

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 9976

RANDALL JOHNSON; KENNETH
CRAIG WILSON; MARK ALAN
DEVORE; LUIS MARCELO
ZANETTI; WILLIAM JAMES FORD;
and RICHARD FORD,

Plaintiffs,

v.

FRANCIS EVERETT; CATHIE
EVERETT; CONVERT-A-STAIR,
L.L.C.; FJ STAIRWAYS, LLC; and
BRIAN ESTES, jointly and severally,

Defendants.

**ORDER AND OPINION ON
DEFENDANT BRIAN ESTES'
MOTION FOR JUDGMENT
ON THE PLEADINGS**

THIS MATTER is before the Court on Defendant Brian Estes' Motion for Judgment on the Pleadings ("Motion," ECF No. 35). The Court, having considered the Motion, the parties' briefs, the arguments of counsel, and all appropriate matters of record, **CONCLUDES** that the Motion should be **GRANTED**, in part, and **DENIED**, in part.

Vann Attorneys, PLLC, by James R. Vann and Ian Richardson, for Plaintiffs Randall Johnson, Kenneth Craig Wilson, Mark Alan Devore, Luis Marcelo Zanetti, William James Ford, and Richard Ford.

Buckmiller, Boyette & Frost, PLLC, by Matthew W. Buckmiller, for Defendants Francis Everett and Cathie Everett.

Michael Best & Friedrich LLP, by Justin G. May and Luke Taylor, for Defendant Convert-A-Stair, L.L.C.

No counsel appeared for Defendant FJ Stairways, LLC.

Ward and Smith, P.A., by Alexander C. Dale and Luke Tompkins, for Defendant Brian Estes.

INTRODUCTION

1. The plaintiffs in this action allege that they invested in a company called FJ Stairways, LLC (“FJ Stairways”) that sought to obtain a patent for a “pre-fabricated stair box system that would revolutionize the home building industry.” (Compl. ¶ 15, ECF No. 3.) Unbeknownst to the plaintiffs, the founding member of FJ Stairways subsequently created a new company, Convert-A-Stair, L.L.C. (“CAS”), that was a direct competitor of FJ Stairways and benefitted from FJ Stairways’ assets (including the plaintiffs’ funds). The founding member ultimately assigned the patent to CAS rather than to FJ Stairways. Plaintiffs have sued the founding member and his wife on multiple theories, but those claims are not implicated by the present Motion. Instead, the sole issue presently before the Court is whether judgment on the pleadings should be granted in favor of an additional defendant, Brian Estes, who assisted in the formation of CAS and was allegedly involved in its operations that took place to the detriment of FJ Stairways.

FACTUAL AND PROCEDURAL BACKGROUND

2. “The Court does not make findings of fact on motions for judgment on the pleadings under North Carolina Rule of Civil Procedure 12(c) and recites only those allegations in the pleadings that are relevant and necessary to the Court’s determination of the Motion.” *Golden Triangle #3, LLC v. RMP-Mallard Pointe, LLC*, 2020 NCBC LEXIS 37, at *1 (N.C. Super. Ct. Mar. 23, 2020).

3. Plaintiffs Randall Johnson, Kenneth Craig Wilson, Mark Alan Devore, Luis Marcelo Zanetti, William James Ford, and Richard Ford (collectively,

“Plaintiffs”) are all investors in FJ Stairways. (Compl. ¶ 15.) Most of the Plaintiffs “work in either the stair or construction industry[.]” (Compl. ¶ 15.)

4. FJ Stairways is now a defunct entity. However, at all times relevant to Plaintiffs’ claims, FJ Stairways was a limited liability company organized under the laws of North Carolina with its principal place of business in New Hanover County, North Carolina. (Compl. ¶ 10.)

5. Defendant Francis Everett (“F. Everett”) is FJ Stairways’ registered agent. (Compl. ¶ 10.) F. Everett and Cathie Everett (“C. Everett”), also a defendant, are married and maintain their primary residence in Pender County, North Carolina. (Compl. ¶¶ 7–8.)

6. FJ Stairways was “in the business of manufacturing a now patented stair system” that the parties refer to as a “wedge system.” (Compl. ¶¶ 16–17.) The manufacturing of FJ Stairways’ wedge system began in January of 2017. (Compl. ¶ 18.)

7. Plaintiffs allege that “[F.] Everett solicited investments into FJ Stairways from all of the Plaintiffs . . . by explaining to them that he was developing a patent-pending pre-fabricated stair box system that would revolutionize the home building industry” known as “Convert-A-Stair.” (Compl. ¶¶ 15–17, 27.) He represented to Plaintiffs that in exchange for their investments they would be given membership interests in FJ Stairways. (Compl. ¶ 28.) Furthermore, “[p]rior to each Plaintiff investing, [F.] Everett represented to each Plaintiff that their investment into FJ Stairways would be utilized to fund FJ Stairways’ efforts to procure a patent

for the stair box system which would be manufactured by the limited liability company in which they would be members.” (Compl. ¶ 60.)

8. Plaintiffs collectively invested \$307,500 in FJ Stairways in exchange for membership interests therein.¹ (Compl. ¶ 25.)

9. Plaintiffs allege that F. Everett did not personally invest any money in FJ Stairways and instead used Plaintiffs’ investments to fund FJ Stairways’ operations, as well as the patent application process for the wedge system. (Compl. ¶ 26.)

10. On 3 March 2018, F. Everett drafted an operating agreement on behalf of FJ Stairways. (See Compl. Ex. A, ECF No. 3.) The operating agreement listed F. Everett, Johnson, Wilson, Luis Zavetto, and Matthew J. Larsen as the members of the company. (See Compl. Ex. A.)

11. On 16 October 2018—without Plaintiffs’ knowledge—F. Everett formed CAS, a limited liability company² with its principal place of business located in Pender County, North Carolina. (Compl. ¶¶ 9, 39–40.) As with FJ Stairways, F. Everett was listed as the registered agent for CAS. (Compl. ¶ 9.)

¹ More specifically, on 23 October 2017, Johnson invested \$30,000 in FJ Stairways. (Compl. ¶ 19.) Johnson’s investment was followed by Zanetti’s investment of \$75,000 on 1 November 2017. (Compl. ¶ 22.) Subsequently, on 22 March 2018, Wilson invested \$75,000. Next, Devore invested \$37,500 in the company on 12 July 2018. (Compl. ¶ 21.) Finally, William James Ford invested \$70,000, and Richard Ford invested \$20,000, although the Complaint does not state when the Fords’ investments were made. (Compl. ¶¶ 19–24.)

² Defendants appear to be taking the position that CAS was merely a holding company as opposed to a competitor of FJ Stairways. However, for purposes of the present Motion, the Court is, of course, required to take the contrary allegations in Plaintiffs’ Complaint as true.

12. Plaintiffs allege that F. Everett used funds from FJ Stairways' bank account—funds “which were contributed in whole [or] in part by Plaintiffs”—to pay the filing fee for CAS with the North Carolina Secretary of State's Office. (Compl. ¶ 43.)

13. With respect to the ownership interests in CAS, Plaintiffs allege that the Everetts collectively own thirty percent, Estes owns forty percent, and the remaining interests are owned by third parties who are not parties to this lawsuit. (Compl. ¶ 50.)

14. On 8 January 2019, F. Everett assigned the pending patent for the wedge system to CAS. (Compl. ¶ 53.) Subsequently on 16 April 2019, the patent application was approved, and the patent was issued. (Compl. ¶¶ 54, 57.)

15. Plaintiffs assert that CAS “now operates in the same location formerly occupied by FJ Stairways.” (Compl. ¶ 44.) Plaintiffs also allege that at least one former FJ Stairways employee is now employed by CAS. (Compl. ¶ 45.) Moreover, Plaintiffs contend that this employee performs the same work at CAS that he performed at FJ Stairways—that is, building stair boxes pursuant to the patent. (Compl. ¶¶ 46–47.) Additionally, Plaintiffs allege that CAS “to this day, utilizes some or all of the equipment owned by FJ Stairways to manufacture stairs.” (Compl. ¶ 48.)

16. In July of 2019, F. Everett brought in Estes to assist in the management of one or both of the companies, although the precise scope of his involvement is not entirely clear from the Complaint. (See Compl. Ex. B, ECF No. 3.)

17. On 19 September 2019, Estes sent some or all of Plaintiffs an email, stating as follows:

FJ Management [T]eam,

So Frank brought me in to help save FJ back in July. I evaluated the business model and the books trying to understand the business mission. It turns out FJ was trying to “do it all” with minimal funds and limited business guidance. As I told Frank, Kenny, and Randy during our September 7th meeting, FJ’s condition was the product of poor business decisions. FJ was financially broke and Frank’s patent effort was on life-support in desperate need of cash and a major overhaul of the business structure.

In July Frank assured me he could fund the business for 12 weeks if we could find a way to ensure future success. In 8 short weeks we completely restructured the business model, creating a corporate holding company (Convert-A-Stair), created an exclusive scalable distribution network, and a regionalized manufacturing sector that can supply over 500 stair boxes and associated covers currently. We developed this to scale as needed without impacting financially or injecting any manufacturing constraints. In a word, the Convert-A-Stair business model is “ready”. Beginning October 1, it will be a reality.

You invested in an idea. When I was introduced to your “idea”, you and mostly Frank, were days from failure. On September 7th, I introduced 3 options to your team for survival.

1) Be a full scale manufacturer and distributor. This is the original direction FJ tried and burned through cash. This is not a viable option which was proven.

2) FJ to transition as an exclusive distributor of the Convert-A-Stair system in Wilmington, Raleigh, and any other serviceable market. This seems to be the best option especially since most of the team has a day job. We provided basic revenue and profit numbers during the meeting.

3) Walk away and Frank will pay back all investments at \$0.50 on the dollar ONLY after 6 months of positive revenue and growth.

Since the Sept 7th meeting, Frank found an investor who will become a working partner to ensure the success of FJ. This will obviously inject much needed cash into FJ, paying down debt, and creating some operating income to help FJ start.

I am writing the letter to ask if current FJ members want to continue. I asked the same question in the meeting on Sept 7th. Frank asked me to extend to you special treatment as he wants to see everyone be successful. As the consultant rebuilding this business, I am moving this business forward with a distributor in Wilmington ASAP. If it's your team, we will all be excited. If not, there will be another distributor set-up by Oct 1. I don't mean to press but please make a decision by next Wednesday September 25th. Understand I get paid on the success of this business as do you.

Please reach out with any questions you have. I want you guys to be comfortable with the decision you make. I have attached the following for your review:

- 1) Business Model visual
- 2) Distribution revenue and cash flow matrix

Thanks,
Brian Estes

(Compl. Ex. B (emphasis added).)

18. On 25 April 2023, Plaintiffs initiated this action by filing a Complaint in Wake County Superior Court naming as defendants F. Everett, C. Everett, CAS, FJ Stairways³, and Estes. (Compl., ECF No. 3.) The Complaint asserts claims for breach of contract against F. Everett; quantum meruit against all Defendants; breach

³ On 25 October 2023, the Court issued an Order Entering Default against FJ Stairways pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure based on its failure to file an answer or otherwise respond to the Complaint. (Order Mot. Entry Default, ECF No. 43.)

of fiduciary duty against F. Everett; constructive fraud against F. Everett, C. Everett, Estes, and CAS; civil conspiracy against all Defendants; fraud against F. Everett, C. Everett, and Estes; declaratory judgment against F. Everett, FJ Stairways, and CAS; and judicial dissolution pursuant to N.C.G.S. § 57D-6-02. (Compl. ¶¶ 72–127.)

19. This case was designated a mandatory complex business case on 27 April 2023 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

20. On 22 September 2023, Estes filed the present Motion seeking judgment on the pleadings as to all claims against him pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. (Mot., ECF No. 35.)

21. On 28 November 2023, the Court held a hearing on Estes’ Motion, which is now ripe for resolution.

LEGAL STANDARD

22. “The Court reviews a Rule 12(c) motion as it does a motion to dismiss pursuant to Rule 12(b)(6).” *Spivey v. Smith*, 2023 NCBC LEXIS 111, at **7 (N.C. Super. Ct. Sept. 18, 2023) (citing *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **19 (N.C. Super. Ct. Nov. 3, 2011)).

23. “A [Rule 12(c)] motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974). “A complaint is fatally deficient in substance, and subject to a motion by the defendant for judgment on the pleadings if it fails to state a good

cause of action for plaintiff and against defendant.” *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 3 (2013) (cleaned up).

24. When deciding a motion under Rule 12(c), the Court may only consider “the pleadings and exhibits which are attached and incorporated into the pleadings.” *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 104 (2004) (cleaned up). The Court must “view the facts and permissible inferences in the light most favorable to the nonmoving party.” *Ragsdale*, 286 N.C. at 137. “All well pleaded factual allegations in the nonmoving party’s pleadings are taken as true and all contravening assertions in the movant’s pleadings are taken as false. All allegations in the non-movant’s pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant[.]” *Id.* (internal citations omitted).

ANALYSIS

25. At the outset the Court notes that apart from Estes, no other Defendants have moved under Rule 12 for dismissal of the claims asserted against them by Plaintiffs. Accordingly, the Court’s analysis herein applies only to the claims asserted against Estes.

26. As noted above, Plaintiffs have alleged claims for quantum meruit, constructive fraud, conspiracy, and fraud against Estes. (Compl. ¶¶ 76–82, 87–117.) The Court addresses each of these claims below.

I. Fraud

27. “The essential elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992) (cleaned up).

28. Estes contends that Plaintiffs’ claim for fraud is fatally defective because they failed to plead all the required elements of fraud and, in addition, their allegations fail to meet the particularity requirement imposed by Rule 9(b). (Def.’s Br. Supp. Mot., at 13, ECF No. 36.)

29. At the 28 November hearing, counsel for Plaintiffs conceded that the allegations of the Complaint are insufficient to state a valid claim for fraud as to Estes, and the Court agrees.

30. Therefore, Plaintiffs’ fraud claim against Estes is **DISMISSED with prejudice**.

II. Quantum Meruit

31. Under North Carolina law, “[t]o recover in *quantum meruit*, [a] plaintiff must show (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.” *Scott v. United Carolina Bank*, 130 N.C. App. 426, 429 (1998) (cleaned up). “*Quantum meruit* claims require a showing that both parties understood that services were rendered with the expectation of payment.” *Id.*

32. Estes argues that the quantum meruit claim against him fails because “Plaintiffs have not alleged, and cannot prove, that the services rendered were to Mr. Estes, that he knowingly or voluntarily accepted them, or that, at the time services were rendered, Plaintiffs expected Mr. Estes to pay.” (Def.’s Br. Supp. Mot., at 6.) Estes further contends that (1) “Plaintiffs have failed to clearly identify what service[s] form[] the basis of their . . . claim[;]” and (2) assuming the alleged services concerned Plaintiffs’ investments in FJ Stairways, “Plaintiffs fail to allege, and cannot prove, that they invested this money to the benefit of Mr. Estes or that they rendered any other service to Mr. Estes.” (Def.’s Br. Supp. Mot., at 6.)

33. The Court concludes that Plaintiffs’ quantum meruit claim fails for several reasons—most basically, because their allegations do not meet the first element of the claim. There is no allegation that Plaintiffs actually rendered any services to *Estes*.

34. Plaintiffs’ response brief seeks to restate this claim as one for unjust enrichment but even so construed, the claim still fails as a matter of law.

35. To plead a claim for unjust enrichment, a plaintiff must allege the following elements:

First, one party must confer a benefit upon the other party. . . . Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. . . . Third, the benefit must not be gratuitous. . . . Fourth, the benefit must be measurable. . . . Last, the defendant must have consciously accepted the benefit.

JP Morgan Chase Bank, N.A. v. Browning, 230 N.C. App. 537, 541–42 (2013) (cleaned up).

36. Plaintiffs contend that the allegation in paragraph 77 of their Complaint sufficiently avers that Plaintiffs provided a benefit directly to Estes. (Pls.' Br. Opp. Mot., at 16, ECF No. 38.) Paragraph 77 states as follows: "At the request of [F.] Everett, Plaintiffs provided a total of \$307,500.00 to [F.] Everett, FJ Stairways, and upon information and belief, ultimately Convert-A-Stair, [C.] Everett, and Mr. Estes." (Compl. ¶ 77.) Estes contends that this allegation is impermissibly conclusory.

37. For purposes of analyzing the sufficiency of a claim under Rule 12(c), "the Court need not accept as true allegations that are 'merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Spivey*, 2023 NCBC LEXIS 111, at **8 (quoting *Good Hope Hosp., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 174 N.C. App. 266, 274 (2005)).

38. The Court finds that the reference to Estes in paragraph 77 is insufficient to save this claim. Other portions of the Complaint make clear that the money Plaintiffs invested in FJ Stairways was solicited solely by F. Everett, and a thorough reading of the Complaint reveals that this money was paid by Plaintiffs well before Estes was brought on board by F. Everett.

39. Indeed, in paragraph 52 of the Complaint Plaintiffs expressly acknowledge that after F. Everett's original efforts to persuade Plaintiffs to invest in FJ Stairways—which, once again, did not involve Estes—neither the Everetts nor Estes ever asked Plaintiffs for additional funds for FJ Stairways. As such, Plaintiffs' allegations are insufficient to state a valid claim for either quantum meruit or unjust enrichment.

40. For these reasons, Plaintiffs' claim for quantum meruit against Estes is **DISMISSED with prejudice.**

III. Constructive Fraud

41. Our Supreme Court has summarized the elements of a constructive fraud claim as follows:

Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less exacting than that required for actual fraud. When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. To assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Head v. Gould Killian CPA Grp., P.A., 371 N.C. 2, 9 (2018) (cleaned up).

42. Estes contends that the claim for constructive fraud against him fails because there is no allegation that Plaintiffs had a confidential relationship or a relationship of trust or confidence with him. (Def.'s Br. Supp. Mot., at 9–11.) In response, Plaintiffs argue that they have sufficiently alleged the existence of a *de facto* fiduciary relationship with Estes. (Pls.' Br. Opp. Mot., at 10–12.)

43. The Court concludes that the Complaint is devoid of allegations sufficient to plead the existence of a fiduciary relationship between Plaintiffs and Estes.

44. "In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*)[.]" *Lockerman v. S. River Elec. Mbrshp. Corp.*, 250 N.C. App. 631, 635 (2016). *De jure* fiduciary relationships are often characterized by the existence of "a heightened level of trust and the duty of the

fiduciary to act in the best interests of the other party.” *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014). With respect to *de facto* fiduciary relationships, “[t]he standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.” *Lockerman*, 250 N.C. App. at 636 (cleaned up).

45. As an initial matter, Plaintiffs do not contend that a *de jure* fiduciary relationship existed between them and Estes. Furthermore, the allegations contained in the Complaint cannot reasonably be construed as asserting the existence of a *de facto* fiduciary relationship. There is simply no allegation of trust or confidence reposed by Plaintiffs upon Estes or that Estes took advantage of such a relationship. Indeed, the only actual contact alleged in the Complaint between Estes and Plaintiffs is their receipt of the 19 September 2019 email sent by Estes and a 7 September meeting referenced in that email that apparently occurred between Estes and several of Plaintiffs in which the financial status of FJ Stairways was discussed.

46. Accordingly, Plaintiffs’ claim for constructive fraud against Estes is **DISMISSED with prejudice.**

IV. Conspiracy

47. The Court reaches a different conclusion, however, with respect to Plaintiffs’ conspiracy claims against Estes.

48. It is well-established law that “there is not a separate civil action for civil conspiracy in North Carolina.” *Dove v. Harvey*, 168 N.C. App. 687, 690 (2005). Rather, “civil conspiracy is premised on the underlying act.” *Harris v. Matthews*, 361 N.C. 265, 274, n.2 (2007). Accordingly, to plead a claim for civil conspiracy, a plaintiff must allege: “(1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff.” *Boyd v. Drum*, 129 N.C. App. 586, 592 (1998).

49. A conspiracy claim cannot be maintained “for acts that occurred before [a party] joined the alleged conspiracy *if those acts completed the ultimate objective of the conspiracy*. In contrast, if the objective of the conspiracy was not yet achieved when [the party] joined, then [the party] remains jointly and severally liable for those acts.” *Hart v. First Oak Wealth Mgmt., LLC*, 2022 NCBC LEXIS 81, at **66 (N.C. Super. Ct. July 28, 2022) (emphasis in original).

50. This Court has noted that “it is difficult to dismiss a conspiracy claim summarily because the elements of a conspiracy claim are broadly stated.” *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC LEXIS 40, at *48 (N.C. Super. Ct. Apr. 23, 2015); *see also Kixsports, LLC v. Munn*, 2021 NCBC LEXIS 32, at *37 (N.C. Super. Ct. Apr 1, 2021) (“An action for conspiracy may be proven through circumstantial evidence, and behavior that may be benign or innocuous when standing alone can acquire a different meaning when placed in a larger context.” (citation and quotation marks omitted)); *Glob. Textile All., Inc. v. TDI Worldwide*,

LLC, 2018 NCBC LEXIS 104, at **19–20 (N.C. Super. Ct. Oct. 9, 2018) (finding allegations minimally sufficient to support a civil conspiracy claim).

51. Among other allegations in their Complaint in support of this claim, Plaintiffs assert that “Defendants conspired to deceive and defraud Plaintiffs, in violation of [F.] Everett’s fiduciary duties, into conferring a substantial benefit on Defendants.” (Compl. ¶ 97.) According to the Complaint, this conspiracy involved the Everetts “form[ing] an agreement to solicit investments from Plaintiffs and then form[ing CAS] as a way to exclude Plaintiffs from any benefit of the operation of FJ Stairways, or the Patent” in violation of F. Everett’s fiduciary duties to Plaintiffs. (Compl. ¶ 98.)

52. With respect to Estes, Plaintiffs allege that he joined the Everetts’ conspiracy “shortly after [CAS] was formed and agreed to participate in and continue the unlawful conduct of [the] Everett[s].” (Compl. ¶ 99.) Plaintiffs contend that Estes acted in furtherance of the alleged conspiracy when he sent the 19 September 2019 email to Plaintiffs. (Compl. ¶ 101.)

53. Estes, conversely, maintains that even assuming *arguendo* that the Everetts engaged in a conspiracy to deceive and defraud Plaintiffs, “its purpose would have been accomplished as soon as money from FJ [Stairways] was used to form and fund CAS.” (Def.’s Br. Supp. Mot., at 12.) Thus, Estes argues, he cannot be liable for any such conspiracy because its objective would have been fulfilled before he assumed any role with regard to the companies at issue.

54. Admittedly, the conspiracy allegations against Estes are not a model of specificity. Nevertheless, the Court believes they are sufficient to allow the conspiracy claim against Estes to go forward.

55. It is true, as Estes contends, that the Complaint alleges a conspiracy for the purpose of inducing Plaintiffs to invest money in FJ Stairways and that this objective was accomplished before Estes came on the scene. However, the Complaint *also* alleges that Estes participated in a conspiracy with F. Everett to breach F. Everett's fiduciary duty to Plaintiffs by forming CAS for the purpose of competing against FJ Stairways and using FJ Stairways' assets (including Plaintiffs' invested funds) to do so. For example, Plaintiffs allege the following:

Upon information and belief, when FJ Stairways was "out of funds" [F.] Everett, [C.] Everett, and Mr. Estes formed an agreement to sell off "equity" in the new entity, Convert-A-Stair, L.L.C., an entity engaged in the the [sic] exact same business as FJ Stairways, to the exclusion of Plaintiffs, and in violation of [F.] Everett's fiduciary duties to the Plaintiffs.

...

Upon information and belief, [F.] Everett, [C.] Everett, and Mr. Estes sold interests in Convert-A-Stair, L.L.C. to various third parties, even though Convert-A-Stair, L.L.C. uses the equipment of FJ Stairways, the location of FJ Stairways, works with certain customers of FJ Stairways, and manufactures the exact same patented product previously manufactured by FJ Stairways.

...

Upon information and belief, Mr. Estes conspired with, and formed an agreement with, [F.] Everett and/or [C.] Everett to send Plaintiffs Exhibit "B" in violation of [F.] Everett's fiduciary duties to Plaintiffs.

...

[F.] Everett breached his fiduciary duties to the Plaintiffs proximately causing damage to the Plaintiffs by:

- a. Misappropriation of funds;
- b. Conspiring with [C.] Everett and [F.] Everett to create a new limited liability company, Convert-A-Stair, L.L.C. to compete with Plaintiffs to the exclusion of Plaintiffs; and
- c. Other ways to be proven at trial.

(Compl. ¶¶ 49, 51, 62, 85.)

56. Moreover, in Estes' 19 September 2019 email, he acknowledges that he participated in the creation of CAS and played at least some role in addressing the companies' financial issues and business plans. (*See* Compl. Ex. B.)

57. It is clear that much remains to be fleshed out during discovery about the scheme alleged by Plaintiffs, Estes' role in these events, the extent to which CAS improperly competed with FJ Stairways, and how the formation and operation of CAS contributed to Plaintiffs' alleged injuries. Nevertheless, taking the allegations in the light most favorable to Plaintiffs, Plaintiffs have alleged an agreement between Estes and F. Everett (and possibly others) to engage in wrongful conduct, that Estes committed overt acts in furtherance of the agreement, and that Plaintiffs were injured as a result. These allegations are enough to survive Estes' Rule 12(c) motion.

58. Therefore, Estes' Motion is **DENIED** as to Plaintiffs' civil conspiracy claim. *See New Friendship Used Clothing Collection, LLC v. Katz*, 2017 NCBC LEXIS 72, at *49 (N.C. Super. Ct. Aug. 18, 2017) ("The Court concludes that, at the pleading stage, these allegations are sufficient to state an agreement between Defendants facilitating Katz's breach of fiduciary duty."); *Veer Right Mgmt. Group, Inc. v.*

Czarnowski Display Serv., 2015 NCBC LEXIS 13, at **11 (N.C. Super. Ct. Feb. 4, 2015) (“Again recognizing that the issue at this stage is solely whether Plaintiff has adequately alleged a claim, not whether it ultimately will be able to prove that claim, the Court concludes that Plaintiff has adequately alleged an agreement, with subsequent harm caused by implementing the agreement, and that the conspiracy claim withstands Rule 12(b)(6).”); *GoRhinoGo, LLC v. Lewis*, 2011 NCBC LEXIS 39, at **18–22 (N.C. Super. Ct. Sept. 29, 2011) (recognizing that a scheme to violate a party’s fiduciary duty could give rise to a claim for civil conspiracy); *see also Hart*, 2022 NCBC LEXIS 81, at **65 (holding that a more developed factual record was necessary to evaluate the validity of the plaintiff’s conspiracy claim).

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendant Estes’ Motion is **GRANTED** with respect to Plaintiffs’ claims for fraud, quantum meruit, and constructive fraud, and those claims are hereby **DISMISSED with prejudice** as against Defendant Estes.
2. Defendant Estes’ Motion is **DENIED** as to Plaintiffs’ claim for civil conspiracy.

SO ORDERED, this the 5th day of January, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases