STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-06-595064

JOHN A. SIVINSKI	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**OPINION**
	)	
LYNN ARKO KELLEY, et al.	)	
	)	
Defendants.	)	
	)	

SHIRLEY STRICKLAND SAFFOLD, JUDGE:

I. FACTUAL BACKGROUND

Plaintiff, John A. Sivinski (hereinafter "Plaintiff"), entered into an agreement in 1997 with Defendant's, Lynn Arko Kelley (hereinafter "Defendant"), husband, Michael Kelley (hereinafter "Kelley"), for Plaintiff's employment at Kelley's newly formed law firm, Kelley and Ferraro. The agreement for employment provided that Plaintiff would be paid a salary that was to come directly from Kelley's share of the firm's profits. Defendant alleged that under this agreement, Plaintiff was guaranteed an annual salary of $200,000.00 for the first six months and $225,000 thereafter, with the potential to earn more money based upon a formula that would award him additional bonuses based on a percentage of Kelley's share of firm profits.

After Kelley's death in 2006, Plaintiff brought this action against Kelley's estate, James Ferraro, and Kelley and Ferraro, to recover under the 1997 agreement. Plaintiff alleged that under the agreement he was underpaid approximately $2.4 million. Subsequently, James Ferraro and Kelley and Ferraro were dismissed from this action.

In response, Defendant alleged that Plaintiff was due no money under the 1997 agreement because in fact, Plaintiff and Kelley entered into a modification of that agreement in

2000. Defendant maintained that under this modified agreement Plaintiff was to receive an increased guaranteed salary, but lost the opportunity to earn additional bonuses. Plaintiff contended that even if the modified agreement governed, he was still underpaid in excess of $200,000.

This matter was originally scheduled for trial on June 29, 2009 and was continued until July 23, 2009 due to a conflict with the Court's Criminal Docket. Plaintiff then moved this Honorable Court for a continuance of the July 23rd date due to the unavailability of a key witness. This Honorable Court accommodated this request and continued the trial until July 27th. Due to a conflict with the Court's Criminal Docket the trial was again continued from July 27th until October 5, 2009, a date agreed to by all parties and counsel.

This matter was called to trial on October 5, 2009. However, Plaintiff again moved for a continuance based upon an alleged health emergency suffered by Plaintiff's co-counsel, Glenn D. Feagan, Esq. Plaintiff, choosing to act as co-counsel to Mr. Feagan, requested a continuance, which after a hearing on the record, this Honorable Court granted. Plaintiff chose October 19, 2009 as the new trial date.

This matter was called to trial before this Honorable Court on October 19, 2009. After impaneling a trial jury, Plaintiff indicated to the Court that his primary and main witness would not be available to testify. On October 20, 2009 Plaintiff began the presentation of his case, including the testimony of witnesses and the introduction of evidence.

After two days of testimony, Plaintiff, while acting as a witness, indicated that his attorney, Mr. Feagan, had an appointment that would demand his absence from the trial. Plaintiff at the time was being cross-examined. The Court, being under the impression that the appointment was somehow related to Mr. Feagan's health emergency two weeks prior,

consented. It was not until later when the Court mentioned that Mr. Feagan was absent due to medical necessity that it was informed that the absence was completely unrelated to a medical emergency. Plaintiff insisted that another attorney appear on October 15, 2009 to replace Mr. Feagan as co-counsel for the day to make any necessary objections to the cross-examination of Plaintiff. Despite the unorthodox nature of this procedure, Plaintiff insisted on continuing in such a manner. This Honorable Court noted the deficiency that this procedure caused, and Plaintiff waived any right to appeal based upon this deficiency both on the record and in writing.

Once his cross-examination was completed, and with many issues outstanding, Plaintiff stepped down. This questionable presentation was further complicated by the Plaintiff's emotional outbursts that were self-serving and encomium of himself. Plaintiff rested his case on October 22, 2009.

At the close of Plaintiff's case, Defendant moved this Honorable Court for a Directed Verdict pursuant to Ohio Rules of Civil Procedure, Rule 50(A). Pursuant to Civ. R. 50(A)(4), when such a motion has been properly made, and the trial court, having construed the evidence most strongly in favor of the party against whom the motion is directed, finds that "[u]pon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." *Id.*

II. CLAIMS

A. Declaratory Judgment

Plaintiff alleged that he was an equity partner in the law firm of Kelley and Ferraro and requested that this Honorable Court make a determination of the legal relationship between

Plaintiff and Defendant, including a declaration of the nature of his rights under the agreement and his interest in the partnership.

It is the opinion of this Honorable Court that the Plaintiff presented no evidence at trial to establish a partnership relationship between he and Kelley, or he and the Kelley and Ferarro law firm. For reasons more fully set forth in the Fiduciary Duty portion of this opinion, reasonable minds could come to but one conclusion, that Plaintiff was not an equity partner at the Kelley and Ferraro law firm.

B. Breach of Agreement

Plaintiff alleged in his Complaint that Kelley breached the 1997 agreement by failing to pay him approximately $2.4 million. Plaintiff further alleged that even if the 2000 amended agreement governed, he was still underpaid by approximately $200,000.

Plaintiff failed to present any evidence at trial that supported his claim that the 1997 agreement governed. Plaintiff maintained that because only he (and not Kelley) signed the 2000 agreement, it was not an enforceable agreement. However, Ohio law controverts this stance.

The Court of Appeals, Eighth Appellate District, in *American States Insurance Company v. Honeywell, Inc.*, opined that in fact it is not necessary for all parties to a contract to sign it in order for it to be enforceable. *American States Insurance Company v. Honeywell, Inc.*, 1990 WL 19319. Quoting *Corbin on Contracts* (1950), 774, Section 524, the court opined:

> In order for a memorandum to be sufficient, it is not necessary that it [sic] should be signed by both parties…If either party to the contract has signed an otherwise sufficient memorandum, it is enforceable against him as the party to be charged, even though no memorandum has been signed by the other party for whose benefit it is being enforced.

1990 WL 19319 at *6.

Thus, because the 2000 agreement was signed by Plaintiff, the party against whom the agreement could be enforced, it was an enforceable modification of the original 1997 agreement. The mere lack of Kelley's signature does not in and of itself void the agreement.

Furthermore, Plaintiff failed to produce any evidence at trial that Kelley breached the 2000 agreement. Thus, reasonable minds can come to but one conclusion, that there was no breach of the 2000 agreement.

C. Unjust Enrichment

Plaintiff has alleged that he conferred a benefit upon Kelley, and thereby his estate, and that it would be unjust for Defendant to retain the benefit without fully paying him. Defendant conversely alleged that a claim for unjust enrichment is improper due to the existence of a written contract.

In Ohio, unjust enrichment is an equitable doctrine that allows a party to pursue the reasonable value of services rendered upon another when a benefit has been conferred without an exchange of compensation. *Cheers Sports Bar & Grill v. DirecTV, Inc.*, 563 F.Supp. 2d 812, 819. "Under Ohio law, a plaintiff must prove the following elements to succeed in an action for unjust enrichment: (1) a benefit conferred by the plaintiff upon the defendant, (2) defendant's knowledge of the benefit, (3) improper retention of the benefit without the defendant's rendering of payment to plaintiff for same." *Id. quoting, Hummel v. Hummel* (1938), 133 Ohio St. 520, 527.

Furthermore, Ohio courts have held that recovery under an unjust enrichment claim is "[u]navailable when the matters in dispute are governed by the terms of an express contract." *Metz v. American Electric Power Co., Inc.,* 172 Ohio App. 3d 800, 811. Unjust enrichment may be pled "[I]n the alternative when the existence of an express contract is in dispute and may be

maintained despite the existence of an express contract where there is evidence of fraud, bad faith, or illegality." 563 F.Supp. 2d 812 at 819.

Here, Plaintiff presented no evidence in his case alleging that there was no express contract. In fact, Plaintiff made reference to not one, but two express contracts, the 1997 agreement and the 2000 agreement. Therefore, the only way that recovery under a theory of unjust enrichment would be proper is if there was evidence of fraud, bad faith, or illegality. Plaintiff presented no such evidence and made no such allegations. Thus, it is the opinion of this Honorable Court that Plaintiff cannot recover under the theory of unjust enrichment.

D. Breach of Fiduciary Duty

Plaintiff has alleged that Michael Kelley and he entered into a partnership agreement that made Plaintiff an equity partner in the law firm Kelley and Ferraro. Plaintiff maintains that due to this agreement, and the ensuing "partnership" that resulted, Kelley owed him a fiduciary duty, which he subsequently breached by allegedly failing to pay him in line with their agreement.

It is true that in Ohio the law imposes upon partners a fiduciary duty and imposes upon them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. *Lorain National Bank v. Saratoga Apartments,* 61 Ohio App. 3d 127, 130, *quoting* 59A American Jurisprudence 2d (1987) 453, Partnership, Section 420. However, this duty is imposed upon partners, not non-partners.

Ohio Revised Code (hereinafter "RC") § 1775.06 provides rules to determine the existence of a partnership. RC § 1775.06(D) provides, "The receipt by a person of a share of the profits of a business is prima-facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment…as wages of an employee…" RC § 1775.06(D)(2).

Here, Plaintiff maintains that his agreement with Kelley made him an equity partner in the law firm. However, Plaintiff failed to introduce any evidence to support this claim. The agreement itself was not marked as a partnership agreement, but rather just an agreement. Furthermore, per the agreement, Plaintiff was paid a salary from Kelley's portion of the law firm's profits. Under RC § 1775.06(D)(2), there is no inference that a person is a partner if he receives a portion of the partnership profits as a salary.

Therefore, this Honorable Court has determined that Plaintiff has presented no evidence that the agreement established him as a partner in the law firm. As such, no fiduciary duty was owed to him by Kelley, and thus, reasonable minds could come to but one conclusion, that no breach occurred because no duty was owed.

E. Conversion

Prior to Defendant's moving for a Directed Verdict, Plaintiff, on the record, withdrew his claim for conversion.

F. Accounting

Because this Honorable Court has determined that Plaintiff in fact was not an equity partner in the Kelley and Ferraro law firm, and accounting is not in order.

III. CONCLUSION

Therefore, it is the opinion of this Honorable Court, after having construed all of the evidence in the light most favorable to the Plaintiff, John A. Sivinski, that upon any determinative issues in this matter reasonable minds could come to but one conclusion, and that conclusion is adverse to the Plaintiff. Therefore, Defendant's, Lynn Arko Kelley, Motion for Directed Verdict is well taken and granted on all counts.

IT IS SO ORDERED.

_____	_____
Date	Judge Shirley Strickland Saffold

NOTICE OF SERVICE

A copy of the foregoing JUDGMENT AND OPINION was forwarded this _____ day of October, 2009, via hand delivery to the following:

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