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20-P-825 Appeals Court

SUZANNE G. TEDESCHI-FREIJ vs. PERCY LAW GROUP, P.C.,[1] & another.[2]

No. 20-P-825.

Bristol. April 7, 2021. - June 17, 2021.

Present: Blake, Hanlon, & Shin, JJ.

Publication of Name or Picture. Name. Attorney at Law, Advertising. Damages, Nominal damages. Consumer Protection Act, Availability of remedy. Unjust Enrichment. Declaratory Relief. Practice, Civil, Summary judgment, Damages, Waiver.

Civil action commenced in the Superior Court Department on March 29, 2018.

The case was heard by Elaine M. Buckley, J., on a motion for summary judgment.

Lisa S. Carlson for the plaintiff.
Kathleen A. Federico for the defendants.

[1] Formerly known as Percy, Tedeschi & Associates, P.C.

[2] Thomas Percy.

BLAKE, J. This is an action arising out of a former business relationship between the plaintiff, Suzanne G. Tedeschi-Freij (Tedeschi), and the defendants, Percy Law Group, P.C., and Thomas Percy (collectively, Percy or defendants). Tedeschi, an attorney, alleged that Percy used her name, without her consent, in violation of G. L. c. 214, § 3A, was unjustly enriched by the use of Tedeschi's name, and in so doing, violated G. L. c. 93A (93A claim). She also sought a declaration that Percy misrepresented Tedeschi as his law partner and used her name without authority for his own financial gain. A judge of the Superior Court allowed Percy's motion for summary judgment, finding that Tedeschi was unable to quantify her damages for the unauthorized use of name and unjust enrichment claims. As to the 93A claim, the judge found that the statute did not apply to an employer-employee relationship, and that Tedeschi was unable to quantify her damages. Thereafter, a judgment of dismissal entered on all claims. This appeal followed. We affirm in part and reverse in part.

Background. We recite the facts in the light most favorable to Tedeschi, a licensed attorney, who joined the law firm of Percy & Teixeira, P.C., in 2000. The firm announcement named Tedeschi as a partner, as did a story that appeared in a local newspaper. During the summer of 2001, in a meeting with Tedeschi and others, Percy raised the issue of making Tedeschi a

partner in the firm. Ultimately the name of the firm was changed to Percy, Teixeira & Tedeschi, P.C.[3] However, at Percy's request, specifics of the partnership were not discussed at that time. Tedeschi's subsequent efforts to discuss a partnership agreement with Percy proved fruitless. After Attorney Elizabeth Teixeira left the firm in 2005, Percy changed the name of the firm to Percy, Tedeschi & Associates, P.C.[4]

Percy referred to Tedeschi as his partner; Tedeschi received a significant increase in her compensation at that time. Tedeschi brought many clients and businesses to the firm; she received referrals from her former law firm and her family's real estate business (Tedeschi Realty Center), among others. Tedeschi believed that Percy benefited from her name being included in the firm's name.[5]

In 2007, Attorney Edwin Kilcline was hired by Percy and discussions about a partnership among the trio ensued. When Kilcline joined the firm, the firm's name was changed to Percy,

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[3] The letterhead, pens, signage, and advertising were changed to reflect the new firm name.

[4] Once again, the letterhead, pens, signage, and advertising were changed to reflect the new firm name.

[5] In addition to the family real estate business, the name Tedeschi is associated with the Tedeschi Food Shops, Inc., and the singer, Susan Tedeschi, although the latter two are not related to Tedeschi herself.

Tedeschi & Kilcline, P.C. Once again, Percy resisted negotiating a partnership agreement with Tedeschi and Kilcline. Kilcline left the firm shortly thereafter and the firm name reverted to Percy, Tedeschi & Associates, P.C.

Tedeschi continued her efforts to discuss an equity position with Percy, but Percy said it would be discussed in the future. Notwithstanding, Tedeschi continued to practice law at the firm. Tedeschi believed that her work, along with her name as part of the firm, financially benefited Percy.

In July 2009, Tedeschi changed her status at the firm to "of counsel." On August 27, 2012, Tedeschi decided to open her own practice and to separate from Percy. She e-mailed Percy to tender her resignation and asked that her name be removed from the firm as soon as possible. Percy acknowledged the e-mail and agreed to rename the firm within sixty days. On September 6, 2012, Percy changed the firm's name to Percy Law Group PC, with the Secretary of State's Office, but made no other changes; the firm's letterhead, website, and outside advertising continued to bear Tedeschi's name.

On December 3, 2012, Tedeschi was hired by the Bristol County District Attorney's office;[6] shortly thereafter she sent

[6] Tedeschi was assigned to the Taunton District Court, which was within walking distance of Percy's firm. Court personnel and private attorneys asked Tedeschi whether she was working two jobs and why her name was on the firm's building signage. See

an e-mail to Percy informing him of her new position and that, as a result, she was precluded from accepting any other employment. Percy did not remove the signage from the building bearing Tedeschi's name; in fact, he continued to advertise the firm as Percy, Tedeschi & Associates, P.C., until 2018. Tedeschi learned that potential clients called the firm looking to retain her, thereby suggesting that Percy benefited from Tedeschi's name and reputation.

On June 19, 2014, Tedeschi sent another e-mail to Percy requesting the immediate removal of her name from the sign on the building. Percy acknowledged that it had been "way too long" and indicated that he would "make the necessary arrangements soon." Tedeschi sent another e-mail to Percy on October 19, 2014, inquiring about the removal of her name from the sign. Percy replied that he was "in that process now."

In 2016, advertisements containing the firm name of Percy, Tedeschi & Associates, P.C., appeared in local real estate advertising books. Thereafter, Tedeschi filed a complaint with the Board of Bar Overseers (BBO) regarding the unauthorized use of her name; Percy was issued an admonition in January 2018.

G. L. c. 12, § 16 ("Assistant district attorneys shall devote their full time during ordinary business hours to their duties, and shall neither directly nor indirectly engage in the practice of law").

After the BBO complaint was filed, Percy changed the signage on the building, but the firm's Facebook page continued to show a photo identifying the firm as Percy, Tedeschi & Kilcline, P.C., as of 2018. Additionally, the firm was listed as Percy, Tedeschi & Associates, P.C., in the Internet yellow pages and as the registered agent on the Massachusetts corporations website until February 2018.

Discussion. 1. Standard of review. "We review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law" (quotations and citations omitted). Dalrymple v. Winthrop, 97 Mass. App. Ct. 547, 552 (2020). "While a judge should view the evidence with an indulgence in the [nonmoving party's] favor . . . the [nonmoving] party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." Green v. Zoning Bd. of Appeals of Southborough, 96 Mass. App. Ct. 126, 133 (2019), quoting LaLonde v. Eissner, 405 Mass. 207, 209 (1989). Additionally, a "nonmoving party's failure to establish an essential element of her claim renders all other facts immaterial and mandates summary judgment in favor of the moving party" (quotation and citation omitted). Roman v. Trustees of Tufts College, 461 Mass. 707, 711 (2012).

2. Unauthorized use of name. Tedeschi alleged that Percy's continued use of her name violated G. L. c. 214, § 3A, which provides, in pertinent part, that "(a)ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent . . . may recover damages for any injuries sustained by reason of such use." The statute, which was enacted in 1973,[7] was first construed in Tropeano v. Atlantic Monthly Co., 379 Mass. 745 (1980), where the court held that the interest protected "is the interest in not having the commercial value of one's name, portrait or picture appropriated to the benefit of another." Id. at 749. An appropriation is actionable under the statute if "the defendant use[d] the plaintiff's name, portrait or picture deliberately to exploit

[7] General Laws c. 214, § 3A, has its origins in common-law tort and is set out in the Restatement (Second) of Torts § 652C (1977) as "Appropriation of Name or Likeness." The Restatement provides that "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Massachusetts law, however, distinguishes between the right to privacy and the interest protected by G. L. c. 214, § 3A. The Legislature has codified the right to privacy by providing that a "person shall have a right against unreasonable, substantial or serious interference with his privacy." G. L. c. 214, § 1B. "In order to avoid creating an unwarranted statutory redundancy where none actually exists, we must interpret G. L. c. 214, § 3A, in a way that permits it to perform its intended function without overlapping the function of the Right of Privacy statute." Tropeano v. Atlantic Monthly Co., 379 Mass. 745, 748 (1980).

its value for advertising or trade purposes." Id. Since Tropeano, there has been a dearth of cases construing or applying the statute, and none that addressed the question presented here: whether Tedeschi must establish damages as an element of her claim to survive summary judgment.

Percy does not deny that Tedeschi's name was not removed from the firm's outdoor building signage for nearly six years. And, as the judge found, he continued to use Tedeschi's name in the firm's advertisement for years after she asked that her name be removed. The question is whether Tedeschi must prove quantifiable damages to maintain this cause of action. At the time of the summary judgment hearing, discovery was closed. On the issue of damages, in response to Percy's first request for interrogatories, Tedeschi asserted that the "firm income was enriched by the use of" her name, and that she "agree[d] to submit a full calculation [of her damages] in a timely manner." At her deposition, Tedeschi testified that, because her name was recognizable, and she worked hard, a financial benefit inured to Percy.

General Laws c. 214, § 3A, provides that a plaintiff "may recover damages for any injuries sustained by reason of such use [of her name]." And, upon a finding that a defendant knowingly used a plaintiff's name in violation of the statute, a judge has discretion to impose treble damages. See id. In reliance on

this language, Percy asserts that damages are an essential element of Tedeschi's claim; that she failed to offer any actual evidence of damages (such as evidence that Percy financially benefited from the use of her name); and therefore the judgment should be affirmed.[8] Tedeschi contends that she need not prove quantifiable damages at the summary judgment stage, but rather that nominal damages should be presumed and that her actual damages, including economic loss and emotional distress, are open for determination by the fact finder.

An examination of cases from other jurisdictions is useful. In a case involving the continued use of a deceased lawyer's name by his former law firm, the lawyer's widow filed a complaint against the firm in the circuit court in South Carolina asserting claims for infringement on the right of publicity, conversion, unjust enrichment, and quantum meruit. Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456 (2009). Although the court affirmed the grant of summary judgment in favor of the law firm on other grounds, it characterized the tort of the right of publicity -- which addresses a person's right to control the use of one's identity

[8] Percy also argues that summary judgment was appropriate because his use of Tedeschi's name was merely incidental and not deliberate. This argument rests on disputed issues of fact and cannot be resolved on summary judgment.

-- as a property right and concluded that damages were presumed. Id. at 463, 467. Specifically, the court held that "[a]lthough . . . there is a limited market available for the right to use [a] name in the legal field, . . . there is a presumption of nominal damages in . . . cases involving the infringement on the right to control the use of one's identity." Id. at 463. This holding is consistent with other jurisdictions that have considered similar causes of action. See, e.g., Ainsworth v. Century Supply Co., 295 Ill. App. 3d 644, 650 (1998) (nominal damages presumed in claim for appropriation of likeness); James v. Bob Ross Buick, Inc., 167 Ohio App. 3d 338, 344 (2006) (plaintiff need not establish actual damages in misappropriation of name or likeness claim).

As another example, in a case involving a claim of appropriation of a name or likeness brought by an employee against his employer, the United States District Court for the Western District of Kentucky, relying in part on James and Gignilliat, held that nominal damages were available for this claim. See Thornton v. Western & S. Fin. Group Beneflex Plan, 797 F. Supp. 2d 796, 815 (W.D. Ky. 2011). In Thornton, the plaintiff testified that the publication of his likeness "resulted in no harm to him physically, mentally or financially" and that the defendant did not profit from the publication. Id. at 814. The court held that "while any monetary benefit that

[the defendant] received as a result of its alleged wrongful use of [the plaintiff's name] is an appropriate measure of [the plaintiff's] actual damages, it is not the only measure of damages." Id. at 815. Rather, a jury could base damages on the commercial value of, or goodwill associated with, the plaintiff's name or instead, award nominal damages. See id. at 814-815. Indeed, "the court will presume damages if someone infringes another's right to control his identity." Id. at 815, quoting James, 167 Ohio App. 3d at 344. See Restatement (Second) of Torts § 652H (1977) (plaintiff who establishes unlawful invasion of privacy may recover damages for "harm to his interest in privacy," "mental distress" resulting from the invasion, and "special damage of which the invasion is a legal cause").

These cases are instructive and support our conclusion that nominal damages are presumed in a claim filed pursuant to G. L. c. 214, § 3A. The rationale of these cases is that the appropriation of a likeness or name is "in the nature of a usurpation of a plaintiff's property rights" and "[i]t is proper to vindicate [a] plaintiff's right to the use of his [or her] image [or name] against this deliberate violation, even if [the] plaintiff cannot prove actual damages." James, 167 Ohio App. 3d at 344, quoting Ainsworth, 295 Ill. App. 3d at 649-650. Percy has cited no case from any jurisdiction -- and we are aware of

none -- that has reached the opposite conclusion.[9] Accordingly, summary judgment in favor of Percy on this claim was error.

3. General Laws c. 93A claim. Tedeschi's complaint alleged that Percy's continued use of her name, and his misrepresentation that Tedeschi and Percy were affiliated after her departure from the firm constitute a violation of G. L. c. 93A. See generally Governo Law Firm LLC v. Bergeron, 487 Mass. 188 (2021). In granting summary judgment to Percy, the judge found that the statute did not apply to a dispute between an employer and an employee arising out of the employment relationship. She further found that, even if applicable, Tedeschi failed to establish damages. "It is well established that disputes between parties in the same venture do not fall within the scope of G. L. c. 93A, § 11." Szalla v. Locke, 421 Mass. 448, 451 (1995). To bring a claim under the statute, there must be "a dual inquiry whether there was a commercial transaction between a person engaged in trade or commerce and another person engaged in trade or commerce, such that they were acting in a 'business context'" (citation omitted). Milliken &

[9] While not dispositive of the issue, we also note that the model jury instruction for the common-law tort of misappropriation of one's name or likeness does not include damages as a prima facie element. See Massachusetts Superior Court Civil Practice Jury Instructions § 7.6 (Mass. Cont. Legal Educ. 3d ed. 2014).

Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2008). "'Int[tra]-enterprise' disputes, including those stemming from an employment relationship . . . , are essentially private in nature, and thus not considered 'commercial transactions' within the meaning of c. 93A" (citation omitted). Selmark Assocs. v. Ehrlich, 467 Mass. 525, 550 (2014). See Psy-Ed Corp. v. Klein, 459 Mass. 697, 719 (2011) (93A claim inapplicable to disputes arising from employer-employee relationship).

Here, on the undisputed facts, Tedeschi's claim is not a dispute between parties in the same venture. Rather, the claim is that once they were not in the same venture, Percy wrongly continued to use her name. Put another way, these facts are not subject to the intra-enterprise exception. Tedeschi testified at her deposition that Percy repeatedly made promises to her about finalizing their business relationship. But Tedeschi's efforts to formalize a joint venture of some kind with Percy never materialized. We have held that, where a party engages in sham negotiations for a joint venture, without any actual intent to establish the relationship, a 93A claim may apply. See Goldbaum v. Weiss, 50 Mass. App. Ct. 554, 558-559 (2000).[10] We

[10] We also note that Federal courts considering the applicability of c. 93A have held that a claim may lie where a plaintiff is an independent contractor. See, e.g., Trent Partners & Assocs. v. Digital Equip. Corp., 120 F. Supp. 2d 84, 107 n.26 (D. Mass. 1999).

express no opinion as to whether Percy engaged in sham negotiations with Tedeschi, but this disputed issue of fact precludes entry of summary judgment.

Percy's alternative argument -- that Tedeschi provided insufficient proof of damages -- depends on whether Tedeschi's 93A claim is brought under § 9 or § 11, which the complaint does not specify. If the claim is under § 11, Tedeschi would be obliged to prove that she suffered, or will suffer, "loss of money or property," G. L. c. 93A, § 11; her failure to offer evidence of damages would therefore be fatal. It would not be fatal, however, if her claim is under § 9, which entitles a plaintiff to nominal damages of twenty-five dollars. See O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 453 & n.1 (D. Mass. 2018) (c. 93A, § 9 damages may be "non-economic" and may include emotional distress). Although it appears as though Tedeschi's claim falls under § 11, the parties have not briefed the issue. We therefore leave that question for determination in any further proceedings.

4. Unjust enrichment. Unlike the unauthorized use of name claim, we agree with the judge that this claim fails on insufficient proof of damages. Unjust enrichment is the "retention of money or property of another against the fundamental principles of justice or equity and good conscience" (citation omitted). Santagate v. Tower, 64 Mass. App. Ct. 324,

329 (2005). However, "[t]he fact that a person has benefitted from another is not of itself sufficient to require the other to make restitution therefor" (quotation and citation omitted). Keller v. O'Brien, 425 Mass. 774, 778 (1997). "In order to recover for unjust enrichment, a plaintiff must prove that (1) [she] conferred a measurable benefit upon the defendant; (2) [she] reasonably expected compensation from the defendant; and (3) the defendant accepted the benefit with the knowledge, actual or chargeable, of the plaintiff's reasonable expectation." Stewart Title Guar. Co. v. Kelly, 97 Mass. App. Ct. 325, 335 (2020). Nevertheless, "[a]n equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law." Santagate, supra.

The summary judgment record is bereft of any evidence that Tedeschi conferred a measurable benefit upon Percy. Tedeschi's allegation, without more, is insufficient. Apart from Tedeschi's supposition, there is no evidence, on this record, that Percy received any money or quantifiable benefit.[11] Contrast Liss v. Studeny, 450 Mass. 473, 479 (2008) ("Even if ultimately unsuccessful, an attorney's competent efforts to advance his client's cause are a measurable benefit to the

[11] Given our conclusion on this point, we need not determine whether Tedeschi could prove any of the other elements of an unjust enrichment claim.

client. They are a benefit in that the attorney performs a service on behalf of the client, and they are measurable in that the court may determine the fair and reasonable charge for an attorney's services by considering, among other things, the time spent on the matter and the prices usually charged by other attorneys for similar services"). Accordingly, the grant of summary judgment was proper as to this claim. See Roman, 461 Mass. at 711; Stewart Title Guar. Co., 97 Mass. App. Ct. at 335.

5. Declaratory judgment. Tedeschi's complaint sought a declaratory judgment[12] on the question whether Percy mispresented Tedeschi as a partner in the law firm and used her name without authority for his own financial gain. We presume the judge dismissed the declaratory judgment count because she granted summary judgment to Percy on all of Tedeschi's other claims. On appeal, Tedeschi failed to argue the issue in her principal brief. The issue is therefore waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) (court need not pass upon questions or issues not argued in brief). Tedeschi briefly referenced the disposition of the declaratory

[12] "[D]eclaratory relief is reserved for real controversies and is not a vehicle for resolving abstract, hypothetical, or otherwise moot questions." Commissioners of the Bristol County Mosquito Control Dist. v. State Reclamation & Mosquito Control Bd., 466 Mass. 523, 534 (2013), quoting Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 547 (2012).

judgment claim in her reply brief, submitted in response to Percy's brief. But we need not consider arguments raised for the first time in a reply brief. See Boxford v. Massachusetts Highway Dep't, 458 Mass. 596, 605 n.21 (2010) (argument raised for first time in reply brief is not properly before appellate court); Allen v. Allen, 86 Mass. App. Ct. 295, 302 n.11 (2014) ("Any issue raised for the first time in an appellant's reply brief comes too late, and we do not consider it" [citation omitted]). Moreover, even if the issue was properly preserved, Tedeschi's claims are not supported by sufficient legal argument or factual detail and do not cite to any supporting authority. See Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011) ("bald assertions of error that lack[] legal argument . . . [do not] rise[] to the level of appellate argument" [quotation and citation omitted]). See also Mass. R. A. P. 16 (a) (9) (A). Accordingly, we shall affirm the dismissal of this count.

Conclusion. So much of the judgment as awarded summary judgment to Percy on counts 1 and 2 of Tedeschi's complaint is vacated. In all other respects, the judgment is affirmed.

So ordered.