation, which has no basis in the record, is clearly insufficient to overcome" summary judgment. *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 424 (D.S.C. 1994). A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Id.* (citation omitted).

UNDISPUTED FACTS

Plaintiff is a family medicine doctor. She was a sole practitioner until approximately May of 2013 when she accepted employment with Colonial. At the initiation of her employment with Colonial, she signed an Employment Agreement ("Agreement") that governed the employment

relationship. This Agreement addressed Plaintiff's ability to become a partner in the future as follows:

> 15. Membership Interest Purchase. At the end of the thirty-six (36th) month of employment, both Employer and Employee agree that consideration will be given to permitting Employee to purchase a membership interest in Colonial Family Practice, LLC at the end of the third (3rd) year of employment, or at such other time as agreed to by the parties. . . . The purchase price, percentage amount and remaining terms of such buy-in and the method of payment shall be determined at the time of buy-in.

The Agreement contains a merger clause which states the following:

> 22. Entire Agreement. This instrument contains the entire agreement of the parties and may not be changed orally but only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought.

The Agreement contains an assignment paragraph which states the following:

> 11. Employer may assign this Agreement to a successor organization of Employer with the advance written consent of Employee, which consent shall not be unreasonably withheld.

Plaintiff admits that she never consented to an assignment of this Agreement. There is no dispute that Plaintiff has been employed by Colonial since she signed the Agreement in May of 2013.

Plaintiff's primary claim in this case is that she was not offered partnership. The Agreement contemplated "consideration" for partnership in May of 2016. In December of 2015, there was an unexpected intervening event where Colonial sold its practice as part of a complex business transaction (the "2015 Transaction"). Pursuant to the 2015 Transaction, Varsity was created as a Special Purpose Vehicle (SPV) to house the investment. Pursuant to the 2015 Transaction, Family Care Partners Holdings, LLC ("FCP Holdings") (not a defendant in this lawsuit) and Family Care Partners Management, LLC ("FCP Management") were created to manage the organization. Varsity became the majority investor in FCP Holdings. FCP Holdings itself owned FCP Management. FCP Management entered into a Management Services

Agreement ("MSA") with Colonial.

The evidence shows that Varsity was at all times an investor entity. There is no evidence that Varsity acted outside its role of an investor and partial owner of FCP Holdings. Plaintiff has not presented any evidence that Varsity employed any physicians or management officials related to the 2015 Transaction or the subsequent management of the relevant entities. Plaintiff has not presented any competent evidence to dispute the sworn testimony of Varsity representatives that Varsity never had any employees.

As part of the Transaction, FCP Holdings was formed and it established an Operating Agreement. The Operating Agreement established a Board of Directors of FCP Holdings. The Operating Agreement provided that the Board of Directors managed FCP Holdings and had full, exclusive and complete discretion to manage and control the business and affairs of FCP Holdings. The FCP Holdings Board of Directors could consist of up to seven directors who were designated as follows: (i) up to four directors designated by Varsity (the "Preferred Directors"); (ii) Dr. Lowder, (iii) one Director which may be designated by the Preferred Directors so long as such Director is an "Independent Director", and (iv) the Chief Executive Officer of FCP Holdings.

The initial management structure of FCP Holdings was as follows: Thomas Watson, Chief Executive Officer (CEO); Dr. Lowder, Chief Medical Officer (CMO); Paul Miller, Chief Financial Officer (CFO). David Alpern served as the Chairman of the FCP Holdings Board of Directors from approximately December 2015 until approximately November of 2017. In his role as Chairman of the Board of FCP Holdings, Mr. Alpern had the authority to communicate with FCP Holdings and Colonial officials about management of the practice and FCP Holdings partnership issues. Plaintiff has not presented any evidence to show that Mr. Alpern or any other Varsity representative acted outside of their official capacity as FCP Holdings Board members in

participating in any decision related to the management of FCP Holdings or Colonial.

After the 2015 Transaction, Plaintiff and the other physician-employees remained employees of Colonial. The non-physician licensed employees of Colonial became employees of FCP Management. After the 2015 Transaction, partnership was no longer available in Colonial. Rather, any partnership opportunity was in FCP Holdings. Plaintiff was informed of this fact by both Dr. Lowder and Dr. Katz. The Board of FCP Holdings had to vote on any new partners in that entity. Plaintiff was never presented for a partnership vote to the FCP Holdings Board of Directors.

Plaintiff admits that she never had any conversations with any Varsity official about her employment with Colonial or potential partnership in FCP Holdings. Plaintiff admits that she does not know which legal entities were involved in decisions related to partnership. Plaintiff believed that Dr. Katz intended to present her for partnership at the scheduled May 9, 2017 meeting of the FCP Holdings Board of Directors. However, this meeting was cancelled in response to a financial crisis.

On February 20, 2017, the CFO of FCP Holdings (Paul Miller) surprised Tom Watson and members of the FCP Holdings board of directors with a cash forecast showing significant negative cash for the end of that week (2/24/2017). At that time, there were significant concerns about late and inaccurate reporting by the CFO of FCP Holdings and a search began to hire a new CFO. The cash flow issues and concerns continued into April of 2017. As Chairman of the Board of FCP Holdings, Mr. Alpern, decided to cancel a FCP Holdings Board meeting scheduled for May 9, 2017. The reason he decided to cancel this meeting was the significant financial concerns of the organization. Plaintiff has not presented any evidence to dispute this reason for cancelling the FCP Holdings Board meeting. FCP Holdings was experiencing a stressed cash position and Mr.

Alpern as Chairman of the FCP Holdings Board was implementing remediation plans.

Mr. Alpern decided to convene a working session in New York City with several FCP Holdings Board members and Varsity investors to analyze the significant financial crisis of the organization. There is no evidence to suggest that Plaintiff's partnership was discussed at this meeting. There is no evidence that the May 2017 FCP Holdings Board meeting was cancelled to avoid voting on any new partners in FCP Holdings. Rather, the undisputed evidence shows that the organization was in financial crisis and steps were being taken to quickly address this crisis.

In June of 2017, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that she was denied partnership based on her gender. After this charge was filed, communications regarding Plaintiff's eligibility or consideration for partnership were through legal counsel for the parties.

The financial position of FCP Holdings did not improve. As a result, in July of 2018, the assets of FCP Holdings, and all operating revenue and cash flow, were assigned by creditors to a new entity and a new board. After this assignment, Varsity no longer held any investment interest in FCP Holdings. The individuals who invested in FCP Holdings abandoned their shares due to the financial health of FCP Holdings and lost all of that investment, including Dr. Katz, Dr. Baker, and Tom Watson. The undisputed evidence shows that had Plaintiff become a partner in FCP Holdings, she would have also lost all of her partnership investment.

On July 29, 2019, Plaintiff provided a sworn deposition in this case. During the deposition, Varsity's counsel asked Plaintiff if she wanted to be offered partnership at that time. Specifically, Plaintiff's testimony was as follows:

Q. Do you want to be offered partnership currently?

A. No.

(Pl. Dep. at 303:21-23.)

The undisputed evidence is that after the 2015 Transaction, several individuals referred to FCP Holdings, the FCP Holdings Board of Directors and/or FCP Management as "Varsity" for ease of reference. There is no evidence to suggest that these references had any legal significance. Plaintiff did not detrimentally rely on any reference to Varsity. Plaintiff admits that when she heard the reference to "Varsity" that she did not know what specific business entity was being referenced.

Plaintiff has not presented any evidence to show that any FCP Holdings official or Board member acted outside the scope of their authority as officers or Board members in the control of FCP Holdings and in the control over partnership in FCP Holdings. Multiple witnesses have confirmed that no FCP Holdings official or representative acted outside the scope of their official authority. There is no evidence that any individual acted in an official capacity on behalf of Varsity as it related to Plaintiff.

DISCUSSION

1. PLAINTIFF'S TITLE VII CLAIM

Varsity has argued that Plaintiff's claim against Varsity under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), must be dismissed because Varsity was not Plaintiff's employer. The Court agrees with Varsity on this issue. A defendant may be held liable under Title VII if it (1) fits within the "employer" definition of Title VII and (2) exercises substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment. *Williams v. Grimes Aero. Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997).

With regard to the first element, an employer must employ 15 or more employees to be covered by Title VII. 42 U.S.C. § 2000e(b). Plaintiff has not presented any competent evidence

to contradict Varsity's sworn testimony that it never had any employees. Plaintiff asserts "email addresses used" by certain persons prove Varsity had employees. However, the domain name she references is "@familyhealthcarepartners.com" a different entity name than Varsity Family Care Partners, LLC. Moreover, merely using a domain name with a substantially similar entity name is not evidence of employment. Plaintiff alleges "Watson is . . . a self-identified Varsity employee" but the evidence she cites does not support her allegation. Watson testified in his deposition that he was employed by Family Care Partners.

With regard to the second element, the United States Court of Appeals for the Fourth Circuit follows the hybrid test for Title VII cases, which emphasizes the control exhibited by the putative employer and considers eleven additional factors to determine if an individual is an employee of the defendant:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
> (2) the skill required in the particular occupation;
> (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
> (4) the length of time during which the individual has worked;
> (5) the method of payment, whether by time or by the job;
> (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation;
> (7) whether annual leave is afforded;
> (8) whether the work is an integral part of the business of the "employer";
> (9) whether the worker accumulates retirement benefits;
> (10) whether the "employer" pays social security taxes; and
> (11) the intention of the parties.

Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 412-13 (4th Cir. 2015); *Williams*, 988 F. Supp. at 935. Under the hybrid test, control is still the most important factor to be considered, but it is not dispositive. *Id.*

Plaintiff has also not presented any evidence that Varsity was a joint employer of Plaintiff. While Plaintiff has attempted to present evidence that Varsity officials were also FCP Holdings

Board members, she has not presented any evidence that Varsity officials acted outside their capacity as FCP Holdings Board members. In addition, Plaintiff has attempted to show some evidence of Varsity's control but, even assuming that these instances actually involved Varsity, it is clear that these instances did not involve Plaintiff. For example, Plaintiff argues "Varsity employees met with . . . others, in an official capacity, in a multi-day New York City meeting to give instruction to Colonial . . . and [FCP Holdings] on issues such as: billing, collections, M.D. communication, acquisitions, financing plans, auditing, and more." Plaintiff relies on emails exchanged regarding "topics . . . to cover during our meeting," an agenda, and related documents, but has not presented any evidence to suggest that any Varsity representative acted outside of the scope of his or her official duties as a board member and exercised substantial control specifically related to Plaintiff's employment. The fact that Varsity "maintained records" related to the practice, as Plaintiff asserts, does not prove the type of substantial control over Plaintiff's employment necessary for a showing of joint employment under Title VII.

Plaintiff also argues the corporate entities, Varsity, Colonial, FCP Holdings, and FCP Management, are "integrated" and "intertwined." Plaintiff is in essence attempting to pierce the corporate veil to hold corporate investors liable through the argument of joint employment or seeking a judicial determination of amalgamation, also known as the "single enterprise theory." The piercing doctrine is not to be applied without "substantial reflection." *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984).

It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders. *Hunting v. Elders*, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004). According to the South Carolina Uniform Limited Liability Company Act, "the debts obligations, and liabilities of a limited liability

company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." S.C. Code Ann. § 33-44-303. Furthermore, the "failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." Id.

Here, it is undisputed that FCP Holdings was at all relevant times a limited liability company and that after the 2015 Transaction, Plaintiff's only avenue for partnership was in FCP Holdings. Varsity was a member/investor in FCP Holdings between the date of the 2015 Transaction and July of 2018. Varsity cannot be liable for the debts of FCP Holdings simply because it is a member/investor in that entity. Plaintiff has not presented evidence to pierce the corporate veil in this case.

South Carolina courts have outlined a two-prong test to determine whether a corporate veil should be pierced. The first part of the test requires an eight-factor analysis focused on the observance of corporate formalities. *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318. Plaintiff has not argued or established any of these eight factors. There is no evidence in this case to show that FCP Holdings and Varsity failed to observe corporate formalities. Pursuant to S.C. Code Ann. § 33-44-303, the failure to observe formalities is not grounds for piercing the veil of a limited liability company. The second part of the test requires an element of injustice or fundamental unfairness caused by protecting the corporation's owners or officers. *Id.* Plaintiff has not presented any evidence of fundamental unfairness or injustice as it relates to Varsity. The reality is that had Plaintiff been made partner in FCP Holdings after the Transaction, she would

have lost her investment along with every other individual who was became a partner in FCP Holdings after the Transaction.

WHEREFORE, this Court **GRANTS** Varsity's Motion for Summary Judgment related to Plaintiff's Title VII claim.

2. PLAINTIFF'S EQUAL PAY ACT CLAIM

The Court grants Varsity's Motion for Summary Judgment related to Plaintiff's Equal Pay Act (EPA) claim for the same reasons outlined in Section 1 above, there is no evidence that Varsity was Plaintiff's employer. The EPA utilizes the Fair Labor Standards Act's (FLSA) enforcement mechanisms and employs its definitional provisions. "Separate persons or entities that share control over an individual worker may be deemed joint employers under the FLSA." *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006); A joint employment relationship can exist in the following situations:

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Id. at 306 (quoting 29 C.F.R. § 791.2(b)).

Plaintiff has not presented any evidence to establish these elements of the joint employment relationship. Plaintiff never performed any services for Varsity. Plaintiff has not presented sufficient evidence that Varsity exercised any control over her employment or partnership consideration. The indisputable evidence in this case is that Plaintiff was employed by Colonial and that the FCP Holdings Board of Directors was solely responsible for making partnership decisions related to partnership in FCP Holdings.

WHEREFORE, this Court **GRANTS** Varsity's Motion for Summary Judgment related to Plaintiff's EPA claim.

3. PLAINTIFF'S BREACH OF CONTRACT CLAIM

Plaintiff admits the only written contract is between Plaintiff and Colonial and was executed prior to the 2015 Transaction. Varsity did not exist when the Agreement was executed in May of 2013. When the 2015 Transaction occurred in December of 2015, Varsity was merely an investor entity in FCP Holdings. Varsity was not a successor of Colonial as Colonial continued to exist and continued to employ Plaintiff and other physicians. Plaintiff's Agreement with Colonial was not assigned to Varsity. The Agreement required Plaintiff's written consent to any assignment and Plaintiff never provided any written consent for any assignment. No other evidence of any assignment of the Agreement has been adduced or provided to the Court.

Plaintiff also asserts Varsity is in privity of contract with Plaintiff based an Acquisition Agreement from the 2015 Transaction. Plaintiff relies on Section 8.1.4, which provides:

> Buyer shall be responsible for the payments and benefits to be provided to Continuing Employees in accordance with Section 8.2, and continuation coverage for Continuing Employees in accordance with Section 8.2, as well as any other potential liability relating to any discontinuation of the employment of any Continuing Employee on or after the closing.

Plaintiff interprets "Continuing Employees" to include her. However, Section 8.1.2 defines "Continuing Employees" as "Non-Practitioner Employees" and Section 8.1 defines "Non-Practitioner Employees" as employees who are not Healthcare Providers. Plaintiff was undisputedly a healthcare provider and therefore, this section is inapplicable. Plaintiff attempts to rely on alleged oral promises after the Agreement was executed to support a contract claim against Varsity. However, the Agreement contains a merger clause and any modifications to the Agreement were required to be in writing. Thus, the Agreement could not be orally modified.

There have been no written modifications to the Agreement.

Furthermore, Plaintiff cannot produce any evidence that Varsity orally adopted or modified the Agreement. Plaintiff admits that she never had any conversations with any official of Varsity and does not even know who the officials are of that entity. The indisputable evidence is that Varsity was not a party to any contract involving Plaintiff.

WHEREFORE, this Court **GRANTS** Varsity's Motion for Summary Judgment related to Plaintiff's breach of contract claim.

4. PLAINTIFF'S BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT CLAIM

Because Plaintiff has not established the existence of a contract between her and Varsity, she cannot establish an essential element of her breach of contract accompanied by a fraudulent act. *See Osborn v. Univ. Med. Assoc. of Med. Univ. of South Carolina*, 278 F.Supp.2d 720, 740 (D.S.C. 2003)(a plaintiff must prove (1) breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.).

Furthermore, Plaintiff has not established any evidence of a fraudulent intent or act by Varsity. *See Save Charleston Found. v. Murray*, 333 S.E.2d 60, 66 (S.C. Ct. App. 1985).

WHEREFORE, this Court **GRANTS** Varsity's Motion for Summary Judgment related to Plaintiff's breach of contract accompanied by fraudulent act claim.

5. PLAINTIFF'S PROMISSORY ESTOPPEL CLAIM

Plaintiff admits that she never communicated with any Varsity employee or official. Therefore, she cannot establish a promissory estoppel claim against Varsity. South Carolina courts recognize a remedy in equity if the plaintiff can prove:

> (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Satcher v. Satcher, 351 S.C. 477, 483-84, 570 S.E.2d 535, 538-39 (Ct. App. 2002). The applicability of the doctrine depends on whether the refusal to apply it "would be virtually to sanction the perpetration of a fraud or would result in other injustice." *Id. citing Citizens Bank v. Gregory's Warehouse, Inc.*, 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App. 1988).

Plaintiff has not established any of the elements of this claim against Varsity.

WHEREFORE, this Court **GRANTS** Varsity's Motion for Summary Judgment related to Plaintiff's promissory estoppel claim.

CONCLUSION

Varsity's Motion for Summary Judgment is hereby **GRANTED** and Varsity is completely dismissed from this case with prejudice.

IT IS SO ORDERED.

_____
Clifton B. Newman, Fifth Judicial Circuit
Court of Common Pleas/Business Court

DATED: _____, 2019
_____, South Carolina

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Richland Common Pleas

Case Caption: Kaoru Pridgen vs Colonial Family Practice Llc , defendant, et al

Case Number: 2018CP4002545

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127