IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Terrence Davidson,

Plaintiff,

v. CIVIL ACTION FILE
NO. 1:14-CV-00507-HLM

Onika Maraj,
and Pink Personality, LLC,

Defendants.

ORDER

This case is before the Court on Defendants' Motion to Dismiss [19].

I. Standard Governing a Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss a complaint, or portions of a complaint, for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When reviewing a motion to

dismiss, the Court must take the allegations of the complaint as true and must construe those allegations in the light most favorable to the plaintiff. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008).

Although a court is required to accept well-pleaded facts as true when evaluating a motion to dismiss, it is not required to accept the plaintiff's legal conclusions. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). When evaluating the sufficiency of a plaintiff's complaint, the court makes reasonable inferences in favor of the plaintiff but is not required to draw the plaintiff's inference. Id. (quoting Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)). Similarly,

the Court does not accept as true "'unwarranted deductions of fact'" or legal conclusions contained in a complaint. Id. (quoting Aldana, 416 F.3d at 1248).

Finally, the Court may dismiss a complaint "if the facts as pled do not state a claim for relief that is plausible on its face." Sinaltrainal, 578 F.3d at 1260. In Bell Atlantic Corporation v. Twombly, the Supreme Court observed that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. 544, 555 (2007). Although factual allegations in a complaint need not be detailed, those allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in

fact)." Id. Moreover, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The mere possibility that the defendant might have acted unlawfully is not sufficient to allow a claim to survive a motion to dismiss. Id. Instead, the well-pleaded allegations of the complaint must move the claim "across the line from conceivable to plausible." Twombly, 550 U.S. at 570.

II. Background

A. Plaintiff's Allegations

Plaintiff, Terrence Davidson, is a resident of the State of Georgia. (Amd. Compl. (Docket Entry No. 14) ¶ 1.) Defendant Onika Maraj ("Maraj") is a resident of the State

of California. (Id. ¶ 2.) Defendant Pink Personality, LLC ("Pink Personality") is incorporated in the State of Delaware and has its principal place of business in the State of California. (Id. ¶ 3.)

On or about January 2010, Plaintiff began working as Defendant Maraj's hairstylist. (Amd. Compl. ¶ 6.) Plaintiff designed wigs for Defendant Maraj for particular events and Defendant Maraj was only to use the wigs for personal use. (Id.) Plaintiff's wigs assisted in creating Defendant Maraj's appearance as "Nicki Minaj." (Id. ¶ 8.) Plaintiff created several wigs for Defendant Maraj including the "Pink Upper Bun Wig," the "Fox Fur Wig," the "Pink High Top Wig," the "Super Bass Wig," the "Half Blonde-Half Pink Wig," and the "VS Wig." (Id. ¶¶ 12, 14, 16, 18, 20, 22.)

Beginning in November 2011, Plaintiff discussed various business opportunities regarding the wigs created by Plaintiff for Defendant Maraj with Al Branch ("Branch"), Defendant Maraj's brand manager. (Amd. Compl. ¶ 23.) Branch told Plaintiff to "hold off" on accepting an offer for a reality television show and promised that Plaintiff and Defendant Maraj would do a reality show together. (Id. ¶¶ 24-25.) Branch and Plaintiff also agreed to pursue a joint business venture in the form of a line of wigs. (Id. ¶ 26.) One hair company sent "a full business proposal for the proposed wig line" including profit and loss projections and an overview of a budget. (Id. ¶ 29.) Following that meeting, Plaintiff did not hear anything else about the possible wig line or reality television show for months. (Id. ¶ 35.)

Plaintiff stopped working as Defendant Maraj's hairstylist in January 2013. (Amd. Compl. ¶ 37.) Later in 2013, Plaintiff discovered that Defendant Maraj was using his wig designs for her own wig line. (Id. ¶ 38.) The wig styles created by Plaintiff were being sold on retail websites, including Defendant Maraj's own website. (Id. ¶ 39.) Plaintiff did not receive compensation or credit for the wig designs and did not consent to their use. (Id. ¶ 40.) At least one of the wig designs also appeared as a bottle top in Defendant Maraj's fragrance line. (Id. ¶ 42.)

Plaintiff further states that he expected he would receive compensation for use of his wig designs, as evidence by the earlier negotiations. (Amd. Compl. ¶ 53.) Plaintiff was only paid for his services as a personal

hairstylist for specific appearances by Defendant Minaj and not for the value of his work stemming from later retail sales based on his designs. (Id. ¶ 60.)

B. Procedural Background

Plaintiff originally filed this case against Defendant Maraj and Defendant Pink Personality on February 21, 2014. (Compl. (Docket Entry No. 1).) Plaintiff filed a First Amended Complaint on June 5, 2014. (Amd. Compl.) Plaintiff alleged claims under the theories of quantum meruit, unjust enrichment, and promissory estoppel as well as violations of the Georgia Fair Business Practices Act, the Lanham Act, and the Georgia Uniform Deceptive Trade Practices Act. (Id.)

The Clerk originally assigned this case to U.S. Senior District Court Judge Robert L. Vining, Jr. (See Docket). Upon Judge Vining's retirement, the Clerk reassigned the case to this Court on August 29, 2014. (Id.)

Defendants filed their Motion to Dismiss for Failure to State a Claim on July 22, 2014. (Docket Entry No. 19.) The briefing process for the Motion to Dismiss is complete, and the Court therefore finds that the Motion is ripe for resolution.

III. Discussion

A. Quantum Meruit and Unjust Enrichment

Plaintiff claims he is entitled to payment under the theories of quanum meruit and unjust enrichment because he was not compensated for the continued use of the wig

designs. Defendant argues that Plaintiff fails to state a claim because he was compensated for his hairstyling services.

"Quantum meruit is not available when there is an express contract; however, if the contract is void, is repudiated, or can only be implied, then quantum meruit will allow a recovery if the work or service was accepted and if it had value to the recipient." Joseph M. Still Burn Ctrs., Inc. v. AmFed Nat. Ins. Co., 702 F. Supp. 2d 1371, 1376 (S.D. Ga. Mar. 31, 2010) (quoting Watson v. Sierra Contracting Corp., 226 Ga.App. 21, 28, 485 S.E.2d 563 (1997)) (internal quotation marks omitted). Similarly, "[t]he theory of unjust enrichment applies when there is no legal contract."

Cochran v. Ogletree, 244 Ga. App. 537, 538, 536 S.E.2d 194, 196 (2000).

Plaintiff cannot sustain a claim for quantum meruit or unjust enrichment because the Amended Complaint pleads facts that, if true, would tend to prove the existence of an express contract between Plaintiff and Defendant Maraj.[1] The Amended Complaint states that Plaintiff designed and provided wigs for Defendant Maraj, that Defendant Maraj paid for wigs, and that Defendant Maraj's use of the wigs was limited to her personal use only. These facts suggest a contract existed between Plaintiff and Defendant Maraj.

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[1]Plaintiff does not make an alternative claim for breach of contract.

Based on the above reasons, the Court therefore finds that Plaintiff fails to state a claim for relief under quantum meruit or unjust enrichment.

B. Promissory Estoppel

Plaintiff further argues that the doctrine of promissory estoppel entitles him to relief. The State of Georgia has codified promissory estoppel in O.C.G.A. § 13-3-44. That statue requires a plaintiff prove "(1) the defendant made a promise...; (2) the defendant should have reasonably expected the plaintiff to rely on such promise; (3) the plaintiff relied on such promise...; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiff changed [her] position to [her] detriment ...." Griffin v. State Bank of

Cochran, 312 Ga. App. 87, 94-95, 718 S.E.2d 35, 42 (2011) (alterations in original) (quoting Hendon Props. v. Cinema Dev., 275 Ga.App. 434, 438-439, 620 S.E.2d 644, 649 (2005)). Furthermore, the plaintiff must reasonably rely on the promise. Tampa Bay Financial, Inc. v. Nordeen, 272 Ga. App. 529, 532, 612 S.E.2d 856, 859 (2005). "The question of whether a party reasonably relied on the promise of another is ordinarily a factual inquiry for a jury to resolve." Gilmour v. Am. Nat'l Red Cross, 385 F.3d 1318, 1321 (11th Cir. 2004). "Promissory estoppel does not, however, apply to vague or indefinite promises, or promises of uncertain duration." Georgia Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 675, 700 S.E.2d 662, 664 (2010). Furthermore, "[i]t usually is unreasonable

to rely on a substantial promise that has not been reduced to writing." Johnson v. Univ. Health Servs., Inc., 161 F.3d 1334, 1340 (11th Cir. 1998).

In this case, Defendant Maraj's promises were too indefinite and vague to be enforceable, and Plaintiff unreasonably relied on them. In Branch Banking the promise about a loan agreement was too vague with respect to the material terms of an agreement including the interest rate, which had not been specified. 305 Ga. App. at 676, 700 S.E.2d at 664. Even taking Plaintiff's allegations as true, Defendant Maraj's promises to pursue future business opportunities with Plaintiff lacked any such material terms or specificity with regard to financing, product, each party's obligations, or particular business

ventures to pursue. There was also no time limit indicating when the promise to jointly pursue business opportunities would no longer be effective. Furthermore, a promise to enter into an new, ongoing business possibly worth millions of dollars and to be on a reality show with someone clearly constitute substantial promises. Defendant Maraj made these substantial promises orally, not in writing, making it even more unreasonable for Plaintiff to rely on them.

Defendant Maraj's promises are no more than agreements to agree in the future on another agreement. Those types of agreements are unenforceable. See e.g., Sierra Assocs., Ltd. v. Cont'l Ill. Nat. Bank & Trust Co. of Chicago, 169 Ga. App. 784, 790, 315 S.E.2d 250, 256 (1984) (finding that an agreement to agree to refinance a

loan was unenforceable); Wachovia Bank of Ga., N.A. v. Mothershed, 210 Ga. App. 853, 854, 437 S.E.2d 852, 854 (1993) (holding that a "commitment for a future loan is no more than an agreement to agree in the future" and thus unenforceable" (internal quotation marks omitted)). The fact that Defendant Maraj's promises were only an agreement to agree, when combined with the vagueness and indefiniteness of the oral promises, makes it unreasonable for Plaintiff to have relied on them and makes the promises too indefinite to be covered by the doctrine of promissory estoppel.

Based on the above reasoning, the Court concludes that Plaintiff is unable to maintain a claim for promissory estoppel.

C. Georgia Fair Business Practices Act

Plaintiff does not oppose dismissal of his claim for violation of the Georgia Fair Business Practices Act. (Pl. Response Mot. Dismiss (Docket Entry No. 24) at 18.) The Court therefore finds the Georgia Fair Business Practices Act claim should be dismissed.

D. Federal and State Trade Dress Infringement Claims

1. Lanham Act

"In addition to protecting registered marks, the Lanham Act, in § 43(a), gives a producer a cause of action for the use by any person of 'any word, term, name, symbol, or device, or any combination thereof ... which ... is likely to cause confusion ... as to the origin, sponsorship, or

approval of his or her goods....'" Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 209 (2000) (omissions in original) (quoting 15 U.S.C. § 1125(a)). "[T]he design of a product may constitute protectable trade dress under Section 43(a)." Kohler Co. v. Titon Indus., Inc., CIV.A. 1:97CV428 RWS, 1999 WL 1043221, at *2 (N.D. Ga. Mar. 26, 1999) (footnote omitted). "To establish a prima facie case of trade dress infringement, the plaintiff must show that (1) the trade dress of the two products is confusingly similar, (2) the features of the trade dress are primarily nonfunctional, and (3) the trade dress has acquired a secondary meaning or is inherently distinctive." Id. Product design cannot be inherently distinctive, instead "a product's design is distinctive, and therefore protectible, only upon a

showing of secondary meaning." Samara, 529 U.S. at 216 (2000). Secondary meaning "occurs when, 'in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.'" Id. at 211 (alteration in original) (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n. 11 (1982)).

Plaintiff cannot sustain a claim for trade dress infringement because the design of the wigs, even if unique and novel, do not identify the source of the product. The Supreme Court ruled that

> [i]n the case of product design, as in the case of color, we think consumer predisposition to equate the feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source, but

> to render the product itself more useful or more appealing.

Samara, 529 U.S. at 213. In this case, Plaintiff only claims the wigs are distinctive because of their design and color. Plaintiff may, in fact, be correct that the wigs are unique and distinctive in the ordinary sense of the word, but that allegation by itself is insufficient to have protectable trade dress because Plaintiff pleads no facts showing that the primary significance of the design or colors is to identify the wig with its source rather than to identify the wig itself. Sure enough, even the Amended Complaint uses the claimed trade dress features, not to prove Plaintiff made the wigs, but to identify the wigs.[2]

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[2]For example, the Amended Complaint names several of the wigs according to their design: "The Pink Upper Bun

Plaintiff further pleads that "[b]y their intrinsic nature, one can assume without proof that the symbols, colors, and designs of the wigs, individually or as the sum of their parts, together with the emotions they evoke, will automatically be perceived by customers as an indicator of origin." (Amd. Compl. ¶ 114 (emphasis added).) On the contrary, "Plaintiff has the burden of sustaining a high degree of proof in establishing a secondary meaning for a descriptive term." Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C., 931 F.2d 1519, 1525 (11th Cir. 1991) (emphasis added); see also Olem Shoe Corp. v. Washington Shoe Co., 09-23494-CIV, 2011 WL 6202282, at *20 (S.D. Fla. Dec. 1,

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Wig," "The Fox Fur Wig," and "The Pink High Top Wig." (See e.g., Amd. Compl. ¶¶ 12, 14, 16.)

2011) ("[A] plaintiff attempting to bring a claim for violation of an unregistered product design trade dress faces a difficult task." (internal quotation marks and citation omitted)). The law in this Circuit is that:

> In the absence of consumer survey evidence, courts consider four factors to determine whether a particular trade dress has acquired a secondary meaning: (1) The length and manner of its use; (2) the nature and extent of advertising and promotion; (3) the efforts made by the plaintiff to promote a conscious connection in the public's mind between the trade dress and the plaintiffs ... business; and (4) the extent to which the public actually identifies the trade dress with the plaintiff's products.

Olem Shoe Corp., 2011 WL 6202282 at *20 (omission in original). Plaintiff, here, pleads no facts indicating the existence of consumer survey data, the length and manner

of the use of any trade dress,[3] that Plaintiff had made any effort to connect these wigs to himself in the public's mind, or that anyone actually confuses the wigs being sold by Defendant Maraj with products produced by Plaintiff.

Plaintiff does plead that there was intentional copying of his wig designs. This is "probative evidence" that there is secondary meaning. Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 716 F.2d 854, 860 (11th Cir. 1983). Evidence of intentional copying alone, however, is not "an adequate substitute for proof of secondary meaning." Id. at 859. Thus, while Plaintiff pleads some evidence supporting the

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[3]In fact, these wigs appear to be one-off productions by Plaintiff, unavailable to the average consumer. Thus, there is little reason to think that the average consumer would identify any of these unique designs with Plaintiff.

existence of secondary meaning for the design and color of the wigs, he has not alleged enough to plead a plausible claim for trade dress infringement.

Because Plaintiff fails to plead facts plausibly showing that the design and color of the wigs have secondary meaning, Plaintiff cannot sustain a claim for trade dress infringement. Therefore, the Court dismisses Plaintiff's claim for trade dress infringement under the Lanham Act.

2. Georgia Uniform Deceptive Trade Practices Act

Both parties agree that the same standard governs unfair competition claims under O.C.G.A. § 10-1-372 and 15 U.S.C. § 1125(a). (Defs'. Memo. in Sup. Mot. Dismiss (Docket Entry No. 19-1) at 22; Pl. Opp. Mot. Dismiss (Docket Entry No. 24) at 19); see also Optimum Techs., Inc.

v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 1239 (11th Cir. 2007) ("[T]he same analysis that governs a trademark infringement also applies to claims brought under 15 U.S.C. § 1125(a) and O.C.G.A. § 10–1–372(a).").

Because Plaintiff's claim for trade dress infringement fails under the standard for the Lanham Act, it also fails under the Georgia Uniform Deceptive Trade Practices Act. Therefore, the Court dismisses Plaintiff's state law claims for trade dress infringement.

E. Claims against Defendant Pink Personality

Plaintiff's Amended Complaint contains no allegations of wrongdoing relating to Defendant Pink Personality.[4] (See

[4]In fact, after the third paragraph in which Plaintiff pleads Defendant Pink Personality's state of incorporation, principal place of business, and that it is subject to personal

generally Amd. Compl.) As such, Plaintiff's Amended Complaint does not state a viable claim for relief against Defendant Pink Personality.

F. Attorney's Fees and Expenses

Plaintiff's claim for attorney's fees and expenses against Defendants also fails because Plaintiff's independent tort claims against Defendants cannot survive a motion to dismiss. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1018 n.34 (11th Cir. 2004); see also D.G. Jenkins Homes, Inc. v. Wood, 261 Ga. App. 322, 325, 582 S.E.2d 478, 482 (2003) ("The derivative damages of attorney's fees and punitive damages will not lie in the

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jurisdiction in the State of Georgia, the Amended Complaint does not again mention Defendant Pink Personality by name.

absence of a finding of compensatory damages on an underlying claim."). The Court therefore dismisses that claim.

IV. Conclusion

ACCORDINGLY, the Court **GRANTS** Defendants' Motion to Dismiss [19] and **DISMISSES** Plaintiff's claims against Defendants. Because Plaintiff already repleaded his complaint once and it does not appear that Plaintiff can amend his complaint to allege viable claims, this dismissal is with prejudice. Because this Order resolves all of Plaintiff's claims, the court **DIRECTS** the Clerk to **CLOSE** this case.

IT IS SO ORDERED, this the 16th day of Sept., 2014.

UNITED STATES DISTRICT JUDGE