Opinion issued December 8, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00643-CV

MARTY PATTERSON AND PATTERSON MIDSTREAM SERVICES, LLC, Appellants

V.

FIVE POINT CAPITAL MIDSTREAM FUNDS I AND II, L.P.; THEIR MANAGER, FIVE POINT ENERGY LLC F/K/A FIVE POINT CAPITAL PARTNERS, LLC; DAVID N. CAPOBIANCO; AND MATTHEW MORROW, Appellees

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On Appeal from the 129th District Court
Harris County, Texas
Trial Court Case No. 2019-18272

MEMORANDUM OPINION

Appellants, Marty Patterson and Patterson Midstream Services, LLC (collectively, "Patterson"), minority partners in Redwood Midstream Partners, LLC (hereafter, “Redwood”), sued the majority partner and its related entities, appellees Five Point Capital Midstream Funds, I and II, L.P., their manager, Five Point Energy LLC formerly known as Five Point Capital Partners, LLC, David N. Capobianco, and Matthew Morrow (collectively, “Five Point”), alleging breach of Redwood’s operating agreement, or, alternatively, if there is no enforceable contract, fraud, unjust enrichment, quantum meruit, and conversion. Five Point filed a Motion to Dismiss pursuant to Rule 91a of the Texas Rules of Civil Procedure, which the trial court granted. In four issues on appeal, Patterson contends that the trial court erred by (1) dismissing its contract claim because, it contends, the contact is ambiguous and presents an issue that cannot be resolved as a matter of law, (2) dismissing its alternative, non-contractual causes of action, (3) concluding that Patterson had no standing, and (4) not awarding Patterson attorney’s fees and costs for defending against the Rule 91a motion and pursuing this appeal. We affirm.

I. BACKGROUND

A. The Parties

Five Point is a private equity firm that specializes in the midstream section of the oil and gas industry. Five Point invests through two related entities, Five Point Capital Midstream Funds I & II. David Capobianco and Matthew Morrow are Five Point’s managing partners. Marty Patterson worked for several decades in the energy industry—mostly in the midstream segment—and is the sole owner of Patterson Midstream Services, LLC.

B. The Original Operating Agreement

In 2013, Capobianco, Morrow, and Patterson formed a new Five Point portfolio company, Redwood Midstream Partners, LLC, to operate midstream energy assets. The parties' November 11, 2013 Operating Agreement ("Original Operating Agreement") set forth "the rights, duties, status and liabilities of the Members, and the organization, operation, dissolution, and termination of [the] Company" and provided that it was to be governed by the laws of the State of Delaware. The Original Operating Agreement was signed by Morrow from Five Point Capital Partners, LLC and Patterson of Patterson Midstream Services, LLC. Five Point and Patterson Midstream Services, LLC were the original Class A members, with Five Point owning a 75% interest and Patterson owning the remaining 25% interest. Subject to certain conditions, Redwood's board of managers[1] issued distributions in accordance with the Class A members' percentage interests.

The Original Operating Agreement defined Redwood's "Business" as "engag[ing], directly or indirectly, in processing, treating, storing, transporting,

[1] The initial board of managers consisted of Morrow, Capobianco, and Patterson, with Morrow being the initial chairman of the board of managers.

owning, trading, buying, settling, transferring, and otherwise handling hydrocarbons and other commodities and activities incidental thereto[.]"

The Original Operating Agreement had two clauses relevant to the issues presented:

Article 2.11, entitled "Limited Duty of Loyalty," provided:

> Each Member acknowledges that the *Five Point Member and its Associates are free to engage or invest in an unlimited number of other activities or businesses, any one or more of which may be related to or competitive with the Business, without having or incurring any obligation under this Agreement to offer any interest in such activities to Company or any Member and neither this Agreement nor any activity undertaken pursuant to this Agreement shall prevent the Five Point Member or its Affiliates from engaging in such activities, or require the Five Point Member to permit Company or any Member or its Affiliates to participate in any such activities*, and as a material part of the consideration for the execution of this Agreement by the Five Point Member, each other Member hereby waives, relinquishes, and renounces any such right or claim of participation under this Agreement.
>
> (Emphasis added).

Article 4.1, entitled "Limitation on Liability," provided in pertinent part:

> To the fullest extent permitted by the Act, no Member, Manager or Officer shall be personally liable to the Company, the other Members, or any other Person for any loss, damages, or claims arising out of or incurred by reason of any act or omission by such Member, Manager, or Officer (including any loss, damages, or claims based on the proposition that such Member, Manager, or Officer owes any fiduciary or other duties to any Person); provided, however, this Section 4.1 shall not limit the liability of a Member, Manager, or Officer for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing. Except for the duties expressly set forth in this Agreement, a Member, Manager, or Officer shall not be

> subject to any duties (including fiduciary duties) with respect to the management of [the] Company.

The Original Operating Agreement had an integration clause providing that it "supersede[d] all prior agreements and understandings among the parties with respect to the subject matter hereof."

C. The Amended Operating Agreement

On June 14, 2014, Redwood amended its Operating Agreement. The "Amended Operating Agreement" was signed by Morrow for Five Point Fund II and Patterson for Patterson Midstream Services, LLP. Under the Amended Operating Agreement, Five Point Fund I became the sole Class A Member and Patterson became an Incentive Member. As an Incentive Member, Patterson still had a right to share in future distributions but was no longer an owner of Redwood. The Amended Operating Agreement also replaced the Original Operating Agreement's distribution provisions with a distribution waterfall that allotted, at most, just under 20% of all distributions to Incentive Members like Patterson. In all other significant respects, the terms of the Amended Operating Agreement were the same as the Original Operating Agreement.

D. The Investments

By May 2014, Five Point, through Fund I and II, had acquired an interest in a business called Twin Eagle Resource Management (hereafter, "Twin Eagle"). And, by 2018, Five Point, through Fund I and II, had acquired interests in at least three other investments: San Mateo Midstream, LLC, 5 Star SWD, and Don Shaver. Redwood was not a party to any of these investments, though Patterson claims that it identified these potential investments for Five Star.

E. The Lawsuit

On March 12, 2019, Marty Patterson and Patterson Midstream Services, LLC filed suit against Five Point Capital Midstream Funds I & II, Five Point Energy LLC, Capobianco, and Morrow. In its First Amended Original Petition, Patterson brought claims for (1) breach of contract, specifically breach of the implied duty of good faith and fair dealing under Delaware law, or, alternatively, in the event that there was no enforceable contract, extra-contractual claims for (2) fraud, (3) unjust enrichment, (4) conversion, and (5) quantum meruit. The basis for Patterson's suit was that, while Five Point was "free to invest in their own separate deals apart from Redwood, [] they were not to be allowed to steal from [Patterson] their share in the upside on deals Patterson and Patterson LLC sourced for investment[.]" Put another way, Patterson alleged that all investment opportunities that it "found, identified, and targeted" belonged to Redwood and that Five Point breached its duty of good faith and fair dealing by usurping those opportunities.

II. DISMISSAL UNDER RULE 91a

Five Point filed a Motion to Dismiss Patterson's claims pursuant to Texas Rule of Civil Procedure 91a, alleging that, even taking the factual assertions in

Patterson's petition as true, its petition had no basis in law and did not entitle it to the relief sought. After a non-evidentiary hearing, the trial court granted Five Point's motion and dismissed Patterson's claims. This appeal followed. In four issues on appeal, Patterson contends that the trial court erred by (1) dismissing its contract claim because, it contends, the contact is ambiguous and presents an issue that cannot be resolved as a matter of law, (2) dismissing its alternative, non-contractual causes of action, (3) concluding that Patterson had no standing, and (4) not awarding Patterson attorney's fees and costs for defending against the Rule 91a motion and pursuing this appeal.

A. Standard of Review

Texas Rule of Civil Procedure 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1. In ruling on a Rule 91a motion, a court "may not consider evidence . . . and must decide the motion based solely on the pleading of the cause of action[.]" TEX. R. CIV. P. 91a.6. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. TEX. R. CIV. P. 91a.1. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.*; *see City of Dallas v. Sanchez*, 494 S.W.3d at 722, 724 (Tex. 2016). Whether this standard is satisfied is determined solely by reference to the pleading on the cause of action and any permissible pleading exhibits. TEX. R. CIV. P. 91a.6; *see Bethel v. Quilling, Selander, Lownds, Winslett & Mose, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (noting court's factual inquiry is limited to plaintiff's pleading). We review the merits of a Rule 91a motion de novo. *Bethel*, 595 S.W.3d at 654.

B. Breach of Contract

In issue one, Patterson contends the trial court erred in dismissing its breach-of-contract claim, and in issue three it contends that the trial court erred in concluding that Patterson had no standing to assert its breach-of contract claim. In its Motion to Dismiss, Five Point offered two reasons for dismissing Patterson's breach-of-contract claim: (1) that Patterson had no standing to bring a breach-of-contract claim based on injuries to Redwood and (2) that the court cannot, under Delaware law, imply a covenant of good-faith-and-fair-dealing in the Amended Operating Agreement. We address each argument, respectively.

1. Standing

Under Delaware law,[2] when a claimant seeks recovery for an injury to a limited liability company,[3] that claim belongs to the company and can be brought by a member only as a derivative claim. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036–37 (Del. 2004). Thus, we are required to determine whether Patterson's breach-of-contract claim is direct or derivative. To determine whether a claim must be asserted derivatively, we must determine: (1) whether the company or the members suffered the harm, and (2) whether the company or the members would receive the benefit of any recovery. *Shirvanian v. DeFrates*, 161 S.W.3d 102, 110 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *Tooley*, 845 A.2d at 1035). If the limited liability company alone, rather than the individual member, suffered the alleged harm, the company alone is entitled to recover, and the claim in question is derivative. *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008). Conversely, if the member suffered harm independent of any injury to the company that would entitle him to an individualized recovery, the cause of action is direct. *Id.*

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[2] The Amended Operating Agreement provides that "[t]he laws of the State of Delaware shall govern the validity of this agreement, the construction of its terms, and the interpretation of the rights and duties arising hereunder."

[3] "[C]ase law governing corporate derivative suits is equally applicable to suits on behalf of an LLC." *VGS, Inc. v. Castiel*, C.A. No. 17995, 2003 WL 723285, at*11 (Del. Ch. Feb. 28, 2003).

Patterson, citing *CMS Inv. Holdings, LLC v. Castle*, 2015 WL 3894021, at *7 (De. Ch. June 23, 2015), urges that because it is a "direct signing party" to both the Original Operating Agreement and the Amended Operating Agreement, its rights "run directly to them from the Appellees under the Operating Agreement [and] give the Appellants standing to sue the Appellees for violating those contracts."

However, after *Castle* was decided, the Delaware Supreme confirmed that the *Tooley* analysis applies to companies governed by operating agreements (LLCs and LPs), rejecting the position that any claim sounding in contract is direct by default. *See El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016). In *El Paso Pipeline*, a limited partner alleged that the general partner breached the limited partnership agreement's conflicts-of-interest provision. 152 A.3d at 1257. The limited partner's complaint was based on the assertion that "'the Partnership was injured' when the defendants caused [the Partnership] to pay too much" in a transaction that violated the partnership's conflict-of-interest provision. *Id.* at 1260–61.

The *El Paso Pipeline* court reversed the lower court, which had held that, in the limited partnership context, limited partners can sue directly to enforce contractual constraints in the limited partnership agreement, holding instead that a plaintiff's status as a party to the contract does not alone enable him to litigate every claim arising from the agreement. *See id.* at 1255, 1259. Instead, the Delaware

Supreme Court found that "it is plain under the limited partnership agreement that the limited partnership itself was entitled in the first instance to sue and obtain recovery against the general partner and its co-defendants for any claim that the transaction was economically unfair to the limited partnership." *Id.* at 1251. "That individual limited partners might press the limited partnership's rights as derivative plaintiffs does not make the claims ones belonging to them individually." *Id.*

Accordingly, the *El Paso Pipeline* plaintiff's status as a limited partner and party to the limited partnership agreement did not enable the plaintiff to litigate directly every claim arising from the limited partnership agreement because "[s]uch a rule would essentially abrogate *Tooley* with respect to alternative entities merely because they are creatures of contract." *Id.* at 1259–60. Thus, under *El Paso Pipeline*, when a claim stems from breach of a contractual duty owed to the company, the court must still employ the *Tooley* test to determine whether the claim to enforce the company's rights must be asserted derivatively or whether it is dual in nature such that it can proceed directly, just as a court would do in a breach of fiduciary duty claim. *See id.*

We also note that *Castle*, relied upon by Patterson, is distinguishable. In *Castle*, the plaintiff, a Class A unitholder, alleged that the defendants used their positions within the Company to deceive the plaintiff and pay themselves, Class B and C unitholders, money that should have been paid to the plaintiff. *Castle,* 2015

WL 3894021, at *8. The plaintiff sued, alleging a breach of the operating agreement, and the court agreed that the plaintiff's claims were direct claims against the defendants who caused the breach to occur. *Id.* It is important to note, however, that nothing was withheld from the company in *Castle*; distributions were misallocated under the terms of the agreement. However, in this case, the gist of Patterson's allegations is that Five Point breached its duty to Redwood by investing in opportunities identified by Patterson without allowing Redwood to participate. Only if Redwood were allowed to participate in the usurped opportunities would distributions to *any* of Redwood's members occur. As such, Patterson's harm is derivative of its membership interest in Redwood. *See El Paso Pipeline*, 152 A.3d at 1262 (holding that alleged overpayment claim caused harm to overall value of partnership, thus plaintiff's claim was derivative).

In light of *El Paso Pipeline*, and because *Castle* does not apply, we reject Patterson's assertion that its breach-of-contract claim is direct simply because it is a signatory to the Operating Agreements. Instead, we apply the *Tooley* test to determine whether Patterson's breach-of-contract claim is direct or derivative.

The first prong of *Tooley* requires us to determine whether Patterson or Redwood suffered the harm caused by the alleged breach of the implied duty of good faith and fair dealing. *See Tooley*, 845 A.2d at 1035. Under this first prong, a claim is direct only if "the duty breached was owed to the [LLC member] and that he or she can prevail without a showing an injury to [the company].” *Id.* at 1039. In so doing, we examine the “core theory” of Patterson’s complaint, *see El Paso Pipeline*, 152 A.3d at 1260–61, which is that Five Point “stripped Redwood bare” and “moved all of the investment targets that [Patterson] found for Redwood to a separate entity such that Redwood owns nothing.” In sum, the “gist” of Patterson’s complaint is that Five Point usurped investment opportunities from Redwood, and, because Redwood did not make any money on the usurped investments, Patterson, as a member of Redwood, did not make any money. Without first showing that Redwood was denied investment opportunities by Five Point, Patterson cannot show that it did not receive distributions from the allegedly usurped investments. As such, Patterson’s claims require showing an injury to Redwood. *Tooley*, 845 A.2d at 1039. Thus, the first prong of *Tooley* supports the conclusion that Patterson’s claims are derivative. *See DiRienzo. v. Lichenstein*, C.A. No. 7094-VCP, 2013 WL 5503034, at *26 (Del Ch. Sept. 30, 2013) (holding that claim that opportunities were diverted from company to third party to be “exclusively derivative in nature”).

Under the second prong of *Tooley*, the benefit of any recovery must flow solely to the limited liability company. *See El Paso Pipeline*, 152 A.3d at 1264. The necessity of a pro rata recovery to remedy the alleged harm indicates that a claim is derivative. *Id.* Here, Patterson seeks “recovery of damages to the extent of the value of their proper share of distributions that have been, or are anticipated to be made from" the alleged usurped investments. This is a claim that, had the investments been made by Redwood as Patterson claims they should have been, Patterson would have received its share of the distributions. Even though the distributions would ultimately belong to Patterson, there would be no distributions to anyone without a recovery by Redwood first.

Because both prongs of *Tooley* show that the breach-of-contract claim is a derivative claim properly asserted by Redwood, not Patterson, the trial court did not err in concluding that Patterson had no standing to bring the breach-of-contract claim and dismissing it. *See Data Foundry, Inc. v. City of Austin*, 575 S.W.3d 92, 96 (Tex. App.—Houston [14th Dist.] 2019, pet. granted) (noting Rule 91a may be used to challenge standing).

2. Implied Covenant of Good Faith and Fair Dealing

Patterson's breach-of-contract claim is based on his assertion that Five Point violated Delaware's implied covenant of good faith and fair dealing by funding investment targets identified by Patterson through entities other than Redwood. Put another way, Patterson asserts that the Amended Operating Agreement contained an *implied* covenant that Five Point would invest, through Redwood only, in opportunities identified by Patterson. Five Point counters that, in light of the "Limited Duty of Loyalty" provision found in section 2.1.1 of the Amended Operating Agreement, such a duty cannot be implied.

This Court has described Delaware's implied duty of good faith and fair dealing as follows:

> The implied covenant is "best understood as a way of implying terms in [an] agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (internal quotation omitted). Consequently, the first step in our analysis must be to consider whether a gap exists that must be filled. *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, No. 7141-VCL, 2014 WL 2768782, at *17 (Del. Ch. June 12, 2014) (mem. op.). This means the contract itself remains paramount and the existing contract terms control. *Id.* As one court explained, "For Shakespeare, it may have been the play, but for a Delaware limited liability company, *the contract's the thing*." *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, No. 3803-CC, 2008 WL 3846318, at *1 (Del. Ch. Aug. 19, 2008) (mem. op.). The implied covenant "cannot be used to circumvent the parties' bargain, or to create a free-floating duty . . . unattached to the underlying legal document." *Dunlap*, 878 A.2d at 441 (internal quotation omitted). To that end, a party generally cannot assert a claim for breach of the implied covenant based on conduct authorized by the terms of the agreement. *See id.*; *In re El Paso Pipeline Partners*, 2014 WL 2768782, at *17 ("The implied covenant will not infer language that contradicts a clear exercise of an express contractual right.").

Lee v. Glob. Stainless Supply, Inc., No. 01-17-00865-CV, 2018 WL 6684854, at *11 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, pet. denied) (mem. op.).

Thus, this Court must decide whether Five Point's conduct—investing in opportunities "identified" by Patterson without offering Redwood the opportunity to participate—is authorized by the Amended Operating Agreement. If the conduct was authorized, the implied duty of good faith and fair dealing cannot be used to infer a duty to the contrary.

Five Point argues that the Amended Operating Agreement, specifically Section 2.11, authorizes it to make investments, even those identified by Patterson, without offering Redwood the right to participate. We agree. Section 2.11 of the Amended Operating Agreement provides that Five Point is "free to engage or invest in an unlimited number of other activities or businesses, any one or more of which may be related to or competitive with the Business, without having or incurring any obligation under this Agreement to offer any interest in such activities to [Redwood]." The Agreement further provides that no "activity undertaken pursuant to this Agreement shall prevent [Five Point] from engaging in such activities, or require [Five Point] to permit [Redwood or Patterson] to participate in any such activities." Even if we assume without deciding, as Patterson urges, that identifying investment opportunities is part of Redwood's "Business," it is also is an "activity taken pursuant to [the] Agreement" by Patterson, and the Agreement explicitly provides that such activity does not create a contractual duty for Five Point to offer Redwood (or Patterson) the opportunity to participate in any investment. Because the Agreement is not silent on the issue of Five Point's right to invest in opportunities "identified" by Patterson without offering Redwood the opportunity to participate, there is no "gap" for the implied duty of good faith and fair dealing to fill. *See Global Stainless Supply*, 2018 WL 6686854, at *11. "Delaware law does not permit this Court to employ the implied covenant in a manner that would effectively rewrite the contract to afford [Patterson] a better deal." *Id.*

Additionally, Patterson is attempting to use the implied duty of good faith and fair dealing to create a fiduciary duty for Five Point not to usurp Redwood's investment opportunities. However, section 4.1.2 of the Amended Operating Agreement explicitly provides that the contract "does not, create or impose any fiduciary duty on any Member, Manager, or Officer" and that "the duties and obligations of each Member, Manager, or Officer to each other and to [Redwood] are only as expressly set forth in this Agreement." Patterson cannot use the implied duty of good faith and fair dealing to recreate a fiduciary duty that has been explicitly waived in the contract. *See In re El Paso Pipeline Partners, LP Diriv. Litig.*, C.A. No. 7141-VCL, 2014 WL 2768782, at *20 (Del. Ch. June 12, 2014) (refusing to imply fiduciary duty of disclosure because "[w]hen an . . . agreement eliminates fiduciary duties as part of a detailed governance scheme, Delaware courts should hesitate to use the implied covenant to reconstruct the outcome that fiduciary duty analysis would have generated.").

Patterson also urges this Court to consider parol evidence, specifically the parties' 2013 letter agreements, which predated the Original Operating Agreement, to determine whether the parties' Operating Agreements are ambiguous about Five

Point's right to invest in opportunities "identified" by Patterson without offering Redwood the right to participate in the investment.

Generally, the parol evidence rule circumscribes the use of extrinsic evidence when interpreting an integrated document. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981). When, as here, a contract contains a merger or integration clause,[4] the contract's execution presumes that all prior negotiations and agreements relating to the transaction have been merged into the contract, and it will be enforced as written and cannot be added to, varied, or contradicted by parol evidence. *Barker v. Roelke*, 105 S.W.3d 75, 83 (Tex. App.—Eastland 2003, pet. denied). This rule, however, has an exception; a merger clause does not prohibit evidence of a collateral agreement. *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 179 n. 10 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Patterson argues that we should consider the parties' prior writings because they are prior to and consistent with the parties' ultimate written contract, and parol evidence can be used to show a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement.

[4] Both the Original Operating Agreement and the Amended Operating Agreement provide that "[t]his Agreement sets forth the entire agreement among the parties with respect to the subject matter hereof, and supersedes all prior agreements and understandings among the parties with respect to the subject matter hereof."

This Court has described a "collateral agreement" as "one that the parties might naturally make separately, i.e., one not ordinarily expected to be embodied in, or integrated with, the written agreement and not so clearly connected with the principal transaction as to be part and parcel of it." *Id.* In this case, the parties' prior 2013 writings are not collateral because they address the same subject as the Operating Agreements. And, to the extent that Patterson claims the letters indicate that the Operating Agreements were intended to give it the right to participate, through Redwood, in all investments that it identified, it would be inconsistent with the Operating Agreements. Thus, under Texas law, parol evidence would not be admissible to vary the terms of the parties' integrated contract. The same is true under Delaware law. *See Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012) ("The parol evidence rule bars the admission of evidence extrinsic to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract").

3. Conclusion Regarding Breach of Contract

Because Patterson lacks standing to bring the breach-of-contact claim asserted in its petition, and because the Operating Agreements, as a matter of law, permit the conduct complained of by Patterson in its petition, the trial court did not err in dismissing Patterson's breach-of-contract claim under Rule 91a. *See In re Farmers Tex. Cty. Mut. Ins. Co.*, 604 S.W.3d 421, 428 (Tex. App.—San Antonio 2019, orig.

proceeding) (holding trial court erred in not dismissing contract claim pursuant to Rule 91a because contract, as a matter of law, was not breached).

Accordingly, we overrule Patterson's first and third issues on appeal.

C. Extra-Contractual Claims

Patterson's First Amended Original Petition also alleged, in the alternative to its breach-of-contract claim, causes of action for fraud, unjust enrichment, quantum meruit, and conversion. We discuss each, respectively.

1. Fraud

Patterson pleaded that "[t]hrough [Five Point's] representations and conduct prior to entering into the Amended Operating Agreement and its related Assignment, and in their subsequent dealings with [Patterson], [Five Point] created and perpetuated the false impression that all investments sourced by [Patterson] would be owned by Redwood." Patterson further alleged that "in failing to disclose their true intent to place all such investments in one or both of the Five Point Funds to the exclusion of [Patterson], the Five Point Companies and the Individual Defendant fraudulently induced [Patterson] to enter into the Assignment and Amended Operating Agreement." Thus, Patterson's fraud claim is that it was induced to enter the Amended Operating Agreement because Five Point fraudulently led it to believe that all investments Patterson sourced would be placed with Redwood in the event that Five Point chose to invest. This is, essentially, the same argument undergirding its breach-of contract claim based on the implied duty of good faith and fair dealing.

To establish a cause of action for fraud, the plaintiff must demonstrate each of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff should act upon it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff thereby suffered an injury. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015). A representation is material if "a reasonable person would attach importance to [it] and would be induced to act on the information in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001); *Wilmot v. Bouknight*, 466 S.W.3d 219, 227 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Thus, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties. *Haase*, 62 S.W.3d at 798–99.

Five Point argues that, because Section 2.11 of the Amended Operating Agreement specifically permits it to "engage or invest in an unlimited number of other activities or businesses, any one or more of which may be related to or competitive with the Business, without having or incurring any obligation under this Agreement to offer any interest in such activities to [Redwood]," Patterson cannot show that it relied on any representation to the contrary.

We agree that a fraud claim should be dismissed under Rule 91a when reliance on an alleged misrepresentation is not justifiable as a matter of law. *See Darnell v. Rogers*, 588 S.W.3d 295, 305 (Tex. App.—El Paso 2019, no pet.) (affirming dismissal pursuant to Rule 91a because reliance on misrepresentation not justifiable as matter of law). We must now determine whether Patterson's asserted reliance presented a fact question or whether it was not justifiable as a matter of law.

Under Delaware law, "[i]t is unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement." *Carrow v. Arrow*, CIV. A. 182-K, 2006 WL 3289582, at *11 (Del. Ch. Oct. 31, 2006), *aff'd*, 933 A.2d 1249 (Del. 2007). "Fraudulent inducement is not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation." *Id., see also Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 569–70 (7th Cir. 1995). Texas law similarly provides that "reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 658 (Tex. 2018 (quoting *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858–59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)); *Nat'l Prop. Holdings, Inc., L.P. v. Westergren*, 453 S.W.3d 419, 424–25 (Tex. 2015) (holding no justifiable reliance, as matter of law, on representations about contract "which directly conflict" with content of contract).

We have already held that, in light of section 2.11 of the Amended Operating Agreement, Five Point had no contractual obligation to offer investment opportunities "sourced" by Patterson to Redwood. Because Patterson's claim of reliance on representations to the contrary are directly contradicted by the express, unambiguous provisions of the Amended Operating Agreement, Patterson cannot show, as a matter of law, that its reliance on such representations was justified. Because Patterson cannot show one of the elements of its fraudulent inducement claim as a matter of law, the trial court properly dismissed such claim pursuant to Rule 91a.

2. Unjust Enrichment and Quantum Meruit

Patterson's First Amended Original Petition also sought imposition of a constructive trust "to prevent [Five Points] from being unjustly enriched." Patterson further alleged that "[if] [Patterson is] not protected by specific contract rights, [it] should be awarded an amount equal to such reasonable value based on *quantum meruit*." Five Point sought to dismiss these claims, asserting that no claim for unjust enrichment or quantum meruit will lie when a valid contract between the parties governs the subject matter of the claim. We agree with Five Point.

In *Fortune Production Company v. Conoco*, the Texas Supreme Court ruled that natural gas producers could not recover against their purchaser under an unjust enrichment theory because a written contract governed the sale. 52 S.W.3d 671, 684 (Tex. 2000). The Court held that "when a party claims that it is owed more than the payments called for under a contract, there can be no recovery for unjust enrichment if the same subject is covered by the express contract." *Id.*

Thus, if there is an express contract that covers the parties' dispute, a quasi-contractual or equitable claim such as unjust enrichment or quantum meruit cannot lie. *See, e.g.*, *Becker v. Nat'l Educ. Training Grp., Inc.*, No. 3:01-CV-1187-M, 2002 WL 31255021, at *4 & n.32 (N.D. Tex. Oct. 7, 2002); *Compton v. Citibank (S.D.), N.A.*, 364 S.W.3d 415, 418–19 (Tex. App.—Dallas 2012, no pet.); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 401 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Christus Health v. Quality Infusion Care, Inc.*, 359 S.W.3d 719, 723–25 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (op. on reh'g); *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 731 (Tex. App.—Fort Worth 2008, pet. dism'd). When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement. *See TransAm. Natural Gas Corp. v. Finkelstein*, 933 S.W.2d 591, 600 (Tex. App.—San Antonio 1966, writ denied).

Here, the parties' Amended Operating Agreement expressly provided that Five Point had no contractual obligation to offer any investment opportunities to Redwood. Because the express terms of the contract govern the parties' dispute here, the trial court properly dismissed Patterson's unjust enrichment and *quantum meruit* claims.

3. Conversion

Patterson's First Amended Original Petition alleged that Patterson was entitled "to recover damages from [Five Point] for converting to themselves [Patterson's] entitlement to share in distributions from the investment targets that Patterson identified . . . and that became investments that [Five Point] carries under the aegis of the Five Point Funds." Five Points moved to dismiss this conversion claim, alleging that "the unspecified distributions that [Patterson] alleges [it is] owed cannot give rise to a conversion claim." Again, we agree with Five Point.

Money is subject to conversion only when it can be identified as a specific chattel but not if it is an indebtedness that can be discharged by the payment of money. *Estate of Townes v. Townes*, 867 S.W.2d 414, 419 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Here, Patterson's claim that First Points owes it a "share in distributions from the investment targets that Patterson identified" is a claim for an indebtedness that could be discharged by the payment of money and is not "specific chattel." *See Rente Co. v. Truckers Express, Inc.*, 116 S.W.3d 326, 332 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding claim for conversion of money owed pursuant to lease not "specific chattels" capable of being converted).

Because Patterson cannot, as a matter of law, prove an element of his conversion claim, i.e., a specific chattel, the trial court properly dismissed this claim.

4. Conclusion Regarding Extra-Contractual Claims

Because we have held that the trial court properly dismissed Patterson's extra-contractual claims for fraud, unjust enrichment, quantum meruit, and conversion, we overrule Patterson's second issue on appeal.

Costs and Attorney's Fees

In its fourth issue, Patterson argues that "[i]f this Court reverses the trial court's Order of August 12, 2019 that dismissed [Patterson's] claims, the Court should also award [Patterson] a recovery of their costs and attorneys' fees incurred both in responding to the Rule 91a Motion and in pursuing this appeal." Because we have overruled Patterson's other issues and affirmed the trial court's dismissal of all the claims in Patterson First Amended Original Petition, we also overrule its request for costs and attorney's fees.

We overrule issue four.[5]

III. CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Kelly.

5 Because we have affirmed the trial court's Rule 91a dismissal of all Patterson's causes of action, we need not address the issue of whether Patterson's claims as to the Twin Eagle investment were also barred by limitations.