STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24 CVS 1165
VITAFORM, INC. d/b/a BODY AFTER BABY, Plaintiff, v. AEROFLOW, INC. and MOTIF MEDICAL, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

1. **THIS MATTER** is before the Court upon Defendants' Motion for Judgment on the Pleadings ("the "Motion"), filed pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure (the "Rule(s)") on 26 July 2024 in the above-captioned case.

2. Having considered the Motion, the parties' briefs and materials offered in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court hereby **DENIES** the Motion.

Asheville Legal, by Jake A. Snider and Isable W. Carson, for Plaintiff Vitaform, Inc. d/b/a Body After Baby.

Ward and Smith, P.A., by Joseph A. Schouten, Hayley R. Wells, and Jordan M. Spanner, for Defendants Aeroflow, Inc. and Motif Medical, LLC.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact when ruling on a motion for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure (the "Rule(s)") and instead recites only those allegations in the pleadings that are relevant and necessary to the Court's determination of the motion.

4. This is the second lawsuit between these parties. Plaintiff Vitaform, Inc. d/b/a Body After Baby ("Plaintiff" or "BAB") previously sued Defendants Aeroflow, Inc. and Motif Medical, LLC (collectively, "Defendants") in August 2019, alleging misappropriation of trade secrets, breach of the duty of good faith and fair dealing, joint venture, Lanham Act violations, fraud, fraudulent concealment, constructive fraud, unjust enrichment, and unfair and deceptive trade practices.[1]

5. The Court dismissed and limited a number of Plaintiff's claims in partially granting Defendants' Motion to Dismiss,[2] and after extensive discovery followed by full briefing and hearing, the Court granted in part and denied in part Defendants' Motion for Summary Judgment (the "SJ Order").[3]

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[1] *See Vitaform, Inc. v. Aeroflow, Inc., et al.*, 2019 CVS 3707 (Mecklenburg County Superior Court) ("*Vitaform I*").

[2] *See Vitaform, Inc. v. Aeroflow, Inc.*, 2020 NCBC LEXIS 132 (N.C. Super. Ct. Nov. 4, 2020); (Order and Opinion on Defs.' Mot. to Dismiss Pl.'s First Am. Compl. ("Vitaform I MTD Order"), Vitaform I ECF No. 57.)

[3] *See Vitaform, Inc. v. Aeroflow, Inc.*, 2022 NCBC LEXIS 128 (N.C. Super. Ct. Oct. 27, 2022); (Order and Opinion on Defs.' Mot. Summ. J. ("Vitaform I SJ Order"), Vitaform I ECF No. 138.)

6. In the SJ Order, the Court dismissed Plaintiff's claims for misappropriation of trade secrets, breach of the duty of good faith and fair dealing, violation of the federal Lanham Act, and most of Plaintiff's claims for fraudulent misrepresentation, fraudulent concealment, common law unfair competition, and unfair and deceptive trade practices.[4] In so doing, the Court made a number of determinations upon which Defendants rely on the Motion, including:

a. "[T]he undisputed evidence shows that BAB's entire business model was publicly in use and known to Defendants prior to the July 19 Call [between BAB's principal, Don Francisco, and Aeroflow's representative]."[5]

b. "[A]ll of the components of BAB's alleged trade secret were publicly available prior to the July 19 Call."[6]

c. "The undisputed evidence shows that all of the components of BAB's alleged trade secret were intended to be shared with third parties and were available in the public domain prior to BAB's first contact with Defendants."[7]

d. "The undisputed evidence shows that by 18 July 2018, Defendants had discovered that other DME distributors were selling BAB's post-partum

[4] (Vitaform I SJ Order, ¶¶ 107(a), (b), (c), and (e).)

[5] (Vitaform I SJ Order, ¶ 46.)

[6] (Vitaform I SJ Order, ¶ 53.)

[7] (Vitaform I SJ Order, ¶ 55.)

compression garments online; viewed the product descriptions, images, sizing information, and benefits and features; determined that the products qualified for DME reimbursement; and were actively engaged in finding the applicable codes."[8]

e. "Although Defendants did not have the relevant codes prior to the July 19 Call, Aeroflow, as a DME distributor, regularly determined which codes should be used to obtain insurance coverage for products as part of its routine business practices. And Francisco conceded that he does not know if Aeroflow used the codes BAB provided and acknowledged that determining the appropriate insurance codes is the 'nature of [Aeroflow's] business' and that it would have been 'prudent' for Aeroflow to conduct its own due diligence to verify the appropriate reimbursement codes."[9]

7. Shortly after the SJ Order was entered, the Court set the following claims for trial:[10] (i) Plaintiff's claim for fraudulent misrepresentation "to the extent that claim was based on an alleged promise made by Aeroflow during the July 19 Call to maintain the confidentiality of BAB's comprehensive business plan"[11]; (ii)

[8] (Vitaform I SJ Order, ¶ 45.)

[9] (Vitaform I SJ Order, ¶ 45.)

[10] The Court set *Vitaform I* for trial commencing on 17 April 2023. (Vitaform I Not. Jury Trial, ECF No. 142.)

[11] (Vitaform I SJ Order, ¶ 107(c).)

Plaintiff's claim for fraudulent concealment "to the extent that claim was based on BAB's allegations in connection with and arising from the July 19 Call"[12]; (iii) Plaintiff's claims for common law unfair competition and violations of N.C.G.S. § 75-1.1 "to the extent those claims were based on Aeroflow's alleged promise during the July 19 Call to maintain the confidentiality of BAB's comprehensive business plan and Aeroflow's alleged fraudulent concealment in connection with and arising from the July 19 Call"[13]; (iv) unjust enrichment[14]; and (v) punitive damages and attorneys' fees.[15]

8. Shortly before the scheduled trial date, the Court entered an Amended Order on Cross-Motions to Exclude Experts on 13 March 2023[16] and an Order on Motions in Limine on 6 April 2023.[17] The first of these orders determined that Plaintiff's expert would "not be permitted to testify or offer the opinions contained in his Report at trial" and that Plaintiff would "be precluded from offering other evidence of its alleged damages at trial."[18] Among other things, the second order provided that Plaintiff would "not be permitted to elicit testimony from witnesses or

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[12] (Vitaform I SJ Order, ¶ 107(d).)

[13] (Vitaform I SJ Order, ¶ 107(e).)

[14] (Vitaform I SJ Order, ¶ 107(f).)

[15] (Vitaform I SJ Order, ¶ 107(g).)

[16] (Vitaform I Am. Order & Op. Cross-Mots. Excl. Experts, Vitaform I ECF No. 165.)

[17] (Vitaform I Order on Mots. in Limine, Vitaform I ECF No. 187.)

[18] (Vitaform I Am. Order & Op. Cross-Mots. Excl. Experts, ¶¶ 43(a)(1), (2); *see Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 38, at *20 (N.C. Super. Ct. Mar. 10, 2023).)

make argument upon [certain categories of documents] to show Plaintiff's actual damages, nor [would] the Court permit Plaintiff to introduce these documents as exhibits in a manner that presents or suggests Plaintiff's actual damages."[19]

9. On 10 April 2023, Plaintiff took a voluntary dismissal of its remaining claims without prejudice.[20] Two days later, on 12 April 2023, Defendants took a voluntary dismissal of their counterclaims, also without prejudice.[21] In light of the parties' dismissal of all claims and counterclaims without prejudice, the Court cancelled the jury trial set for 17 April 2023.

10. Eleven months later, on 20 March 2024, Plaintiff filed its Complaint initiating this action. Plaintiff purports to assert the same claims in this action that were pending for trial in the prior action at the time of Plaintiff's voluntary dismissal—fraud and fraudulent concealment based on the July 19 Call, unfair and deceptive trade practices based on the July 19 Call, unjust enrichment, and punitive damages and attorneys' fees.[22]

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[19] (Vitaform I Order on Mots. in Limine, ¶ 21, *see Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 57, at *9–10 (N.C. Super. Ct. Apr. 6, 2023).)

[20] (Vitaform I Pl.'s Not. Vol. Dism'l w/o Prej., Vitaform I ECF No. 188.)

[21] (Vitaform I Defs.' Vol. Dism'l w/o Prej., Vitaform I ECF No. 191.)

[22] (Compl. ¶¶ 78–115, ECF No. 3.)

11. Defendants filed their Answer and Counterclaim on 10 April 2024,[23] followed by their First Amended Answer and Counterclaim on 5 June 2024.[24] Defendants timely filed their Reply.[25]

12. Defendants filed the current Motion on 26 July 2024. Defendants argue that, based on the Court's findings in the SJ Order, "any alleged misrepresentations or concealment could not have been the proximate cause of any damage to BAB or unjust enrichment to Defendants"[26] because "BAB is collaterally estopped from challenging the Court's prior judgment on these issues."[27] As a result, Defendants contend that Plaintiff's Complaint should be dismissed in its entirety with prejudice.[28] Alternatively, Defendants contend that BAB is entitled to, at most, nominal damages on its claims.[29]

13. Plaintiff argues in opposition that Defendants' Motion should be denied "because it seeks to sweepingly apply the Court's narrow summary judgment findings

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[23] (Defendants' Answer and Counterclaims, ECF No. 4.)

[24] (Defendants' First Amended Answer and Counterclaims, ECF No. 15.)

[25] (Plaintiff's Reply to Defendants' Counterclaims, ECF No. 14; *see also* Stipulation to Filing of Pleadings, ECF No. 16.)

[26] (Defs.' Br. Supp. Mot. J. Pleadings [hereinafter, "Defs.' Br. Supp."] 1, ECF No. 23.)

[27] (Defs.' Br. Supp. 1.)

[28] (Defs.' Br. Supp. 3.)

[29] (Defs.' Br. Supp. 3.)

on a specific statutory claim to bar all of Plaintiff's damages on Plaintiff's remaining claims."[30]

14. After full briefing, the Court held a hearing on Defendants' Motion on 17 September 2024 (the "Hearing"), at which all parties were represented by counsel. The Motion is now ripe for resolution.

II.

LEGAL STANDARD

15. Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. R. Civ. P. 12(c). Rule 12(c) is intended "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit and is appropriately employed where all the material allegations of fact are admitted in the pleadings and only questions of law remain." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 63, 70 (2020) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974)).

16. In considering a motion for judgment on the pleadings:

> 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. As with a motion to dismiss, the trial court is required to view the facts and permissible inferences in the light more favorable to the nonmoving party. A Rule 12(c) movant must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action.

Tully v. City of Wilmington, 370 N.C. 527, 532 (2018) (cleaned up).

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[30] (Pl.'s Resp. Br. Defs.' Mot. J. Pleadings [hereinafter, "Pl.'s Br. Opp'n"] 6, ECF No. 17.)

17. Under Rule 12(c), the trial court may consider "[a]n exhibit, attached to and made a part of the [complaint]," *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206 (1970), and documents that are "the subject of the action and specifically referenced in the complaint," *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 242 (2013). Where a document is attached to a pleading, "[t]he terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms." *Wilson*, 276 N.C. at 206. "The party moving for judgment on the pleadings must show that no material issue of fact exists and that he is entitled to judgment as a matter of law." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682 (1987). Moreover, a "motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Newman v. Stepp*, 376 N.C. 300, 305 (2020) (citation and internal quotation marks omitted).

III.

ANALYSIS

18. Defendants seek dismissal of BAB's Complaint based on two interrelated contentions: first, that "BAB is collaterally estopped from challenging that Defendants had access to—and knowledge of—[BAB's] 'comprehensive business plan' before they allegedly tricked BAB into providing it during a July 19, 2018 telephone call between their representatives (the 'July 19 Call')"[31]; and second, that "with these facts conclusively established, BAB cannot show that the alleged fraud

[31] (Defs. Br. Supp. 1, 9–14.)

proximately caused any damages to [BAB] or any unjust enrichment to Defendants."[32] Defendants argue that because all of Plaintiff's claims require BAB to show proximate cause,[33] they are legally deficient as a matter of law and must be dismissed. Furthermore, since "BAB's claims for punitive damages and attorneys' fees depend upon its fatally flawed fraud and [unfair and deceptive trade practice] claims," Defendants contend that those claims must be dismissed as well.[34]

19. As an initial matter, the Court agrees with Defendants that Plaintiff is collaterally estopped from relitigating the factual issues the Court decided in *Vitaform I*.

20. Collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *State v. Summers*, 351 N.C. 620, 622–23 (2000) (citation omitted). Under the doctrine, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414 (1996). Stated differently, collateral estoppel "precludes the subsequent adjudication of a previously determined issue,

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[32] (Defs. Br. Supp. 2–3, 14–21.)

[33] *See, e.g.*, *Jay Grp., Ltd. v. Glasgow*, 139 N.C. App. 595, 599–601 (2000) (noting that a fraud claim "requires that plaintiff establish the element of proximate causation"); *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460–61 (1991) (including proximate cause as an element of an unfair and deceptive trade practices claim); *Booe v. Shadrick*, 322 N.C. 567, 570 (1988) (requiring a "measurable benefit" conferred upon and accepted by the defendant for an unjust enrichment claim).

[34] (Defs. Br. Supp. 3, 21.)

even if the subsequent action is based on an entirely different claim." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15 (2004) (citation omitted). "The issues resolved in the prior action may be either factual issues or legal issues," *Doyle v. Doyle*, 176 N.C. App. 547, 549 (2006), and:

> [t]he party alleging collateral estoppel must demonstrate that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

Frinzi, 344 N.C. at 414.

21. For issues to be considered "identical" to ones "actually litigated and necessary" to a previous judgment:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

Summers, 351 N.C. at 623 (citation omitted). A "very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply." *Beckwith v. Llewellyn*, 326 N.C. 569, 574 (1990).

22. "The burden is on the party asserting [collateral estoppel] to show with clarity and certainty what was determined by the prior judgment." *Miller Bldg. Corp. v. NBBJ N.C., Inc.*, 129 N.C. App. 97, 100 (1998). Significantly for present purposes, "[i]n general, a cause of action determined by an order for summary judgment is a

final judgment on the merits." *Green v. Dixon*, 137 N.C. App. 305, 310, *aff'd per curiam*, 352 N.C. 666 (2000); *see also, e.g.*, *Waters v. Pumphrey*, 286 N.C. App. 151, 153 (2022) (recognizing that "the trial court's order granting summary judgment is a final judgment").

23. Here, the Court's SJ Order became a final judgment once the parties took their voluntary dismissals. *See, e.g.*, *Green*, 137 N.C. App. at 310. In addition, the issues to which Defendants seek to apply collateral estoppel are issues for determination in the current action and are identical to those the Court resolved in its SJ Order in *Vitaform I*. These issues were actually litigated, were necessary to the Court's determinations, and were actually determined in the Court's SJ Order. The Court therefore agrees with Defendants that the Court's conclusions that Plaintiff's entire "comprehensive business plan" was "known to Defendants" and "publicly available" prior to the July 19 Call are binding determinations in this action.

24. The Court cannot agree with Defendants, however, that these findings necessarily preclude Plaintiff from establishing proximate cause or actual injury from Defendants' alleged conduct. While the amount of any provable damages may well be small, Plaintiff still may be able to show that Defendants gained value from receiving the plan from Plaintiff—such as proof of its viability—or from using the plan in some way from which Defendants gained an advantage, such as by accelerating their entry into the relevant market by obtaining BAB's instruction and guidance on the plan's implementation. Indeed, BAB alleges at paragraph 89 of the Complaint that "[w]ithout BAB's divulged information, including all of the

documentation given and Francisco's specialized training and experience, the Defendants would not have been able to successfully market and sell the Motif maternity garments alone on their own."[35] Although Defendants contend that the Court's findings establish that "any of BAB's alleged losses and Defendants' gains would have happened regardless of the alleged fraud," the Court did not make that specific finding in *Vitaform I* and concludes that it is a matter for discovery whether Defendants took any action that they would not have taken but for the alleged fraud.[36]

25. For these same reasons, the Court cannot conclude, as Defendants urge for their alternative relief, that Plaintiff is entitled to no more than nominal damages as a matter of law.

26. Accordingly, based on the above, the Court concludes that Defendants' Motion should be denied.

IV.

CONCLUSION

27. **WHEREFORE**, the Court hereby **DENIES** the Motion.

SO ORDERED, this the 25th day of September, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

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[35] (Compl. ¶ 89.)

[36] The Court notes that the case upon which Defendants principally rely for their contention that Plaintiffs cannot show proximate cause as a result of the Court's findings, *Self v. Yelton*, 201 N.C. App. 653 (2010), was decided on the evidence of record at summary judgment, not, as sought here, on the allegations in the pleadings under Rule 12(c).