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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM A. GRUBB,

Plaintiff - Appellant,

v.

DXP ENTERPRISES, INC.,

Defendant - Appellee.

No. 22-5073

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:19-CV-00443-JH-JFJ)

James M. Love, Titus Hillis Reynolds Love, P.C., Tulsa, Oklahoma (R. Kyle Alderson, Titus Hillis Reynolds Love, P.C., Tulsa, Oklahoma; and J. Christopher Davis, Crowe & Dunlevy, Tulsa, Oklahoma, with him on the briefs), for Plaintiff - Appellant.

Chris Dove, Locke Lord LLP, Houston, Texas (David M. Gregory and Andrew W. Reed, Locke Lord LLP, Houston, Texas; and Chris S. Thrutchley and Andrew J. Hofland, GableGotwals, Tulsa, Oklahoma, with him on the brief) for Defendant - Appellee.

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

In 2008 Plaintiff Bill Grubb signed an employment agreement with Defendant DXP Enterprises to lead the development and production of horizontal pumps. The agreement recited that the parties intended to create a new company to produce the

pumps, and Mr. Grubb would own 10%. If the project became a success, Mr. Grubb had the right under the employment agreement to require DXP to buy his ownership stake at a price based on the new company's gross revenue.

The project was successful. The horizontal-pump unit, led by Mr. Grubb, had sales exceeding $40 million by 2018. In March 2019 Mr. Grubb gave notice to DXP that he wanted to sell his ownership stake in accordance with the agreement. But DXP informed Mr. Grubb that it had never formed the new company, so there was nothing for it to purchase under the agreement.

Invoking federal diversity jurisdiction under 28 U.S.C. § 1332, Mr. Grubb brought this action in the United States District Court for the Northern District of Oklahoma against DXP. He asserted claims for breach of contract, actual and constructive fraud, conversion, breach of fiduciary duty, and unjust enrichment; and sought a declaratory judgment. After the parties filed cross-motions for summary judgment, the district court granted summary judgment in favor of DXP on all claims. Mr. Grubb timely appealed.

Exercising jurisdiction under 28 U.S.C. § 1291, we hold that there was sufficient evidence of bad faith by DXP (in failing to form the new company) to support Mr. Grubb's breach-of-contract claim but otherwise see no error in the rulings by the district court. We reverse in part the judgment below and remand for further proceedings.

I. BACKGROUND

A. Factual Background

In summarizing the evidence presented to the district court, we present all disputed facts in the light most favorable to Mr. Grubb, the nonmoving party. *See Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193, 1196 (10th Cir. 2022).

DXP is a publicly traded company that sells industrial pumps and pumping equipment. In the mid-2000s DXP was an established seller of third-party-produced high-pressure, high-volume centrifugal pumps. But by 2008, DXP wanted to develop and produce its own line of horizontal pumps, and it looked to Mr. Grubb, who had extensive experience designing and launching industrial-pump products, to lead its horizontal-pump initiative.

1. Negotiations and Employment Agreement

Initially, DXP considered acquiring a company named HOSS Pump Systems, with Mr. Grubb managing the development and production of horizontal pumps as a HOSS Manufacturing employee. Under this proposal, HOSS Pump Systems would be reincorporated as HOSS Manufacturing, LLC, a majority-DXP-owned limited-liability corporation. DXP was to make a capital contribution of $850,000 for 85% ownership in HOSS Manufacturing, Mr. Grubb was to contribute $100,000 for 10%, and the owner of HOSS Pump Systems was to contribute $50,000 for 5%. During these negotiations the parties drafted an employment agreement for Mr. Grubb, as well as an operating agreement for HOSS Manufacturing.

The HOSS Manufacturing deal fell through, but DXP was still interested in hiring Mr. Grubb. In October 2008 DXP and Mr. Grubb began discussing employment. Mr. Grubb asked whether DXP was "considering setting up another division, [and] if so, would there be any way for [him] to acquire any ownership?" Aplt. App. at 484. DXP initially declined to provide ownership, responding that "[t]here would not be an ownership opportunity as [the horizontal pump initiative] would be a part of the DXP organization." *Id.* at 483. Mr. Grubb made it clear that ownership was "very important" to him and informed DXP that he was also in negotiations with another company. *Id.* at 482. DXP conceded the issue. It informed Mr. Grubb that David Little, chairman and CEO of DXP, was "willing to set up a new company and provide 10% ownership to you at no cost to you." *Id.* DXP wanted to move quickly to finalize the hiring, and asked Mr. Grubb for any specific details he may have wanted in the employment agreement.

A week later, Mr. Grubb sent a proposed employment agreement to DXP. It was modeled on the draft employment agreement produced during the HOSS negotiations, but Mr. Grubb included a provision copied from the proposed HOSS operating agreement giving him the right to require DXP to purchase his ownership stake if certain conditions were met. DXP reviewed the proposed agreement and made only a minor change to bring the agreement in line with the company's vacation and sick-leave policies.

A recital in the employment agreement states: "WHEREAS, the Company and Employee intend to immediately form and create a new company (the 'New

Company') for the purpose of manufacturing and selling horizontal pumps and other devices." Aplt. App. at 486. The "New Company" is later referenced in the agreement's "Ownership" provision of the "Compensation" section, which states: "Upon and contemporaneous with the creation of the New Company, Employee shall receive an ownership interest in the New Company in an amount equal to Ten Percent (10%) of the total ownership units of the New Company." Aplt. App. at 487**.** The agreement also provides that Mr. Grubb may receive annual bonuses based on the performance of the new company.[1]

Most important for the present dispute is the sale-right provision. Mr. Grubb copied it from the draft HOSS operating agreement. Under the sale-right provision, after the employment agreement has been in effect for two years, if the new company has gross revenues exceeding $8 million, Mr. Grubb can give notice and require DXP to purchase his ownership stake in the new company, based on a valuation of the company at 70% of its previous-twelve-months gross revenues.[2] In an internal email

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[1] The bonus provision states in full: "Employee will have the opportunity, as determined in the sole discretion of the Managers of the New Company, to receive an annual incentive bonus based on the performance of the New Company as determined by objective standards." Aplt. App. at 496.

[2] The sale-right provision states in full:

> Members Buy-Out Requirement Right and Sale Right. For and in consideration of the mutual covenants contained herein, DXP grants to Grubb, his heirs, successors, and executors, the right to require DXP to purchase all of his ownership units, upon the terms and conditions set forth in this Paragraph of section 11 ("Sale Right"). This Sale Right may not be exercised until the following has occurred: (i) the gross revenues of the Company exceed Eight Million and No/100 Dollars ($8,000,000) and (ii) at least two (2) years have elapsed from the Effective Date. Grubb shall

before execution of the agreement, CEO Little noted that the total amount that DXP would be required to pay under the sale-right provision would be "10% of the 70% of 12 months sales" of the new company. Aplt. App. at 1788. In November 2008 Mr. Grubb and Mr. Little executed the employment agreement.

2. Mr. Grubb's Employment

The horizonal-pump initiative was set up as an internal business division of DXP, referred to as Branch 600 or HP Plus. Mr. Grubb was the general manager of Branch 600. He contends that during a December 22, 2008 conference call, Mr. Little instructed another DXP executive to set up Branch 600 as the new company. But no new company was ever formed.

Development of DXP's horizontal pump took about a year and a half. When the product launched in 2010, Mr. Grubb's job responsibilities shifted to market development, managing clients, and providing support for the manufacture, marketing, and sales of horizontal pumps. Mr. Grubb was also responsible for reporting the financial performance of Branch 600. For this, he relied on an internal

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> provide written notice to DXP of Grubb's exercise of the Sale Right, and the date of the closing ("Closing Date") of the purchase and sale of Grubb's units ("the Election Notice") for cash paid in lump sum. The purchase price for each unit set out in the Election Notice shall be equal to the amount determined by multiplying seventy percent (70%) times the gross revenues of the Company for the trailing twelve calendar months, most recently completed and, divided by the total number of the issued and outstanding units as of the date of the Election Notice ("the Unit Price"). The Closing Date shall not be prior to forty-five (45) days after the date of the Election Notice or later than one hundred twenty (120) days after the date of the Election Notice, unless the parties agree in writing on another date.

Aplt. App. at 493.

report called the hybrid report, which showed Branch 600's profits, losses, and sales revenue.

Branch 600 was a success, with sales of over $17 million in 2016, over $32 million in 2017, and over $49 million in 2018. Because Branch 600 exceeded its forecasted sales goals for 2017 and 2018, Mr. Grubb received bonuses for those years. In March 2019 Mr. Grubb sent notice to Mr. Little that he wanted to exercise the sale-right provision of his employment agreement. At the time, he believed that Branch 600 had been formally incorporated and was the "New Company" under the employment agreement. The hybrid reports showed that Branch 600 had $51,795,727.15 in sales revenue for the 12 months from March 2018 through February 2019, and he therefore expected DXP to purchase his 10% ownership in Branch 600 for about $3.6 million. That did not happen.

When Mr. Little received the notice from Mr. Grubb, he replied: "I received your notice and understand. I will be working up the details/amounts and will get back to you for payment." Aplt. App. at 1067. On May 6 Mr. Little and Mr. Grubb met to discuss payment under the provision. Mr. Little told Mr. Grubb that DXP was still working on the issue but said, "I can assure my numbers are not going to be as high as your number." *Id.* at 793. He told Mr. Grubb that DXP's offer would be between $300,000 to $600,000, and Mr. Grubb said, "that's nowhere near what the contract calls out for." *Id.* at 796. Mr. Little replied, "[W]e'll let the lawyers work this out," and ended the meeting shortly thereafter. *Id.* at 794.

B. Procedural History

Mr. Grubb filed suit on August 12, 2019. He initially sought only a declaratory judgment. On August 20 Mr. Little sent an email to Mr. Grubb stating that DXP would not make any payment under the agreement. It explained that Mr. Grubb's employment agreement "assumes we would create a new company in which you would have ownership right in terms of units," but that no company had been created

> because at the time the oil and gas market was going south and we were all just glad to have a job. . . Based on the agreement and the fact that a new company was not created there is nothing to purchase . . . I am not going to be paying you millions of dollars for a company that does not exist.

Id. at 1070. On August 28 Mr. Grubb amended his complaint to add claims for breach of contract and fraud.

A few months later, Mr. Grubb filed a second amended complaint adding a new theory of liability. He alleged that the employment agreement had created a general partnership between Mr. Grubb and DXP, and that he had 10% ownership in the partnership. He claimed that as a partner he was also entitled to his share of Branch 600's net profits. He amended his request for declaratory judgment to include his partnership claims, and he added claims for breach of fiduciary duty and conversion based on the alleged partnership. He also amended his fraud claim to assert claims for both actual fraud and constructive fraud, and added a claim for unjust enrichment.

Following discovery, the parties filed cross-motions for summary judgment. Mr. Grubb moved for partial summary judgment on the issue of liability on his

breach-of-contract and breach-of-fiduciary-duty claims, and DXP moved for summary judgment on all claims.

The district court granted summary judgment in favor of DXP on all claims. *See Grubb v. DXP Enters., Inc.*, No. 19-cv-0443, 2022 WL 16842309, at *5 (N.D. Okla. July 25, 2022). It determined that the contract showed the parties' intention to form a new company, but it did not require a new company to be formed. The court also determined that formation of the new company was a necessary precondition for the exercise of the sale-right provision, and because no new company had been formed, DXP had no contractual obligation under the provision. It further held that even if the contract had required the immediate formation of the new company, Mr. Grubb's breach-of-contract claim would have accrued in 2008—when the new company should have been formed—and his claim would be barred by Oklahoma's five-year statute of limitations. *See* 12 Okla. Stat. § 95(A)(1). The court then rejected Mr. Grubb's partnership claim, ruling that there were no facts in the record to support the theory, and it granted summary judgment on Mr. Grubb's tort and unjust-enrichment claims.

II. DISCUSSION

We] review de novo a district court's grant of summary judgment, applying the same standard of review that the district court should apply. *See Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1218 (10th Cir. 2006). "When reviewing a grant of summary judgment, this court must examine the record to determine whether any genuine issue of material fact pertinent to the ruling remains and, if not, whether the

substantive law was correctly applied." *APC Operating P'ship v. Mackey*, 841 F.2d 1031, 1033 (10th Cir. 1988) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 56(a). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000) (citation omitted).

The employment agreement is expressly governed by Oklahoma law, and the district court determined that Oklahoma law governs Mr. Grubb's partnership and common-law tort claims. On issues of state law that have not been specifically addressed by the state's highest court, our task is to predict how that state's highest court would rule. *See Rocky Mountain Prestress, LLC v. Liberty Mut. Fire Ins. Co.*, 960 F.3d 1255, 1259 (10th Cir. 2020). "[O]rdinarily, we are bound by our own precedent interpreting a state's law." *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 731 (10th Cir. 2020) (internal quotation marks omitted).

Mr. Grubb's opening brief on appeal purports to challenge the district court's dismissal of each of his claims, but he presents no argument challenging the dismissal of his fraud claim, so that issue is waived. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived.").

A. Breach of Contract

The district court ruled that there was no contractual obligation requiring DXP to form a new company and that formation of the new company was "a condition precedent to any contractual liability." *Grubb*, 2022 WL 16842309, at *3. Because no new company had been formed, it held that "DXP did not breach any obligation to buy back plaintiff[']s ownership interest." *Id.* But Mr. Grubb had argued that even if the creation of the new company was a condition precedent, the implied duty of good faith and fair dealing required DXP to make a good faith attempt to satisfy the condition. He contended that because "[t]here were no legal or procedural hurdles to DXP creating a separate entity at any time . . ., up to and including the time after Plaintiff had given notice under the Sale Right Provision," DXP had breached the employment agreement. Aplt. App. at 204. Mr. Grubb is largely correct under Oklahoma law. We therefore must reverse.

1. Implied Duty of Good Faith and Fair Dealing

"Every contract in Oklahoma contains an implied duty of good faith and fair dealing." *Wathor v. Mut. Assur. Adm'rs, Inc.*, 87 P.3d 559, 561 (Okla. 2004). Under this duty, neither party may "act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship." *First Nat'l Bank & Tr. Co. of Vinita v. Kissee*, 859 P.2d 502, 509 (Okla. 1993) (per curiam); *see also Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 728 (10th Cir. 1991) ("The covenant requires that no party destroy or injure another party's right to receive the fruits of the contract." (internal quotation

marks omitted)). We have explained that under Oklahoma law, "'a party to a contract may not by his deliberate act prevent the happening of a condition therein and then take advantage of the condition to defeat liability upon the contract.'" *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987) (quoting *Mount v. Schulte*, 143 P.2d 424, 426 (Okla. 1943)) (brackets omitted). In other words, if a contractual benefit for party A depends on the occurrence of a condition under the control of party B, party B may be in breach of contract if it acts in bad faith to prevent the occurrence of the condition.

Dayton Hudson illustrates the applicable law. Fred Monsour granted a ground lease to Macerich Real Estate Company on land owned by Monsour. *See* 812 F.2d at 1320. The ground lease required Macerich to pay Monsour 20% "of all amounts received by [Macerich] as percentage rental." *Id.* at 1321 (emphasis and internal quotation marks omitted). Macerich constructed a building on the property and had a sublease with Target, under which Target was required to pay "a fixed minimum annual rental and a percentage rental, subject to certain offsets, of 1.5% of Target annual gross sales in excess of $9,040,000." *Id.*

For seven years Macerich made percentage-rental payments to Monsour as required under the ground lease. *See id.* But then Macerich and Target amended their agreement so that Target was no longer required to pay a percentage rental; instead, Target would pay a higher minimum monthly rental and utility, maintenance, and repair costs that had previously been paid by Macerich. *See id.* Macerich effectively would receive the same amount in rent payments from Target as it had under the

previous agreement, but because Target's rent no longer included a percentage-rental payment, Macerich made no percentage-rental payments to Monsour. *See id.*

Monsour claimed that he was still owed the percentage-rental payments that would have been made if not for the amendment, the district court ruled in his favor, and we affirmed. We agreed with the district court that "under the ground lease, there was an implied covenant that neither party to the contract would injure the right of the other party to receive the benefits of the agreement." *Id.* at 1323. We explained that "Macerich was precluded from relying on its own receipt of percentage rent as a condition precedent to pay percentage rent when, as here, it was Macerich's conduct which prevented fulfillment of the condition precedent." *Id.* We summed up: "Macerich's repeated attempts to avoid payment of percentage rentals to Monsour after the amendment to the sublease conflicts directly with the substantive law of Oklahoma[:] a party to a contract may not prevent the performance of a condition and then claim the benefit of such condition." *Id.* at 1324 (citation and internal quotation marks omitted).

Here, there is no dispute that DXP is the only party that could have formed the new company. Mr. Little testified that Mr. Grubb "wouldn't have the authority to go just create [a new company]." *Id.* at 378–79. And the parties agreed at summary judgment that Mr. Grubb "could not 'own [sic] his own' establish a separate corporate entity for [Branch 600]." *Id.* at 1837. Because only DXP could have formed the new company, it had the ability to prevent formation by failing to act. Thus, as in *Dayton Hudson*, "it was [DXP's] conduct which prevented fulfillment of the

condition precedent," 812 F.2d at 1323, that was required for Mr. Grubb to receive the benefit of the sale-right provision. And DXP would breach the employment agreement if its failure to form the new company was deliberate and in bad faith.

DXP contends that there can be no breach of the implied duty of good faith and fair dealing because "the words of the Employment Agreement do not require either party to create the New Company, so there is no contractual duty for DXP to fulfill in 'good faith.'" Aplee. Br. at 34. We agree that there was no contractual commitment to create a new company. Under Oklahoma law, "[r]ecital clauses in a contract generally do not constitute a covenant or a contractual commitment," although they may be "looked to in determining the proper construction of the contract and the parties' intention" if an operative clause is ambiguous. *Ferrell Constr. Co. v. Russell Creek Coal Co.*, 645 P.2d 1005, 1009 (Okla. 1982) (internal quotation marks omitted). And in a multitude of situations DXP would incur no liability for failing to create a new company. But the duty of good faith and fair dealing is breached if DXP acts in bad faith in failing to create one. In *Dayton Hudson*, Macerich had no contractual duty under the ground lease to include a percentage rental provision in the sublease, but it still was prohibited from precluding the application of the percentage-rental-payment provision in bad faith to deny Mr. Monsour the benefit of their agreement. Likewise here, even without an express obligation to form the new company, DXP may still breach the agreement by denying Mr. Grubb the benefit of the sale-right provision through its bad-faith failure to adhere to the parties' mutual intention to form the new company.

DXP also argues that Mr. Grubb's claim is prohibited under Oklahoma law because "the Oklahoma Supreme Court [has] limited the tort of good faith to insurance contracts." Aplee. Br. at 34; s*ee Embry v. Innovative Aftermarket Sys., L.P.*, 247 P.3d 1158, 1160 (Okla. 2010) (*tort* recovery for bad faith "depends upon the existence of a 'special relationship' under a contract (like the 'special relationship' of an insurer and insured)"). But Mr. Grubb does not seek a tort recovery. He alleges breach of contract and seeks only damages for that breach. Mr. Grubb's claim is therefore permitted under Oklahoma law. *See Wathor*, 87 P.3d at 561 ("In ordinary commercial contracts, a breach of th[e] duty [of good faith and fair dealing] merely results in damages for breach of contract, not independent tort liability."); *see also First Nat'l Bank*, 859 P.2d at 509 (for ordinary commercial contracts "a breach of the implied covenant of good faith and fair dealing merely results in a breach of contract").

2. Bad Faith

DXP's liability for breach of contract therefore turns on whether its failure to create a new company was in bad faith. *See* 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 63:22, at 554 (4th ed. 2018) ("It is axiomatic that before a court will consider a claim that the implied duty of good faith has been violated, there must be some factual basis for . . . bad faith on the part of the defendant.").[3] Our task is not to determine whether in fact there was bad faith. We

[3] We do not here decide whether a showing of bad faith is necessary under Oklahoma law to support a claim for breach of the implied covenant of good faith

consider only whether there is sufficient evidence for a jury to find bad faith on the part of DXP. We think there is.

DXP suggests that the parties mutually agreed not to form a new company. If that is the case, it is hard to see how there could be bad faith. But there are two sides to the story. In late 2008, after the execution of the employment agreement, DXP began constructing a new facility in Snyder, Texas, to house the operation to develop and produce the horizontal pumps. About this time, however, oil prices plummeted and DXP halted its construction of the Snyder facility. The parties decided to instead house Branch 600 in an existing DXP facility. DXP contends that the parties agreed not to proceed in Snyder and not to form a new company for the endeavor. Mr. Little testified:

> [W]e all agreed that we were going to set up a business in Snyder. And then the -- the oil field crashed, the numbers started coming in on -- on how much it was going to cost and all the things associated with that. And it is my testimony that we all agreed that we were not going to set up a new business in Snyder.

Aplt. App. at 322.

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and fair dealing. Some caselaw could be read as not requiring such a showing. *See, e.g.*, *Dayton Hudson*, 812 F.2d at 1323–24 (finding a breach of the covenant of good faith without an explicit finding of bad faith). *But see Wathor*, 87 P.3d at 561–63 (appearing to equate a claim for breach of the covenant of good faith and fair dealing with a claim of bad faith by the defendant). A finding of bad faith is certainly *sufficient*, however, to support a claim for breach of the covenant of good faith and fair dealing, so the presence of sufficient evidence to create a genuine dispute of material fact about whether DXP acted in bad faith prevents entry of summary judgment for DXP.

Mr. Grubb, on the other hand, contends that DXP made a decision only about the facility and that the decision was unrelated to whether the new company would be formed. He testified that he was told: "We're not gonna spend the money on Snyder right now, but everything is still going forward," and that he was not concerned about the situation because "[a]n assembly point does not determine a company's position or place." *Id.* at 715 (internal quotation marks omitted). David Vinson, a DXP executive and Mr. Grubb's direct supervisor, testified that during the conference call in which the parties decided not to proceed with the Snyder facility there was no discussion or mention of any new company. And Mr. Grubb said that had he been aware that no new company would be formed, he would have left DXP. He testified:

> [M]y number one reason for joining DXP, my number one goal was I had to have ownership. If I had even heard, or thought I heard whatever that NewCo, partnership, whatever was not going to happen, I'da been on an airplane in Houston, Texas, in a heartbeat.
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> I would have confronted Mr. Little and asked him why. If he said, I've just decided I'm not going to abide by the contract . . . I would have [quit]. . . and gone to back work for a company in Oklahoma that had offered me a job.

Id. at 726–27. Thus, there is a substantial question of material fact whether the parties agreed not to form the new company.

Then, assuming that creation of a new company had not been taken off the table by mutual consent, there is substantial evidence that DXP acted in bad faith in refusing to create the company once the horizontal-pump endeavor had become sufficiently profitable and Mr. Grubb wished to invoke the sale-right provision. When Mr. Little was asked at his deposition whether DXP could have formed the

new company after receiving notice from Mr. Grubb, he refused to answer, stating: "Could have, would have, should have. What the hell is that? [Objection by counsel that question calls for speculation.] Yeah, I'm not answering that." *Id.* at 330. Other evidence suggested that his motive was to keep Mr. Grubb from collecting what was owed him under the employment agreement. Mr. Little testified at his deposition that although he had signed the employment agreement, he did not "agree" with the formula used in the sale-right provision and he did not think it was "fair." *Id.* at 357–58. He stated that Mr. Grubb was "trying to extort [DXP]" and that it's "just not right" and "really sad." Aplt. App. at 407. He also testified that at the May 2019 meeting between Mr. Grubb and him, Mr. Little took the position that because "we never created this freaking company . . . I don't owe you nothing." *Id.* at 405. In addition, there was evidence, which we need not recount here, that after DXP received Mr. Grubb's notice in March 2019, it began to manipulate its internal accounting methods to greatly reduce the sales numbers from the horizontal-pump enterprise.

In short, the evidence would support a jury finding that DXP acted in bad faith in that its reason for not forming the new company was to avoid paying Mr. Grubb what he was owed under his employment contract.

3. Statute of Limitations

DXP argues that any claim based on its failure to create a new company accrued in 2008 and therefore Mr. Grubb's claim is barred under Oklahoma's five-year statute of limitations for breach-of-contract claims. Its brief on appeal states:

"Oklahoma's statute of limitations for contract claims is five years. If the Employment Agreement required the immediate creation of a new company in 2008—and it did not—then that did not occur, then or since, at least as a separate, distinct entity." Aplee. Br. at 53 (citations and internal quotation marks omitted).

We agree with much of DXP's argument. As previously stated, we do not think that DXP had a duty under the employment agreement to immediately create a new company. The recital that the parties intended to create a new company expressed only an intent and was not a binding provision of the agreement. Also, if it was a binding provision, a claim for breach accrued shortly after execution of the contract and Mr. Grubb's complaint was too late to survive the statute of limitations. But DXP overlooks Mr. Grubb's alternative argument that the contract was breached through bad faith. His opening brief on appeal states:

> Even if the creation of the New Company was a condition precedent to the provision and subsequent repurchase of ownership, then DXP was under an obligation to make a good faith effort to satisfy that condition. There were no legal or procedural hurdles to DXP creating a separate entity at any time: it simply failed to do so. Thus, even if the formation of the New Company was a condition precedent, DXP ignored its obligation to act in good faith and attempt to satisfy the condition and cannot rely on that defense.

Aplt. Br. at 33.

Under this theory the breach by DXP occurred when it failed to pay Mr. Grubb after he made his demand under the sale-right provision of the employment agreement. DXP defends against Grubb's breach-of-contract claim on the ground that a condition precedent—the creation of a new company—had not occurred. That

would ordinarily be a solid defense, but not if the failure of the condition precedent was, as Mr. Grubb contends, a result of a bad-faith attempt by DXP to avoid its payment obligation to him. The critical feature of this theory of liability is that the claim did not accrue until DXP refused to pay Mr. Grubb under the sale-right provision. *See Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252, 255 (10th Cir. 1981) (under Oklahoma law a claim for breach of contract accrues when party "fail[s] to fulfill its contractual obligation"). Because Mr. Grubb filed suit shortly after the refusal to pay, his claim is not barred by the statute of limitations.

B. Partnership

Mr. Grubb also contends that he formed a partnership with DXP in November 2008 and makes several claims based on the breach of that arrangement. We agree with the district court in rejecting this claim. Mr. Grubb relies on speculation, not evidence.

Mr. Grubb's employment agreement created no entities, much less a partnership. Although it contemplated a new "company," the form of that company was not stated explicitly or implicitly. True, the absence of such a formal agreement is not dispositive. Under § 1-202(a) of Oklahoma's Revised Uniform Partnership Act (Oklahoma's RUPA), "the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership." 54 Okla. Stat. § 1-202(a). But there is no evidence that Mr. Grubb and DXP "carried on" their relationship as a business for profit. Mr. Grubb was paid only as an employee. Although he could earn bonuses based on pump sales,

the bonus was to be based on gross receipts, not profits; and even if the bonuses were based on profits, the presumption that one "who receives a share of the profits of the business is . . . a partner in the business" does not apply if the profits were received as "wages or other compensation to an employee." 54 Okla. Stat. § 1-202(c)(3)(ii). Nor did Mr. Grubb receive any Form K-1 partner-income statements from DXP, and he presented no evidence that he declared any partnership income or losses on his tax returns. The best Mr. Grubb could do to show that he was a partner was to testify at his deposition that after signing the employment agreement, he "probably said something" to Mr. Little "that 'We're partners no[w]. Let's move forward.'" Aplt. App. at 586. That is too ambiguous to do the trick.

The district court did not err in finding that no partnership had been formed and it properly granted summary judgment in favor of DXP on Mr. Grubb's partnership claims.[4]

C. Tort Claims

Mr. Grubb argues that the district court erred in granting summary judgment on his tort claims for conversion, breach of fiduciary duty, unjust enrichment, and constructive fraud. We can dispose of the first three claims quickly. Mr. Grubb's claims for conversion and breach of fiduciary duty rely on the existence of a general partnership between the parties. Because no partnership was formed, these claims

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[4] DXP urged in district court that the partnership claim should be governed by Texas law, which, in its view, was more favorable to its position. Since we rule in its favor on this claim, we need not resolve whether Texas law governed.

fail. And his claim for unjust enrichment fails under Oklahoma law because "a party is not entitled to pursue a claim for unjust enrichment when it has an adequate remedy at law for breach of contract." *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 374 P.3d 820, 828 (Okla. 2016).

There remains only Mr. Grubb's claim for constructive fraud, which amounts to a claim that DXP failed to inform him that no new company had been formed (perhaps in violation of a duty under the employment contract). Under Oklahoma law, constructive fraud, unlike actual fraud, "does not require an intent to deceive." *Sutton v. David Stanley Chevrolet, Inc.*, 475 P.3d 847, 853 (Okla. 2020). It is "'any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, . . . by misleading another to his prejudice.'" *Id.* (quoting 15 Okla. Stat. § 59). This court has set forth the elements of a constructive-fraud claim under Oklahoma law as follows:

> (1) That the defendant owed plaintiff a duty of full disclosure. This duty could be part of a general fiduciary duty owed by the defendant to the plaintiff. This duty could also arise, even though it might not exist in the first instance, once a defendant voluntarily chooses to speak to plaintiff about a particular subject matter;
>
> (2) That the defendant misstated a fact or failed to disclose a fact to plaintiff;
>
> (3) That the defendant's misstatement or omission was material;
>
> (4) That plaintiff relied on defendant's material misstatement or omission; and
>
> (5) That plaintiff suffered damages as a result of defendant's material misstatement or omission.

Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1180–81 (10th Cir. 2008) (internal quotation marks omitted).

Mr. Grubb has failed to identify any duty of DXP to disclose that no company had been created. Even if DXP had promised Mr. Grubb to do something (create a company), making such a promise would not ordinarily require it to inform him that it had failed to perform as promised. The remedy for breaking a promise is a claim for breach of contract.

We addressed this issue in *Myklatun v. Flotek Industries*, 734 F.3d 1230 (10th Cir. 2013). Mr. Myklatun and Chemical Equipment and Specialties, Inc. (CESI) entered into an agreement for Mr. Myklatun and his company to be the exclusive distributor for five of CESI's chemicals used in the fracking process in a specified territory. While their agreement was in force, CESI developed a new proprietary chemical that would compete with the original five products. Mr. Myklatun sued CESI alleging constructive fraud under Oklahoma law for its failure to inform him that it was developing the new chemical "in a blatant attempt to circumvent Plaintiffs' contract." *Id.* at 1233 (internal quotation marks omitted). Mr. Myklatun argued that because of the exclusivity provision of the contract, CESI had a duty "to disclose their development of any global products that could potentially compete within [his] territory." *Id.* at 1235. We rejected this argument, stating:

> [W]e are not persuaded that Oklahoma law will find a constructive fraud claim to arise whenever a party to a contract fails to disclose that it is taking actions that could potentially result in a future breach. In the absence of any peculiar circumstances giving rise to a duty to disclose, the proper remedy for a breach of contract will be found in a breach of contract claim, not in a

> claim of fraud based on the breaching party's failure to disclose its potential future breach.

Id. at 1235–36 (citation and internal quotation marks omitted). Likewise, we cannot say that Mr. Grubb's employment agreement imposed on DXP a duty to inform him that it had not formed the new company. As in *Myklatun*, Mr. Grubb's proper remedy is via his breach-of-contract claim.

The district court properly granted summary judgment in favor of DXP on Mr. Grubb's tort claims.

III. CONCLUSION

We **REVERSE** the district court's grant of summary judgment in favor of Defendant DXP in part and **REMAND** for further proceedings consistent with this opinion. We **GRANT** Plaintiff's and Defendant's joint request that Volume 10 of Appellant's Appendix be filed and maintained under seal.