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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Jeffery Karp,

10 Plaintiff,

11 v.

12 Avella of Deer Valley, Inc.,

13 Defendant.

No. CV-13-01885-PHX-DGC

ORDER

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15 Plaintiff Jeffery Karp has filed a motion to dismiss Count II of Defendant's
16 counterclaim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 19.
17 The motion is fully briefed and no party has requested oral argument. For the reasons
18 that follow, the Court will deny the motion.

19 **I. Background.**

20 Plaintiff, a doctor of Pharmacy, was employed by Defendant from January 1999
21 through July 2012. Doc. 1-2, ¶ 16. In early 2009, Plaintiff and Defendant executed a
22 "Non-Compete/Non-Solicit Agreement" ("2009 Agreement") which placed restrictions
23 on Plaintiff during and after his employment. *Id.*, ¶¶ 52-58. Defendant alleges it paid
24 Plaintiff \$250,000 as consideration for executing the 2009 Agreement and that Plaintiff
25 would not have received this payment had he not signed the agreement. Doc. 14, ¶¶ 50,
26 52. Plaintiff was diagnosed with Vertebrobasilar Dolichoectasia ("VBD") in August
27 2011. Doc. 1-2, ¶ 30. Plaintiff was subsequently demoted in December 2011 and his
28 salary was reduced. *Id.*, ¶ 38. Defendant then terminated Plaintiff in July 2012. *Id.* at

1 43. Plaintiff instituted this action seeking injunctive relief and a declaratory judgment
2 that the restrictive covenants contained in the 2009 Agreement are unenforceable, and
3 claiming disability discrimination and FMLA retaliation. Doc. 1-2. Defendant asserted
4 several counterclaims, including one alleging that Plaintiff would be unjustly enriched by
5 the \$250,000 payment if he did not abide by the terms of the 2009 Agreement. Doc. 14.
6 The Court partially granted the parties' requests for injunctive relief in a previous order.
7 Doc. 16. Plaintiff now seeks to dismiss Defendant's unjust enrichment counterclaim.

8 **II. Legal Standard.**

9 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the
10 well-pled factual allegations are taken as true and construed in the light most favorable to
11 the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal
12 conclusions couched as factual allegations are not entitled to the assumption of truth,
13 *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a
14 motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103,
15 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the complaint must plead
16 enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v.*
17 *Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard "is not akin to a
18 'probability requirement,' but it asks for more than a sheer possibility that a defendant
19 has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).
20 "[W]here the well-pleaded facts do not permit the court to infer more than the mere
21 possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the
22 pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

23 **III. Analysis.**

24 Plaintiff contends that "[d]ismissal is appropriate because the equitable doctrine of
25 unjust enrichment may not be used to recover consideration paid for an illegal contract."
26 Doc. 19 at 1. Plaintiff's position seems to be predicated on the assumption that the 2009
27 Agreement is illegal, and he cites *Hilb, Rogal & Hamilton v. Holley*, 670 S.E.2d 874, 876
28 (Ga. Ct. App. 2008), for the proposition that a party cannot bring an unjust enrichment

1 claim based on an illegal contract. *Holley* was an appeal from the trial court's order
2 granting a directed verdict on the unjust enrichment claim and was supported by relevant
3 Georgia authority. Although *Holley* may be relevant, it is not controlling here. The only
4 Arizona case cited by Plaintiff, *Landi v. Arkules*, 835 P.2d 459, 460-61 (Ariz. Ct. App.
5 1992), dealt with a contract that was held to be contrary to public policy on a motion for
6 summary judgment. The court there declined to allow the defendant to recover for
7 services that had been rendered under the illegal contract. *Id.* at 468.

8 Plaintiff asks the Court to reach a similar result in the context of a motion to
9 dismiss, without a decision that the 2009 Agreement is illegal or contrary to public
10 policy. Because Plaintiff's argument is based on a decision yet to be made, the Court
11 cannot conclude at this stage that Arizona law prohibits Defendant's claim for unjust
12 enrichment.

13 **IT IS ORDERED** that Plaintiff's motion to dismiss (Doc. 19) is **denied**.

14 Dated this 19th day of December, 2013.

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19 David G. Campbell
20 United States District Judge
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