

STATE OF NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24 CVS 277

KERMIT DAVID WHEELER,
Plaintiff,

v.

ROBERT A. GEIST, individually;
RAGE, INC. f/k/a RAGE
ADMINISTRATIVE AND
MARKETING SERVICES, INC. and
a/k/a ROBERT A. GEIST
ENTERPRISES, INC., a Kansas
corporation; RAGE, INC. f/k/a
RAGE ADMINISTRATIVE AND
MARKETING SERVICES, INC. and
a/k/a ROBERT A. GEIST
ENTERPRISES, INC., a Tennessee
corporation; STARWOOD
INVESTMENTS, L.P., a Kansas
limited partnership; STARWOOD
MANAGEMENT, LLC, a Kansas
limited liability company; and
ROBERT A. GEIST, as Trustee of the
ROBERT A. GEIST REVOCABLE
TRUST dated October 13, 1993,

Defendants.

**ORDER AND OPINION ON
DEFENDANTS' MOTION TO DISMISS**

1. For over fifty years, Kermit Wheeler and Robert Geist were in the pizza business together. That came to an end in 2019 when they sold the five restaurants that they co-owned. In this case, Wheeler alleges that Geist cheated him for much of the last half-century by secretly routing money from their restaurants to Geist's own marketing and real-estate management companies. Aiming to settle those old scores, Wheeler sued Geist, his four companies, and a related trust. All six defendants have jointly moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the following reasons, the Court **GRANTS** the motion.

James, McElroy & Diehl, P.A., by John R. Buric, and Cauthen & Burns, P.A., by B. Travis Brown, for Plaintiff Kermit Wheeler.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, Amanda P. Nitto, H. Hunter Bruton, and Jordan T. DeJaco, and Foulston Siefkin LLP, by James M. Armstrong and Jeffrey A. Jordan, for Defendants Robert A. Geist; Rage, Inc. f/k/a Rage Administrative and Marketing Services, Inc. and a/k/a Robert A. Geist Enterprises, Inc., a Kansas corporation; Rage, Inc. f/k/a Rage Administrative and Marketing Services, Inc. and a/k/a Robert A. Geist Enterprises, Inc., a Tennessee corporation; Starwood Investments, L.P.; Starwood Management, LLC; and Robert A. Geist, as Trustee of the Robert A. Geist Revocable Trust.

Conrad, Judge.

I. BACKGROUND

2. The Court does not make findings of fact on a motion to dismiss. The following background assumes that the allegations of the complaint are true.

3. The relationship between Wheeler and Geist goes all the way back to 1968. That was when they started Winston-Salem, North Carolina's first Pizza Hut franchise. Wheeler, a banker, gladly handled the financing but wanted no part of, and had no aptitude for, everyday management. For help with that, he turned to Geist, who had experience managing a Pizza Hut in neighboring Greensboro. Three other investors—all associates of Wheeler or Geist—joined in the venture as well. (See Compl. ¶¶ 11, 13–16, ECF No. 3.)

4. Over the next few years, Geist and his allies opened dozens more Pizza Hut restaurants. Wheeler invested in some of them, and at one point, his personal portfolio had mushroomed to include stakes in sixteen restaurants across North Carolina. By 1982, though, Wheeler had trimmed his holdings to just five restaurants that he co-owned with Geist. From then on, Wheeler had “a ten percent . . . ownership

interest” in four corporations that operated one or two restaurants each. (Compl. ¶¶ 19, 20, 30, 34, 36.)

5. According to Wheeler, Geist siphoned money from the restaurants early and often. First, Geist formed Rage, Inc. to perform management services for his many restaurants. (There were two companies called Rage, but the Court will refer to them as one for simplicity.) Rage charged each restaurant six percent of gross revenue as a fee. Convinced that this was too much, Wheeler lobbied for a smaller percentage. At first, Geist agreed. Later, without Wheeler’s consent, he reneged and began charging six percent again. (See Compl. ¶¶ 38–41, 43, 44.)

6. Second, an outfit called Starwood, which Geist owned, bought the real estate where the restaurants were located and began charging rent in the 1990s. (There were two Starwood companies as well, which the Court will also refer to as one.) The lease agreements supposedly had some unusual terms that tied rental rates to “cap rates and real estate valuations” and that “allowed a percentage-of-sales override.” Geist took advantage of these terms and upped the rent, which ultimately landed in his own pocket. (Compl. ¶¶ 55, 57–59.)

7. Wheeler alleges that he was unaware of this self-dealing until much later. In 2009, Rage’s CEO, Dale Roach, pressured Wheeler to sell his interests while also threatening to cut his distributions, raise management fees, and take other steps to shrink his share of the pizzeria pie. Wheeler refused, but buyout talks continued, and in 2013, he began asking for information about Rage’s management fees. The information that he received, almost two years later, included examples of the

restaurants' services contracts with Rage and their lease agreements with Starwood. This revealed that Geist was using Rage's fees to fund his other business ventures and that Starwood was overcharging the restaurants for rent. Eventually, in 2019, Wheeler agreed to sell his interests to Geist, all as part of a bigger deal in which Geist sold "his restaurant empire to Tasty Brands, Inc." (Compl. ¶¶ 46–51, 55–59, 62, 64, 65.)

8. In this action, Wheeler alleges that Geist's "bogus management fees" and "lopsided lease agreements" drained the restaurants' profits. That, in turn, harmed Wheeler by decreasing his distributions. The complaint includes a single claim for constructive fraud against Geist, Rage, Starwood, and a related trust that supposedly "holds funds or the interest in funds unlawfully deprived from" Wheeler. (Compl. ¶¶ 7, 67, 72–75.)

9. The defendants have jointly moved to dismiss the complaint. (See ECF No. 20.) Their motion is fully briefed, and the Court held a hearing on 9 July 2024. The motion is ripe for disposition.

II. ANALYSIS

10. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the complaint." *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (citation and quotation marks omitted). The Court treats the well-pleaded allegations as true and views the facts in the light most favorable to the nonmoving party but need not accept conclusory allegations or legal conclusions. See, e.g., *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019); *Wray v. City of Greensboro*, 370 N.C. 41, 46 (2017).

11. The defendants press two independent grounds for dismissal. One is that Wheeler’s allegations of decades-old misconduct are stale and barred by the statute of limitations. The other is that Wheeler has not adequately alleged an essential element of constructive fraud: the existence of a fiduciary relationship between him and each defendant. Persuaded by this second argument, the Court need not reach the first.

12. Constructive fraud isn’t the same as actual fraud. It “arises where a confidential or fiduciary relationship exists” and is therefore more akin to a claim for breach of fiduciary duty. *Forbis v. Neal*, 361 N.C. 519, 528–29 (2007) (citation and quotation marks omitted). “The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.” *White v. Consol. Plan. Inc.*, 166 N.C. App. 283, 294 (2004).

13. A fiduciary relationship exists “when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018) (citation and quotation marks omitted). Some fiduciary relationships arise “due to the legal relations between two parties”—partners, principal and agent, and similar relations. *Id.* (citation and quotation marks omitted). Others arise “as a matter of fact in such instances when there is confidence reposed on one side” of a relationship with “resulting superiority and influence on the other.” *Id.* (citation and quotation marks omitted).

14. Here, it isn't clear what Wheeler's theory is. The complaint refers to Wheeler "as a minority partner" and states that he had "a relationship of trust and confidence with Geist, and by extension, the other Defendants, as a majority partner." (Compl. ¶ 72.) At no point, though, does the complaint allege that a legal partnership existed; to the contrary, the restaurants were organized as corporations, not partnerships. (See Compl. ¶ 36.) Nor does Wheeler contend in his brief that a partnership existed or was the basis for the alleged fiduciary relationship. See, e.g., *BIOMILQ, Inc. v. Guiliano*, 2024 NCBC LEXIS 58, at *29 (N.C. Super. Ct. Apr. 19, 2024) (dismissing claim based on "conclusory allegation" of partnership); *Cosma v. Fit Kitchen, LLC*, 2022 NCBC LEXIS 77, at *3 (N.C. Super. Ct. July 18, 2022) (concluding that plaintiff's "conclusory" references to "partners" were not intended to allege a partnership).

15. More puzzling still is the nature of Wheeler's interest in the corporations that operated the restaurants. He alleges that he had an undefined, minority "ownership interest"—not that he was a shareholder. (Compl. ¶ 36.) Even less is said about the nature of Geist's interest. Nothing in the complaint suggests—and Wheeler does not contend in his brief—that the pair had a shareholder relationship, much less the sort of shareholder relationship that could give rise to a fiduciary relationship. See *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344 (1951) (holding that a controlling majority shareholder owes a fiduciary duty to a minority shareholder).

16. As best the Court can tell, Wheeler contends that a fiduciary relationship arose as a matter of *fact* based on allegations that he was unfamiliar with restaurant

management and relied on Geist to handle day-to-day operations. (See Compl. ¶¶ 13, 14.) Even taking those allegations as true, they come nowhere close to the “control and domination required to form a fiduciary relationship outside that of the normal relationships recognized by law.” *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008) (citation and quotation marks omitted). Moreover, Wheeler’s other allegations show that he was far from powerless. In Wheeler’s own words, he was a “banker” who “purchased from Pizza Hut the franchise rights for the Winston-Salem geographic area,” was “responsible for arranging the financing for th[e] first franchise,” and bought and sold interests in at least sixteen restaurants over an extended period. (Compl. ¶¶ 11–13, 20.) This was a business relationship “in which both men played a key role.” *Azure Dolphin*, 371 N.C. at 601–02 (affirming dismissal of claims for constructive fraud and breach of fiduciary duty). Thus, the complaint does not adequately allege the existence of a fiduciary relationship between Wheeler and Geist.

17. It follows that the allegations concerning Rage, Starwood, and the trust are also inadequate because they owed fiduciary duties to Wheeler, if at all, only “by extension” of those owed by Geist. (Compl. ¶ 72.) For the first time in his brief, Wheeler suggests that Rage and Starwood owed him fiduciary duties for reasons other than their affiliation with Geist. Those arguments are at odds with the complaint and therefore off the mark. They are meritless to boot. Rage was the restaurants’ manager; Starwood was their landlord. If either owed fiduciary duties,

it was to the restaurants, not to someone with an undefined “ownership interest” in them. (Compl. ¶ 36.)

18. These pleading defects require dismissal, not only because Wheeler hasn’t stated a valid claim for constructive fraud but also because he lacks standing. The basis for Wheeler’s claim is that Geist, Rage, and Starwood charged excessive management fees and rent that harmed the restaurants and, in turn, harmed him by decreasing his distributions. (See Compl. ¶¶ 67, 74.) But the usual rule is that an individual may not bring an action to recover his “share of the damages suffered by the corporation” unless the defendant owed him “a special duty” or his injury was somehow “separate and distinct.” *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660 (1997) (citation and quotation marks omitted). The complaint does not specify a separate injury. Nor does it allege a special duty apart from the deficient allegations that the defendants owed Wheeler a fiduciary duty. As a result, he has alleged neither the essential elements of constructive fraud nor his standing to pursue that claim. See *Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 338 (2000) (concluding that plaintiff had not alleged “a special relationship with defendants which supports standing to bring a direct claim”).

III. CONCLUSION

19. For all these reasons, the Court **GRANTS** the motion to dismiss. Wheeler’s complaint is **DISMISSED** without prejudice for lack of standing. See *Kochilla v. Mattamy Carolina Corp.*, 2022 N.C. App. LEXIS 161, at *1 (N.C. Ct. App. Mar. 15,

2022) (unpublished) (“[W]hen a claim is dismissed for a lack of standing, it must be dismissed without prejudice.”).

SO ORDERED, this the 12th day of August, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases