[Cite as *Padula v. Wagner*, 2015-Ohio-2374.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CRAIG PADULA Appellant v. BRIAN C. WAGNER, et al. Appellees	C.A. No. 27509 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2013-04-2106

DECISION AND JOURNAL ENTRY

Dated: June 17, 2015

WHITMORE, Judge.

{¶1} Appellant, Craig Padula, appeals from orders of the Summit County Court of Common Pleas dismissing his claims against Appellees Brian Wagner and CCG Energy Solutions, Inc. ("CCG") (collectively, "Appellees"). We affirm.

I

{¶2} Mr. Padula filed a "Re-filed Complaint" (the "Complaint") on April 22, 2013. The Complaint is the subject of this appeal.[1] Mr. Wagner is the President and sole shareholder of CCG. Mr. Wagner is also Mr. Padula's brother-in-law.

{¶3} Mr. Padula became employed with CCG in or around July 2011. Mr. Padula claims that Mr. Wagner induced him to resign from his former employment to become employed with CCG in return for certain written promises, including that Mr. Padula: (1) would only be

[1] Prior related case CV 2012-12-7053 was voluntarily dismissed by Mr. Padula without prejudice.

terminated for cause; (2) would be compensated in accordance with a salary and commission structure in his employment agreement; and (3) could buy CCG after two years of employment. Mr. Padula states that he relied upon these assurances, and acted to his detriment, by resigning his former employment, agreeing to be bound by restrictive non-compete, non-solicitation, and confidentiality covenants, and by accepting employment with CCG.

{¶4} Mr. Padula claims that these promises and the other terms of his employment are contained in three documents attached to the Complaint. They are the: (1) Term Sheet; (2) Covenants of Employee; and (3) Employment Agreement. The Employment Agreement includes a Commission Plan that contains terms of Mr. Padula's compensation.

{¶5} Mr. Padula further claims that Appellees repudiated the promises in these documents when Mr. Wagner presented him with a Transition Agreement and a Consulting Agreement that were intended to materially alter the terms of his employment. Mr. Padula claims that these documents altered the terms of his employment by: (1) terminating his employment with CCG without cause; (2) reducing or eliminating his commission rate, fees, and compensation; (3) eliminating Mr. Padula's opportunity to purchase CCG; (4) expanding restrictive covenants placed upon Mr. Padula; (5) and requiring Mr. Padula to waive and release Appellees from liability.

{¶6} Mr. Padula refused to execute the Transition Agreement and the Consulting Agreement. Appellees terminated his employment with CCG effective December 31, 2012.

{¶7} In his Complaint, Mr. Padula pleads claims related to his termination. He asserts claims for: (1) declaratory judgment; (2) breach of contract; (3) promissory estoppel; (4) quantum meruit/unjust enrichment; and (5) bad faith for alleged breaches of the Term Sheet, Covenants of Employee, and Employment Agreement.

{¶8} Appellees filed a motion for judgment on the pleadings with respect to the Complaint. In a January 16, 2014 judgment entry, the trial court dismissed all of Mr. Padula's claims except the portion of his declaratory judgment claim regarding the enforceability of certain restrictive covenants. The trial court also granted Mr. Padula leave to plead facts showing that Appellees owed him compensation for base salary and benefits accrued and unpaid prior to his termination.

{¶9} Mr. Padula filed a First Amended Complaint. The trial court struck the First Amended Complaint in a June 6, 2014 order, thereby dismissing Mr. Padula's claim for compensation. This left pending only Mr. Padula's declaratory judgment claim relating to the enforceability of the restrictive covenants. The parties stipulated to a judgment entry dismissing this claim. The judgment entry stated that the trial court's orders of January 16, 2014 and June 6, 2014 were final and appealable.

{¶10} This appeal is taken from the trial court's orders of January 16, 2014 and June 6, 2014. Mr. Padula raises five assignments of error for our review. We will address the first two assignments of error together.

II

Assignment of Error Number One

THE TRIAL COURT ERRED BY DISMISSING PADULA'S BREACH OF CONTRACT CLAIMS PURSUANT TO CIV.R. 12(C).

Assignment of Error Number Two

THE TRIAL COURT ERRED BY DISMISSING PADULA'S CLAIMS FOR DECLARATORY JUDGMENT PURSUANT TO CIV.R. 12(C).

{¶11} Mr. Padula's first and second assignments of error concern the trial court's dismissal of his breach of contract and declaratory judgment claims arising out of the Term

Sheet, Employment Agreement, and Covenants of Employee. Mr. Padula claims that the trial court erred by dismissing these claims and finding that:

> (1) the Term Sheet was not a contract for the sale of CCG to Mr. Padula;
>
> (2) Mr. Padula was an employee at-will under the Employment Agreement and Covenants of Employee; and
>
> (3) CCG owed no further compensation or benefits to Mr. Padula under the Employment Agreement and Covenants.

We disagree.

{¶12} "This Court reviews a trial court's decision to grant a motion for judgment on the pleadings under the de novo standard of review." *McLeland v. First Energy*, 9th Dist. Summit No. 22582, 2005-Ohio-4940, ¶ 6. "When construing a defendant's motion for judgment on the pleadings pursuant to Civ.R. 12(C), the trial court must construe as true all material allegations in the complaint, together with all reasonable inferences to be drawn therefrom." *Id.* Further, "[t]he determination of a motion for judgment on the pleadings is restricted solely to the allegations of the pleadings." *Id.* In order to uphold a judgment on the pleadings, "a reviewing court must find, beyond a doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to the relief requested." *Id.*

{¶13} "A copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Civ.R. 10(C). Documents attached to a complaint become part of the complaint itself and may be considered on a motion for judgment on the pleadings. *See Wright Safety Co. v. U.S. Bank N.A.*, 9th Dist. Summit No. 24587, 2009-Ohio-6428, ¶ 14. Consequently, the Term Sheet, Employment Agreement, and Covenants of Employee may be considered in connection with Mr. Padula's motion for judgment on the pleadings, as each document was attached to the Complaint.

{¶14} First we address Mr. Padula's breach of contract and declaratory judgment claims related to the Term Sheet. In connection with these claims, Mr. Padula seeks an order compelling Mr. Wagner to sell him CCG, and damages for the failure to do so. He claims that the Term Sheet is a binding contract for the sale of CCG, and that Appellees breached the contract for sale when they fired him and made clear that the sale would not occur.

{¶15} Contrary to Mr. Padula's argument, the Term Sheet unambiguously expresses the parties' intent that it is not a binding contract. The first, unnumbered paragraph of the Term Sheet states that it merely reflects the parties' "present intentions" and that any "binding agreement" for the sale of CCG will be set forth in one or more "definitive agreements." Specifically, the first paragraph states:

> The undersigned agree that this Term Sheet reflects their present intentions with respect to the sale by Brian Wagner ("Wagner") to Craig Padula ("Padula") of all of the outstanding capital stock (the "Shares") of CCG Energy Solutions, Inc. (the "Company"). Wagner and Padula agree that any binding agreement with respect to the sale will be set forth in one or more definitive agreements (the "Definitive Agreements") executed by them.

{¶16} Numbered paragraph two of the Term Sheet refers to "draft documents" that will form the basis of the yet-to-be-drafted "Definitive Agreements." Paragraph two states:

> The parties acknowledge that the draft documents (Agreement, Stock Purchase Agreement, Term Note and Pledge Agreement) previously reviewed by the parties, as revised to reflect the contents of this Term Sheet, along with any other required agreements, will be the basis for the Definitive Agreements.

{¶17} Paragraph eleven of the Term Sheet further demonstrates the parties' intent that any binding agreement pursuant to which the parties would commit to the sale of CCG was not yet drafted. Paragraph eleven provides that:

> The parties will use commercially reasonable efforts to negotiate and finalize the Definitive Agreements within the next 60 days, with the understanding that the Agreement (pursuant to which the parties commit to the planned transaction) will

> be signed upon completion, but the other agreements (Stock Purchase Agreement, Note, Pledge Agreement) will not be signed until after the Expiration Date.

This language is clear that the parties intended to give themselves 60 days, after the signing of the Term Sheet, to try to negotiate and finalize a formal, binding contract committing the parties to the sale of CCG.

{¶18} As a general rule, agreements in principle and preliminary negotiations that refer to subsequent, formal agreements are not binding. *See Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 151 (1978). Under well-established Ohio law, courts will give effect to the manifest intent of the parties when clear evidence demonstrates that they do not intend the terms of an agreement to bind them until the agreement is formalized in a written document that both parties sign. *Id*. This is not to say that Mr. Padula is incorrect in his assertion that an informal document that is sufficiently definite in its terms may constitute a binding agreement if the parties' manifest intent is to be bound by the mutual promises contained therein. *See Normandy Place Assocs. v. Beyer*, 2 Ohio St.3d 102, 105-106 (1982) (holding that an agreement to agree is not per se unenforceable, but rather the enforceability of such an agreement depends on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced). Rather, the law is that when a document unambiguously expresses the parties' manifest intent to not be bound by its terms until the agreement is formalized at some future date, a contract does not exist.[2] *Berjian* at 151; *Mansfield Square, Ltd. v. Big Lots, Inc.*, 10th Dist. Franklin No. 08AP-387, 2008-

[2] "'One of the most common illustrations of preliminary negotiation that is totally inoperative is one where the parties consider the details of a proposed agreement, perhaps settling them one by one, with the understanding during this process that the agreement is to be embodied in a formal written document and that neither party is to be bound until he executes this document.'" *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 815 (7th Cir.1987) *quoting* Arthur Linton Corbin, *Contracts*, Section 30, at 97 (1963).

Ohio-6422, ¶ 19-20 (holding that no lease agreement existed where "[a]ll of the letters of intent and draft lease agreements clearly and expressly articulated both parties' desire that no promises would be binding unless and until the promises and the terms of a lease agreement were reduced to writing and incorporated into a signed agreement").

{¶19} Here, the Term Sheet plainly states that it is merely an expression of present intentions, and not a binding contract for the sale of CCG. The parties spelled out in clear language their intent to be bound only by finalized and signed definitive agreements to be executed on a future date, and nothing else. The unambiguous provisions of the Term Sheet show that it was not a final, binding agreement, but rather a preliminary step in the process of negotiating a final, formalized contract. The parties did not successfully negotiate or sign a final contract. Under these circumstances, there is no set of facts under which Mr. Padula can establish that the Term Sheet is a contract. As such, judgment on the pleadings is appropriate on Mr. Padula's claims for breach of contract and declaratory judgment alleging that the Term Sheet is a contract for the sale of CCG, and that Appellees' actions breached that contract.

{¶20} Next we turn to Mr. Padula's claims for breach of contract and declaratory judgment based on his assertion that, under the Employment Agreement and Covenants of Employee, he was not an employee-at-will, such that Appellees could not terminate his employment except for cause. The parties agree that the Employment Agreement and Covenants of Employee were contracts.

{¶21} Construction of an unambiguous written contract is a matter of law to be determined by the courts. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. When the terms in a contract are clear, a court may not create a new agreement by finding a different intent from that which is expressed in the contract. *Id.* at

246. The parties' intent "is presumed to reside in the language that they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987). When interpreting a contract, common undefined words appearing in a written instrument "will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander*, paragraph two of the syllabus.

{¶22} Here, Sections 7 and 9 of the Employment Agreement expressly incorporate by reference the Covenants of Employee. Section 7 states, "The provisions of the Covenants of Employee entered into by the Company and Employee on or about the date hereof are incorporated herein, in full, by reference." Section 9 states, in relevant part, "This Agreement (including the Covenants of Employee referenced in Section 7) contains the entire agreement between the parties hereto with respect to the employment matters contemplated herein and supersedes all prior agreements or understandings among the parties related to such employment matters."

{¶23} It is a rule of contract construction that, when one instrument incorporates another by reference, both instruments must be read together. *Christie v. GMS Mgt. Co., Inc.*, 124 Ohio App.3d 84, 88 (9th Dist.1997). A court must give effect to all parts of a written contract, if this can be done in accordance with the express intent of the parties. *Bank One, N.A. v. The Oaks of Medina*, 9th Dist. Medina No. 04CA0080-M, 2005-Ohio-3546, ¶ 11.

{¶24} Accordingly, the Covenants of Employee and Employment Agreement, when read together, contain the universe of terms governing Mr. Padula's employment with CCG. This Court must read the Employment Agreement and Covenants of Employee together as one

instrument, giving effect, wherever possible, to each contract term. *See Christie* at 88; *Bank One* at ¶ 11.

{¶25} When the Employment Agreement and Covenants of Employee are read together, their unambiguous terms establish that Mr. Padula was an at-will employee. The unambiguous, integrated contracts state that either Mr. Padula or Appellees could terminate the employment relationship at any time, for any reason, with or without cause.

{¶26} Section 1 of the Covenants of Employee expressly provides that Mr. Padula's employment was at-will. Section 1 of the Covenants of Employee states, in pertinent part:

> I understand that my employment is employment at will, and as such may be terminated at any time, with or without Cause (as defined in the Employment Agreement), by either myself or CCG, and any provisions of this Covenant which are applicable after the termination of my employment with CCG will remain binding regardless of whether said termination is with or without cause, voluntary or involuntary.

Thus, the contractual terms of Mr. Padula's employment are explicit that: (1) his employment was at-will; (2) he could be terminated either for no reason or for cause, as defined in the Employment Agreement; and (3) he had the mutual ability with Appellees to end the employment relationship at any point, with or without reason or justification.

{¶27} Section 6 of the Employment Agreement also provides that Mr. Padula could be terminated for any reason apart from the specific reasons for termination set forth in Section 3 (death), Section 4 (disability), and Section 5 ("Cause").[3] Section 6 states:

> Early Termination: Other than Death, Disability or Cause: In the event the Term of Employment is terminated by either party other than pursuant to Section 3, 4 or 5, Employee will be entitled to receive any Base Salary and Benefits earned and

[3] The Employment Agreement defines "Cause" in Section 5 as: (1) the conviction of employee for the commission of any felony involving fraud or financial misconduct; (2) an act of fraud or gross negligence that materially harms CCG; or (3) any other material violation of any provision of the Employment Agreement that is not cured within a specified timeframe.

> accrued but unpaid through the date of termination and any un-reimbursed expenses. The parties will have no further obligation under this Agreement except that Employee will not be relieved of Employee's obligations under Section 7 concerning confidentiality and non-competition.

(Emphasis in sic.) Thus, Section 6 of the Employment Agreement establishes that Mr. Padula could be fired, or could end his employment voluntarily, for a reason laid out in the contract, or for any reason "other than" those specified in the parties' agreement. This is the definition of at-will employment. *See Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985), paragraph one of the syllabus (in an at-will employment relationship, either the employer or employee may terminate the employee relationship for any reason which is not contrary to law).

{¶28} Ohio courts recognize a strong presumption of at-will employment, unless the terms of the agreement clearly indicate otherwise. *Henkel v. Educational Research Council of Am.*, 45 Ohio St.2d 249, 255 (1976). Here, the unambiguous terms of the contract provide that Mr. Padula's employment was at-will. Nonetheless, Mr. Padula argues that two contract terms cast doubt on his at-will status. The first is Section 5 of the Employment Agreement, which permits termination for cause, as defined therein. The second is a term in the Employment Agreement that states that Mr. Padula's employment was for a period of two years. These arguments are not persuasive.

{¶29} First, Section 5 of the Employment Agreement, which allows termination for cause, does not alter Mr. Padula's at-will employment status. When an employment contract contains an unambiguous statement that employment is at-will, the fact that the agreement also contains provisions for termination for cause does not negate the manifest intent of the parties to create an at-will relationship. *See Cramer v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 2007 CA 00057, 2009-Ohio-3338, ¶ 50.

{¶30} Here, the parties' contract expressly states in Section 1 of the Covenants of Employee that Mr. Padula's "employment is employment at will, and as such may be terminated at any time." The same section also states that Mr. Padula could be terminated "with or without Cause" at any time. Thus, Section 1 of the Covenants of Employee establish that Section 5 of the Employment Agreement, which defines termination for cause, sets forth specific grounds for termination that are not the exclusive basis for ending the employment relationship. Nowhere does the agreement provide that termination could be for cause only. Accordingly, Section 5 of the Employment Agreement does not create a basis to dispute that Mr. Padula was an at-will employee.

{¶31} Indeed, the only way to read Section 1 of the Covenants of Employee, Section 6 of the Employment Agreement (termination other than for cause), and Section 5 of the Employment Agreement (termination for cause) together and give effect to each section is to determine that Mr. Padula was an at-will employee who could be terminated at any time, either for cause or for any other reason not contrary to law. A conflicting reading, that Mr. Padula could be fired only for cause, ignores the express at-will provisions in the parties' agreement, and violates the fundamental tenent of contract construction that all terms of a contract must be given effect in accordance with the express intent of the parties. *See Oaks of Medina*, 2005-Ohio-3546, at ¶ 11.

{¶32} Moreover, contrary to Mr. Padula's argument, the inclusion of a defined term of employment does not presumptively negate at-will status when the parties' agreement provides that either party may terminate the agreement with or without cause at any time. *See, e.g., Ziegler v. Findlay Industries, Inc.*, 464 F.Supp.2d 733, 736-737, 741-742 (N.D.Ohio 2006). Here, the Employment Agreement provides:

> The term of employment will commence on the date of this Agreement and continue for a term of two (2) years unless earlier terminated as provided in this Agreement***.

Thus, the "term of employment" clause is expressly subject to the termination provisions in the Employment Contract and Covenants of Employee. As discussed, the termination provisions in Section 6 of the Employment Agreement and Section I of the Covenants of Employee state that Mr. Padula's employment could be terminated at any time. Consequently, the two-year employment term was not guaranteed, but merely was the maximum period for Mr. Padula's employment in the event neither he nor CCG terminated the employment relationship earlier. *See id.* at 742 (holding that an agreement, read in its entirety, clearly showed a presumptive three year employment term which was terminable at an earlier date by either party). Accordingly, the trial court correctly concluded that the parties' employment relationship was at-will, Mr. Padula's presumptive two-year term of employment notwithstanding.

{¶33} Next, we turn to the trial court's June 6, 2014 order striking Mr. Padula's Amended Complaint and claim for further compensation or benefits. To the extent that Mr. Padula claims that the trial court acted in error (he does not address the trial court's June 6, 2014 order in substance in his appellate brief), Mr. Padula is incorrect.

{¶34} In its January 16, 2014 judgment entry, the trial court instructed Mr. Padula to plead facts in support of his breach of contract claim for salary and commissions "accrued and unpaid prior to the date of [his] termination." Mr. Padula's Amended Complaint does not plead any specific facts in support of his breach of contract claim for salary and benefits that both accrued, and were unpaid, before he was terminated. Instead, Mr. Padula vaguely asserts that: (1) he should have been paid based on deals that he worked on that "will amount" to $20 million in revenues and $5 million in gross profit to CCG for the second year of the contracts; (2) shortly

after his termination Appellees closed three of his deals; (3) monies owed for salary and commissions should be held in a constructive trust; and (4) CCG breached a contract by failing to pay him salary, benefits, and commissions. He does not allege single fact to show how much money he is owed, why such money is owed under the parties' agreement, or how any amount owed might be calculated. Nor does he attach any statement of account or other proof that CCG owes him money. [4]

{¶35} "'A trial court's decision to grant a motion to strike will not be overturned on appeal absent an abuse of discretion.'" *Nationwide Life Ins. Co. v. Kallberg*, 9th Dist. Lorain No. 06CA008968, 2007–Ohio–2041, ¶ 20, quoting *Matthews v. D'Amore*, 10th Dist. Franklin No. 05AP–1318, 2006–Ohio–5745, ¶ 25. The trial court did not abuse its discretion in striking the First Amended Complaint under the circumstances.

{¶36} Here, Mr. Padula ignored the trial court's January 16, 2014 judgment entry directing him to plead supporting facts, and merely stated an unsupported conclusion that he is owed money. He neither pled what money he is owed, nor provided factual support which would entitle him to any relief. This is insufficient as a matter of law to sustain a claim for unpaid benefits or commissions. *See State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324 (1989) ("unsupported conclusions of a complaint are not considered admitted . . . and are not sufficient" to withstand judgment as a matter of law). Accordingly, the trial court did not act in an arbitrary, unreasonable, or unconscionable manner in granting Appellees' motion to strike the Amended Complaint. *See Blakemore*, 5 Ohio St.3d at 219 (holding that an abuse of discretion is

[4] In its January 16, 2014 judgment entry, the trial court directed Mr. Padula to plead specific facts that he did not receive all salary and benefits due. The trial court found the Amended Complaint deficient, stating, "Plaintiff filed his Amended Complaint and he did not add <u>any</u> facts to support the generalized allegation that his salary and benefits were not paid pursuant to the parties [sic] contracts." (Emphasis in sic.)

more than an error or law or judgment, but implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable).

{¶37} Moreover, to the extent any facts regarding unpaid compensation are pled in the First Amended Complaint, they appear to relate to monies allegedly owed for deals that closed after, not prior to, Mr. Padula's termination. A claim for such monies is barred by the express language of the parties' integrated contract. Section 2 of the Employment Agreement states that Mr. Padula's compensation was payable only "[d]uring the Term of Employment" which, as discussed, was for a presumptive two-year term subject to earlier termination at any time for any lawful reason. Note 3 of the Commission Plan, which is part of the Employment Agreement, states that an "[i]ndividual must be an employee of the company for commission to be paid."

{¶38} For all of the reasons discussed, Mr. Padula's breach of contract and declaratory judgment claims fail as a matter of law. Mr. Padula's first and second assignments of error are overruled.[5]

Assignment of Error Number Three

THE TRIAL COURT ERRED BY DISMISSING PADULA'S PROMISSORY ESTOPPEL CLAIMS PURSUANT TO CIV.R. 12(C).

{¶39} In his third assignment of error, Mr. Padula argues that Appellees should be estopped from ignoring "promises made by inducement – the promise of two years of

[5] Mr. Padula claims that Appellees anticipatorily repudiated the contractual promises regarding his employment when they presented him with the Transition Agreement and Consulting Agreement. Mr. Padula's repudiation argument appears to relate to Appellees' alleged obligation to pay him additional salary and commissions, and Mr. Padula's alleged right to purchase CCG. This Court holds that the trial court did not err in striking Mr. Padula's First Amended Complaint for unpaid monies supposedly due to him, and that Mr. Padula has never had a contractual right to purchase CCG. Accordingly, Mr. Padula's anticipatory repudiation claim fails.

employment, salary, commission, and the opportunity to buy CCG Energy Solutions." We disagree.

{¶40} To succeed on a promissory estoppel claim, a party must show (1) a clear and unambiguous promise; (2) reliance on that promise; (3) reliance that was reasonable and foreseeable; and (4) damages caused by that reliance. *Rigby v. Fallsway Equip. Co., Inc*., 9th Dist. Summit No. 20985, 2002-Ohio-6120, ¶ 25. Mr. Padula's promissory estoppel claim fails for several reasons.

{¶41} First, the Term Sheet does not support a claim for promissory estoppel. This Court has held that it was the parties' manifest intent to not be bound by the Term Sheet unless a "definitive agreement" was negotiated, drafted, and signed. Under these circumstances, Mr. Padula's reliance on the Term Sheet as a promise to sell CCG to him was unreasonable as a matter of law. A promissory estoppel claim based on preliminary negotiations cannot succeed when the preliminary negotiations specify that they are non-binding, and that no contract exists until a final, formal agreement is written and signed. *See Mansfield Square,* 2008-Ohio-6422, at ¶ 4, 20, 23-24.

{¶42} Mr. Padula's promissory estoppel claim fails also with respect to his term of employment and compensation. Promissory estoppel provides an equitable remedy, and does not apply to statements made prior to a written contract when the contract covers the same subject matter. *See Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, ¶ 39-40; *Borowski v. State Chem. Mfg. Co.*, 97 Ohio App.3d 635, 643 (8th Dist.1994); *Worthington v. Speedway SuperAmerica* LLC, 4th Dist. Scioto No. 04CA2938, 2004-Ohio-5077, ¶ 15. As such, Mr. Padula's claim that he resigned his former employment and came to CCG

based on promises that were reduced to writing in the parties' Employment Agreement and Covenants of Employee cannot succeed as a matter of law.[6]

{¶43} It also must be noted that Mr. Padula does not plead that any promise, oral or written, was made outside of the documents attached to the Complaint. The parties agree, and this Court holds, that the Employment Agreement and Covenants of Employee are binding contracts. Promissory estoppel is an equitable remedy that only comes into play when the requisites of a contract are not met, yet the promise should be enforced to avoid injustice. *See Olympic Holding Co.* at ¶ 39. Indeed, Mr. Padula has pled promissory estoppel only "[i]n the alternative" if the court should determine that the exhibits to the Complaint "do not constitute validly enforceable contracts." Accordingly, no cause of action based in promissory estoppel will lie regarding Mr. Padula's term of employment or claim that he was entitled to additional compensation, where valid, binding contacts govern these matters, and no additional or supplemental promises have been alleged.

{¶44} Further, this Court has held that, for the promissory estoppel exception to the at-will employment doctrine to apply, there must be a clear and unambiguous promise of job security.[7] *Rudy v. Loral Defense Sys.*, 85 Ohio App.3d 148, 154 (9th Dist.1993). Mr. Padula's Complaint does not allege a promise, either oral or written, that clearly and unambiguously

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[6] Furthermore, when the parties have entered into a completely integrated written contract, the parol evidence rule prohibits extrinsic evidence of prior agreements that contradict the written document. *See Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 440 (1996). The rule prohibits a party to a written contract from varying, contradicting, or adding to the terms of the written contract with evidence of prior or contemporaneous agreements, either written or oral. *Id.*; *Nat'l City Bank, Akron v. Donaldson*, 95 Ohio App.3d 241,244-245 (9th Dist.1994).

[7] The Complaint is unclear that Mr. Padula actually pled a claim under the promissory estoppel exception to the at-will doctrine. We assume, for the sake of argument only, that he did attempt to bring such a claim.

promises job security. *See Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 110-111 (1991) (without a specific promise of continued employment, a promise of future benefits or opportunities, including the opportunity to buy into a company, does not support a claim for promissory estoppel). To the contrary, we hold that the parties' integrated contract – which Mr. Padula admits governs the terms of his employment – provides that either party could terminate the employment relationship at any time, for any reason not contrary to law. Moreover, the presumptive two-year term of employment set forth in the Employment Agreement is expressly subject to early termination by either party at any time. Under these circumstances, the promissory-estoppel exception to the employment-at-will doctrine is not available to Mr. Padula.

{¶45} Mr. Padula's third assignment of error is overruled.

Assignment of Error Number Four

> THE TRIAL COURT ERRED BY DISMISSING PADULA'S UNJUST ENRICHMENT / QUANTUM MERUIT CLAIMS PURSUANT TO CIV.R. 12(C).

{¶46} In his fourth assignment of error, Mr. Padula claims that he should be able to pursue a claim for unjust enrichment and quantum meruit where his contract claim has failed. Mr. Padula's argument lacks merit.

{¶47} A claim for unjust enrichment, or quantum meruit, is an equitable claim based on a contract implied in law, or a quasi-contract. *See Hummel v. Hummel*, 133 Ohio St. 520, 525–528 (1938); *see Coyne v. Hodge Const., Inc.*, 9th Dist. Medina No. 03CA0061-M, 2004-Ohio-727, ¶ 5, fn. 3 (the elements of unjust enrichment and quantum meruit are identical). Unjust enrichment occurs under Ohio law "when a party retains money or benefits which in justice and equity belong to another." *Liberty Mut. Ins. Co. v. Indus. Commn. of Ohio*, 40 Ohio St.3d 109, 111 (1988), quoting *Star-Clean of Lexington, Inc. v. Stanley Steemer International., Inc.*, 2 Ohio

App.3d 129, 131 (10th Dist.1981). To prevail on a claim of unjust enrichment, a plaintiff must show: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment***." *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984); *Chef Italiano v. Crucible Dev. Corp.*, 9th Dist. Summit No. 22415, 2005-Ohio-4254, ¶ 26.

{¶48} Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject. *See Ullmann v. May*, 147 Ohio St. 468, 475, 478–79 and paragraph four of the syllabus (1947); *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 18. Mr. Padula concedes in his appellate brief that a claim for unjust enrichment cannot be sustained when there is an express contract related to the same subject matter.

{¶49} Mr. Padula's unjust enrichment claim contends that, "Defendants unjustly accepted, retained, benefitted and/or been enriched [sic] from the services provided by Plaintiff without paying for them." Mr. Padula asks to be compensated for the reasonable value of his services under the equitable unjust enrichment theory. However, the terms of Mr. Padula's compensation are set forth in Section 2 of the Employment Agreement and under the Commission Plan that is part of the Employment Agreement. Mr. Padula admits, and pleads in his Complaint, that the Employment Agreement is a binding contract. Thus, by his own admission, Mr. Padula may not seek to recover compensation under an unjust enrichment theory when an express, valid contract governs his compensation.

{¶50} Mr. Padula nonetheless invites this Court to hold that, because the Term Sheet is not a binding agreement, he should be allowed to pursue under an unjust enrichment theory the

benefit of the sale of CCG to him as compensation for his services. We decline to do so. The existence of the Term Sheet, and the fact that the parties considered, but ultimately did not agree to, an additional benefit in the form of the sale of CCG, does not change well-established Ohio law that the equitable theory of unjust enrichment is not available when the parties' relationship is governed by an express contract. *See Wochna* at ¶ 18. Mr. Padula may not invoke equity to seek additional compensation when the extent of his compensation is defined by the Employment Agreement. *See id.* Mr. Padula's fourth assignment of error is overruled.

Assignment of Error Number Five

> THE TRIAL COURT ERRED BY DISMISSING PADULA'S COMMERCIAL BAD FAITH CLAIMS PURSUANT TO CIV.R. 12(C).

{¶51} In his fifth assignment of error, Mr. Padula argues that the trial court erred in dismissing his bad faith claim based on obligations of good faith and fair dealing purportedly contained in the parties' agreements under R.C. 1301.304. We disagree.

{¶52} The 2001 Official Commentary, Note 1, to R.C. 1301.304 makes clear that the statute does not create an independent cause of action for failure to perform or enforce a contract in good faith. It states, in relevant part:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract***. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

Id.[8]

[8] Further, the parties' agreements at issue here are not commercial contracts imposing an obligation of good faith in their performance and enforcement under R.C. 1301.304.

{¶53} Indeed, although parties to a contract are bound by standards of good faith and fair dealing, there is no separate tort claim for bad faith in an action for breach of contract. *Roberts v. Hagan*, 9th Dist. Medina No. 2845-M, 2000 WL 150766 (Feb. 9, 2000), *4 ("there is no separate cause of action for violating a duty to act in good faith in the employment-at-will context"), citing *Mers*, 19 Ohio St.3d at 105 (there is no exception to employment at-will "for malicious acts or a duty on the parties to act in good faith"); *see also Lakota Loc. School Dist. Bd. of Edn. v. Brickner*, 108 Ohio App.3d 637, 646 (6th Dist.1996) (no cause of action for breach of good faith exists separate from a claim for breach of contract). Instead, "good faith is part of a contract claim and does not stand alone." *Brickner* at 646. Accordingly, Mr. Padula's fifth assignment of error is overruled.

III

{¶54} Each of Mr. Padula's assignments of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
SCHAFER, J.
CONCUR.

APPEARANCES:

DANIEL F. LINDNER, Attorney at Law, for Appellant.

STEVEN M. MOSS and ROBERT A. ZIMMERMAN, Attorneys at Law, for Appellees.

KATIE TESNER, Attorney at Law, for Appellees.