COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
Civil No. 18-3240-BLS1

KIRK RAMEY
Plaintiff

vs.

TRUSTEES OF BOSTON UNIVERSITY, & others[1]
Defendants

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Kirk Ramey brings this action against his former employer, Trustees of Boston University ("BU" or "the University"), Dr. Edward Damiano ("Damiano"), and Beta Bionics, Inc. ("Beta Bionics"), claiming defendants wrongfully denied him an equity interest in Beta Bionics despite his role in developing a dual drug ambulatory infusion pump and administration system known as the "Bionic Pancreas." BU and Damiano have separately moved for summary judgment on all counts against them in the Amended Complaint. Plaintiff does not oppose summary judgment on Counts IV, V, VI, VIII, IX, XI, and XII.[2] For the following reasons, the motions for summary judgment on Counts II (breach of contract), III (breach of the implied covenant of good faith and fair dealing), VII (promissory estoppel), and X (declaratory judgment) are denied.

BACKGROUND

In 2002, Damiano was an assistant professor of bioengineering at the University of Illinois Urbana-Champagne. Damiano and Dr. Firas El-Khatib ("El-Khatib") were researching

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[1] Beta Bionics, Inc. and Edward Damiano.

[2] On the claims related to breach of contract, plaintiff has also waived his claim that he was promised international distribution rights.

closed-loop blood glucose control and began collaborating on a medical device that would come to be known as the "Bionic Pancreas." In 2004, BU hired Damiano as an associate professor of biomedical engineering. Damiano and El-Khatib continued work on the Bionic Pancreas.

In March 2013, Damiano contacted plaintiff to discuss a possible position in his BU lab. In a telephone call, Damiano explained that plaintiff's research on infusion sets could be used to help develop the Bionic Pancreas and that a commercial entity may then be formed. Plaintiff expressed interest in an equity stake in the future entity in addition to the $125,000 annual salary offered by Damiano if he were to join the Bionic Pancreas project. Damiano stated that he was not sure whether any potential future company arising from the Bionic Pancreas project would be for-profit or not-for-profit. No writing memorializes the March 2013 conversation between plaintiff and Damiano. The parties dispute whether during this conversation Damiano agreed to give plaintiff a 10% equity interest in the yet-to-be-formed company. After the call, Damiano forwarded plaintiff's resume and letters of recommendation to BU's Director of Biomedical Engineering.

In May 2013, BU hired plaintiff as a senior research scientist in the College of Engineering at an annual salary of $125,000. Plaintiff did not discuss a possible equity stake in the non-existent company with anyone at BU between his March 2013 telephone conversation with Damiano and beginning work at BU in May. Plaintiff was hired for a one-year term, subject to annual renewal. Plaintiff's appointment letter was signed by the Dean of the College of Engineering. It contained no mention of an equity stake in any yet-to-be-formed entity.

Around May 1, 2013, plaintiff met with BU's Director of Biomedical Engineering for intake before starting the position. At no point during this intake meeting or during the course of his employment did plaintiff raise with or inquire of the Director about any equity interest in a company that could be formed out of the Bionic Pancreas project. The parties dispute whether

when plaintiff began work El-Khatib had an agreement with Damiano about the equity share El-Khatib would receive from a company arising from the Bionic Pancreas project.

On May 4, 2013, plaintiff signed a copy of BU's Patent Policy and Agreement ("Patent Agreement"). Plaintiff claims to have made notes about his expectation of equity on a patent agreement prior to signing it and that BU rejected these notes, though plaintiff does not know whether he still has the marked-up copy of this agreement. In 2017, BU implemented a new patent policy. Under both the Patent Agreement signed by plaintiff and the new policy, plaintiff is entitled to receive a percentage of royalties if and when the Bionic Pancreas product goes to market. The particular percentage to which plaintiff is entitled is determined by his share of inventorship in the patents used in the Bionic Pancreas product. As of late 2021, no royalties have been generated because Beta Bionics has yet to sell any product.

In May 2014, BU renewed plaintiff's annual employment contract. During his employment, plaintiff and Damiano had conversations about forming a company around the Bionic Pancreas as a non-profit corporation. Plaintiff objected to the idea of the company being formed as a non-profit.

In the fall of 2014, plaintiff and Damiano met at a restaurant in the Tampa airport to discuss plaintiff's equity interest. The parties left this conversation with an understanding that plaintiff would receive a 5% equity stake in the yet-to-be-formed company. There exists no writing or documentation to confirm the nature of this conversation.

On May 1, 2015, BU again renewed plaintiff's employment at the same salary.

On October 21, 2015, Beta Bionics was incorporated as a Massachusetts Domestic Benefit Corporation. At formation, Damiano was granted 60,000 Class A Common shares and El-Khatib received 20,000 Class B Common shares. Damiano is the only BU employee listed as

an officer or director of Beta Bionics. BU maintains less than 1% of voting power in the company.

In late 2015, after Beta Bionics was formed, plaintiff and Damiano met to discuss plaintiff's equity in the company. The conversation became contentious and ended abruptly when plaintiff experienced a medical emergency. Plaintiff alleges that Damiano offered him 0.2% equity in shares of common stock. Plaintiff objected.

In November 2015, BU and Beta Bionics entered negotiations for the licensing terms for the Bionic Pancreas.

On December 2, 2015, plaintiff asked for a meeting with Damiano where BU could act as a "good faith neutral party" to assist plaintiff in reaching "an amicable agreement with" Damiano.[3] On December 8, 2015, plaintiff and Damiano met to discuss plaintiff's equity interest in Beta Bionics. BU was not involved in that meeting. There is no written record corroborating the conversation between plaintiff and Damiano.

The Device License Agreement for the Bionic Pancreas product was executed on December 16, 2015. The parties disagree as to what the contents of the Device License Agreement show about plaintiff's right to recover royalties from Beta Bionics.

Plaintiff has testified that, while he was employed by BU, he had other job opportunities with annual salaries ranging from $100,000 to $200,000. BU did not renew plaintiff's employment after May 1, 2016.

Plaintiff filed this action in October 2018. Plaintiff's operative pleading, the Amended Complaint dated September 9, 2019, asserted a dozen counts against BU, Damiano, Beta

[3] It does not appear that such a meeting happened. A BU representative told plaintiff it would be inappropriate for BU to get involved unless plaintiff's issues with Damiano related to plaintiff's employment at BU.

Bionics, and/or El-Khatib.[4] In 2020, the Court (Green, J.) dismissed all of the claims against El-Khatib for insufficient service of process, dismissed the Chapter 93A claim (Count I) against all defendants because the dispute did not arise in trade or commerce, and dismissed all of the remaining claims against Beta Bionics because it did not exist at the time of the alleged misrepresentation or alleged contract. See Amended Memorandum of Decision and Order on Defendants' Motions to Dismiss ("Amended Memo re: Dismissal") (Jun. 15, 2020) (Docket #25).

DISCUSSION

I. The Summary Judgment Standard

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983). A defendant moving for summary judgment bears the burden of demonstrating that the undisputed record shows no outstanding issues of fact to be resolved at trial, and that the plaintiff "has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 710 (1991).

In his motion for summary judgment, Damiano asserts that any alleged verbal promise he made to plaintiff did not contain sufficient material terms to constitute a legally binding agreement, and that even if the parties did reach a meeting of the minds, plaintiff looked to Beta

[4] The Amended Complaint sets out claims against all four defendants for violation of G.L. c. 93A (Count I), fraud (Count IV), intentional or fraudulent misrepresentation (Count V), negligent misrepresentation (Count VI), breach of fiduciary duty (Count VIII), unjust enrichment (Count IX), and declaratory judgment (Count X). It alleges claims against defendants Beta Bionics, BU, and Damiano for breach of contract (Count II), breach of the implied covenant of good faith and fair dealing (Count III), and promissory estoppel (Count VII); and two separate claims just against BU for breach of contract (Count XI) and unjust enrichment (Count XII) for failure to reimburse certain out-of-pocket expenses he incurred.

Bionics to perform the contract, not to Damiano personally. BU's motion centers on the principle that the only obligations it had to plaintiff were those contained in the appointment letters and patent agreements, which they fulfilled.

Plaintiff argues that several disputed factual issues bar entry of summary judgment, including whether Damiano made a legally binding promise to plaintiff, and whether that promise was made by Damiano individually or if he had apparent authority to bind BU and/or Beta Bionics to the agreement. I am persuaded by plaintiff's assessment of the presence of disputed factual issues and find them to be material. I address the four contested counts in the order they appear in the Amended Complaint.

II. Breach of Contract

"It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement." Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878 (2000). To have a binding agreement, the parties "must . . . have progressed beyond the stage of 'imperfect negotiation,'" although "the presence of undefined or unspecified terms will not necessarily preclude the formation of a binding contract." Id. (quotation omitted). When "agreement on all of the essential terms" of a contract exists between the parties who are to be bound by it, there is an enforceable contract. D'Agostino v. Federal Ins. Co., 969 F. Supp. 2d 116, 127 (D. Mass. 2013) (Casper, J.).

The parties agree that the March 2013 phone call between plaintiff and Damiano consisted of a conversation regarding plaintiff's potential equity stake in the yet-to-be-formed company, but dispute the specificity of the terms agreed upon, and whether the plaintiff could reasonably understand whether Damiano was acting in his individual capacity or had apparent authority to negotiate on behalf of BU. Where the existence and terms of an oral agreement are

factually disputed by the parties, the enforceability and provisional contents of the agreement are questions of fact that are "generally reserved for the jury." Situation Mgmt. Sys., Inc., 430 Mass. at 879. The disputed content and weight of both the March 2013 phone call and the meeting at the Tampa airport in the Fall of 2014 create a factual question barring summary judgment on the breach of contract claim.

"Apparent authority exists when the principal, by his or her words or conduct, causes a third person to reasonably believe that the principal consents to the agent acting on the principal's behalf." Fergus v. Ross, 477 Mass. 563, 567 (2017). "Only the words and conduct of the principal . . . and not those of the agent, are considered in determining the existence of apparent authority." Licata v. GGNSC Malden Dexter LLC, 466 Mass. 793, 801 (2014). Given that during the March 2013 conversation Damiano offered plaintiff annual compensation by BU of $125,000, and BU's willingness to stand behind that offer, the inference may be drawn from the summary judgment record that it was reasonable for plaintiff to conclude that Damiano was acting as BU's authorized agent. Ultimately, the question of whether Damiano had apparent authority to bind BU will have to resolved by the fact finder at trial.[5]

Defendants also argue that even if Damiano was acting as a promoter of the still-to-be-formed entity – later known as Beta Bionics – he cannot be held liable because plaintiff "looked only to the corporation for performance." Productora E Importadora De Papel, S.A. De C.V. v.

[5] Defendants have not shown Damiano definitely lacked apparent authority. In ruling on defendants' motions to dismiss, Judge Green found that the allegations in the complaint "plausibly suggest that Damiano had apparent authority" based on the following facts, all of which are still in play on summary judgment: "Damiano, a BU associate professor, requested that [plaintiff] join the Project in exchange for not only a BU salary but also an equity stake in the [Bionic Pancreas]'s commercialization; after he agreed to these terms, BU sent him an offer letter for a Senior Research Scientist position working under Damiano in connection with the Project; Damiano had repeated meetings about Ramey's equity stake at BU's facilities; BU licensed the intellectual property rights related to the [Bionic Pancreas] to Beta Bionics; [and] BU acquired shares in Beta Bionics." Amended Memo re: Dismissal at 13-14.

Fleming, 376 Mass. 826, 836 (1978). However, as Judge Green noted earlier, the law is clear: a contract made by a promotor on behalf of a corporation which does not yet exist generally is only enforceable by and against the promoter. Amended Memo re: Dismissal at 14, citing Framingham Sav. Bank v. Szabo, 617 F.2d 897, 898 (1st Cir. 1980) ("The rationale for the . . . Massachusetts rule stems from the premise that the individual executing the contract could not act as an agent for the not yet existing corporation."). The facts of Fleming, which defendants cite, are not equivalent to the situation here. In Fleming, defendant-promoter signed a contract to do business with a buyer on behalf of a named entity, which had not yet been formed; the buyer understood the contract to be with the corporation, and the promoter was not personally liable. Here, the summary judgment record shows an entirely different situation; one in which there was no confusion about the non-existence of a new entity at the time of plaintiff and Damiano's conversations in 2013 and 2014.[6]

III. Breach of the Implied Covenant of Good Faith and Fair Dealing and Promissory Estoppel

Plaintiff's claims for breach of the implied covenant of good faith and fair dealing (Count III) and for promissory estoppel (Count VII) are intertwined with the breach of contract claim. Under Massachusetts law, claims for breach of the implied covenant of good faith and fair dealing or for promissory estoppel will often rise or fall depending on whether a breach of contract claim survives. See, e.g., Haddad v. Martins, 71 Mass. App. Ct. 1110, 2008 WL 495647 at *2 (Feb. 25, 2008) (Rule 1:28 decision), citing Chokel v. Genzyme Corp., 449 Mass. 272, 276

[6] Defendants also argue that plaintiff cannot show damages from Damiano's and/or BU's alleged breach of contract. I disagree. Plaintiff need not show "mathematical accuracy of proof" of damages at the summary judgment stage, Rombola v. Cosindas, 351 Mass. 382, 385 (1966), but merely "some workable framework" for the court to consider. Albert v. Zabin, 81 Mass. App. Ct. 1109, 2012 WL 130681 at *1 (Jan. 18, 2012) (Rule 1:28 decision). At a minimum, plaintiff's foregone income from the other job offers received while he was working at BU is a sufficient basis of damages on which to proceed.

(2007). Because, among other things, the scope of the covenant of good faith and fair dealing is "shaped by the nature of the contractual relationship," Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 385 (2005), the two claims survive summary judgment. A jury will have to determine whether Damiano made an actionable promise, if so on whose behalf, and whether those bound by the contract acted in such a way to scuttle plaintiff's reasonable expectations that those promises would be performed.

IV. Declaratory Judgment

Defendants' argument for granting summary judgment on the declaratory judgment claim (Count X) presumes that summary judgment is granted on the other remaining claims. Because Counts II, III and VII survive defendants' summary judgment challenge, so too does the declaratory judgment claim.

ORDER

Defendant Dr. Edward Damiano's Motion for Summary Judgment (Docket #41) is **ALLOWED** as to Counts IV, V, VI, VIII, and IX, and Defendant Trustees of Boston University's Motion for Summary Judgment on Counts II-XII of the Amended Complaint (Docket #46) are **ALLOWED** as to the same five counts and also as to Counts XI, and XII. Both motions are **DENIED** as to Counts II, III, VII, and X.

Dated: April 20, 2022

Peter B. Krupp
Justice of the Superior Court