UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1162

September Term, 2016

KOSSI KLASSOU, et. al.,

v.

ABDOL HOSSEIN EJTEMAI, et. al.

Kehoe,
Leahy,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: September 26, 2017

Whether the dismissal with prejudice of an amended complaint filed in January of 2016, by Kossi Klassou and Wintergreen Mobile, Inc. (of which Klassou is seemingly the only officer, shareholder, and director) against Abdol Hossein Ejtemai and Petroleum Marketing Group, Inc., by Judge Cheryl McCally of the Circuit Court for Montgomery County should be affirmed is the issue presented in this appeal.

Mr. Klassou and Wintergreen present three questions for our review:

1. Whether under the facts alleged in the complaint, liberally read as it must be, states a cause of action for breach of contract; fraud; unjust enrichment; detrimental reliance; breach of the Federal Petroleum Marketing Practices Act or any other legal theory.
2. Whether any of the causes of action are barred by the statute of limitations under so-called Maryland's so-called "discovery rule," which tolls the accrual date of the action until such time as the potential plaintiff either discovers his or her injury, or should have discovered it through the exercise of due diligence.
3. Whether the doctrine of relation back, by virtue of which the period of limitations is measured from the date of the accrual of the cause of action to the date of the filing of the original complaint, applies since [sic] factual situation remains essentially the same after the amendment as it was before it, so that the addition of the Petroleum Marketing Practices Act is timely.

Mr. Klassou's claims arose from his alleged purchase on May 2, 2011 of a gas station and car repair garage located in Rockville, Maryland from Mr. Ejtemai. Mr. Klassou, however, allegedly operated only the auto repair garage after April 16, 2014 and was allegedly evicted from the premises on October 7, 2015.

Mr. Klassou initially filed suit on April 3, 2015 and alleged thirteen counts, entitled: 1) "breach of contract"; 2) "fraud"; 3) "credit card fraud"; 4) "violation of franchise law";[1] 5) "violation of section 10(b) of the federal securities law";[2] 6)

[1] Mr. Klassou did not cite to any state or federal statutory provisions related to his claim for violation of franchise law. We surmise from the complaint that the statutory provisions implicated were those in the Maryland Franchise Registration and Disclosure Law, codified at §§ 14-201 to -233 of the Business Regulation Article, Maryland Code (1992, 2010 Repl.Vol.), and the Federal Trade Commission Act, codified at 15 U.S.C. §§ 41-58 (2006), with the attendant Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. §§ 436.1-.11.

[2] The count in the complaint alleging a violation of Section 10(b) of the federal securities law apparently referred to Section 10(b) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78j (2006), with its corresponding Rule 10b–5, 17 C.F.R. § 240.10b–5.

"violation of 12(A) (2) [sic] of federal securities laws";[3] 7) "violation of state anti-fraud securities laws";[4] 8) "violation of registration requirements of state securities laws";[5] 9) "unjust enrichment"; and 10) "detrimental reliance." Mr. Klassou alleged, in the twelfth count, "claims of the individual plaintiff" and sought declaratory judgment and an accounting in the remaining two counts.

Mr. Ejtemai and his company filed a motion to dismiss, alleging that Mr. Klassou failed to state claims upon which relief could be granted and that Wintergreen was not a proper party. A hearing was held in June of 2015 before Judge Audrey A. Creighton of the Circuit Court for Montgomery County, at which time she dismissed Wintergreen as a party because its corporate charter had been forfeited, but seemingly retained the substantive counts.

Mr. Ejtemai, thereafter, filed a motion for reconsideration, asking that the all of the claims be dismissed in their entirety. A hearing on the motion for reconsideration was held before Judge Cheryl A. McCally, who continued the hearing to the end of 2015, at which time she granted the motion to dismiss on varying terms. The Judge dismissed without prejudice the breach of contract, fraud, violation of franchise laws, unjust enrichment, detrimental reliance, and accounting claims. She dismissed with prejudice the counts alleging credit card fraud, violation of section 10(b) of the federal securities law, violation of 12(A)(2) of federal securities laws, violation of state anti-fraud securities laws, violation of registration requirements of state securities laws, declaratory judgment, and claims of the individual plaintiff. The day before Judge McCally ruled on

[3] The count in the complaint alleging a violation of 12(A)(2) of the federal securities laws apparently referred to Section 12(a)(2) of Securities Act of 1933, codified at 15 U.S.C. § 77l(a)(2) (2000).

[4] The count in the complaint alleging violation of state anti-fraud securities laws specifically referred to Section 11-701 of the Corporations and Associations Article, Md. Code (1975, 2007 Repl.Vol.).

[5] The count in the complaint alleging a violation of registration requirements of state securities laws apparently referenced Section 11-501 of the Corporations and Associations Article, Md. Code (1975, 2007 Repl.Vol.).

Mr. Ejtemai's motion for reconsideration, Mr. Klassou also had filed an amended complaint, which he withdrew on the day of the hearing.

Within a month, Mr. Klassou filed the amended complaint under consideration here, which he styled as the "First Amended Complaint," which set forth five causes of action: 1) breach of contract, 2) fraud, 3) unjust enrichment, 4) detrimental reliance, and 5) breach of the Petroleum Marketing Practices Act (PMPA),[6] a claim which had not been included in the initial complaint. Mr. Ejtemai again filed a motion to dismiss, and Judge McCally eventually dismissed the First Amended Complaint with prejudice.

We shall affirm the dismissal with prejudice of the First Amended Complaint, because Mr. Klassou has failed to state a claim upon which relief can be granted for breach of contract, fraud, unjust enrichment, and detrimental reliance and promissory estoppel. We also affirm the dismissal with prejudice of the claim under the PMPA, because it was barred by the statute of limitations and also did not state a claim upon which relief could be granted under the PMPA.

Rule 2-322(b)(2) provides that a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." We review the grant of a motion to dismiss according to the following standard:

> On appeal from a dismissal for failure to state a claim, we "must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.,* the allegations do not state a cause of action for which relief may be granted." *RRC Northeast, LLC v. BAA Maryland, Inc.,* 413 Md. 638, 643 (2010) (citations omitted). We must confine our review of "the universe of 'facts' pertinent to the court's analysis of the motion" to "the four corners of the complaint and its incorporated supporting exhibits, if any." *Id.* "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Id.* at 644. Our goal, in reviewing the trial court's grant of dismissal, is to "determine whether the court was legally correct." *Id.*

[6] Petroleum Marketing Practices Act, codified at 15 U.S.C. §§ 2801 to 2807 (2007).

Parks v. Alpharma, Inc., 421 Md. 59, 72 (2011).

Mr. Klassou argues before us that Judge McCally erred in dismissing his First Amended Complaint for failure to state a claim upon which relief can be granted because he alleged all of the requisite elements of each cause of action in his complaint. He also insists that the court erred in dismissing the Petroleum Marketing Practices Act claim because of the statute of limitations. That claim, he asserts, did relate back to the original complaint and did state a claim upon which relief could be granted.

Mr. Ejtemai, conversely, maintains that Judge McCally correctly dismissed the First Amended Complaint because the allegations therein did not state claims upon which relief could be granted. He also argues that the court correctly dismissed the cause of action alleging violations of the PMPA as time-barred because it did not relate back to the original complaint and, even if it did, that Mr. Klassou failed to state a claim for a violation of the PMPA.

With respect to the count related to "breach of contract," Mr. Klassou alleged:

> 117. The Defendants breached the Agreement and Lease,[7] including without limitation, by inducing the Plaintiffs to enter into these Agreements on the

[7] The Agreement referenced in the breach of contract count was described in Paragraph 19 of the First Amended Complaint as:

> 19. The sum paid for one or more of Plaintiffs to purchase the Mobil Station from Defendants pursuant to an Assignment and Assumption Agreement (hereinafter "Agreement") and incorporated herein by this reference, as if fully set forth, was signed by the parties on or about May 2, 2011 and included by reference the assigned documents of a Motor Fuel Supply Agreement, a Guarantee, a Financing Statement and a Security Agreement (hereinafter "Assigned Agreements") all dated August 23, 2010.

(continued …)

> basis of fraudulent misrepresentations; by failing to sell and deliver gas to Plaintiffs at the agreed upon price; by failing to accurately account for credit card sales an maintenance costs and through lease rental overcharging.
>
> 118. The Defendants further breached the Agreement and Lease by making repeated false, misleading and fraudulent representation to the Plaintiffs after the Plaintiffs entered into the Agreement and Lease, which representation induced the Plaintiffs to continue doing business and purchasing motor fuel from the Defendants, including representations that the price differential between wholesale and retail would be modified and that market conditions would change to permit the Plaintiffs to operate profitably.
>
> 119. Said conduct constitutes a breach of any and all agreements related to the Agreement and Lease.

Finding that the averments included in the breach of contract count sounded as a claim for inducement to enter into a contract rather than a breach of contract, Judge McCally dismissed the count with prejudice:

> Moving backwards to Count 1, the breach of contract, I am going to grant that motion with prejudice to dismiss. As I said, we could have this discussion all day. I have read the new amended complaint. It is not in conformity, so it was an arduous task to read it and go through and understand what has been now alleged because the rules weren't complied with, but nonetheless, it became less complicated to do so because it essentially, in many respect, the complaint in its entirety is a rehashing of what I've already ruled on. So, with regard to this count, breach of contract, the facts that are set forth that plaintiff asserts in this count as the grounds for his breach of contract claim against the defendant, the Court finds amount to facts setting forth a cause of action for inducement but not for a breach of contract.
>
> Inducement to enter into a contract, into a contract, does not constitute a breach of contract, and under the case of Bobo v. State, the Court gives all permissible inferences to, of, only if the alleged facts viewed would, if proven,

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(… continued)

The Lease alleged was described in Paragraph 23, which stated:

> 23. Defendant ABDOL HOSSEIN EJTEMAI, directly and through his agent Mehran Khadivi, aka Mike, told Plaintiff KOSSI KLASSOU that though Plaintiff KOSSI KLASSOU now owned the Mobil Station, Plaintiff KOSSI KLASSOU still had to pay lease payments to Defendant ABDOL HOSSEIN EJTEMAI under a lease [the "Lease"] that, despite request, Defendant ABDOL HOSSEIN EJTEMAI never showed Plainitff KOSSI KLASSOU.

> nonetheless fail to afford relief to the plaintiff. Even if the plaintiff could prove fraudulent inducement, inducement is not and cannot be the basis of the breach of contract because the inducement is how you get to the contract. That's a tort if one is alleging that. A breach of contract is a completely separate action that one party has not acted under the terms of the contract as they agreed to do so after a meeting of the minds and consideration, acceptance and offer all being complied with.
>
> So, that is not the basis of a breach of contract suit. I think the Court has given ample opportunity for Mr. Klassou to state with particularity the facts upon which he is relying, and as I've already said, the discovery process in the civil action is not the basis upon which a plaintiff establishes their cause of action. They have to set forth the cause of action, put the other party or parties on notice of what the cause of action is, and discovery is the mechanism by which the, the evidence is gathered to prove the allegations, not start your case, So I, I understand there have been some difficult circumstances the plaintiff has endured, but that doesn't give him some special privilege to skip over telling the other side what it is they allege he's done, they've done and then just hope to find it in the discovery. That, that's not the state of the law.
>
> And as I've already read into the record, there, the paragraphs in Count 1, 117, 118, 119 and 120, all they simply say is, they breached the agreement because the plaintiff was induced into it and then they didn't do what they said they were going to do, and that is not the basis for a breach of contract action. So, the motion to dismiss is granted as to Count 1 with prejudice.

We agree with Judge McCally that Mr. Klassou failed to state a claim for which relief can be granted with respect to breach of contract, because fraudulent inducement does not a breach of contract make.

The Court of Appeals has described fraud in the inducement as "a term used to describe a situation where a person is induced by some fraudulent representation or pretense to execute the very instrument which is intended to be executed." *Meyers v. Murphy,* 181 Md. 98, 100 (1942). We have explained that, "[t]he tort of fraudulent inducement 'means that one has been led by another's guile, surreptitiousness or other form of deceit to enter into an agreement to his detriment." *Rozen v. Greenberg,* 165 Md. App. 665, 674 (2005) (citing *Sec. Constr. Co. v. Maietta,* 25 Md. App. 303, 307 (1975)). We have articulated the elements of the tort of fraudulent inducement as:

> (1) the defendant made a false representation to the plaintiff,

> (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth,
> (3) the misrepresentation was made for the purpose of defrauding the plaintiff,
> (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and
> (5) the plaintiff suffered compensable injury as a result of the misrepresentation.

Id. at 674-75 (citing *Hoffman v. Stamper,* 385 Md. 1, 28 (2005)).

Mr. Klassou's claim, thus, albeit conclusory, sounds in fraudulent inducement, and not as a claim for breach of contract. To maintain a breach of contract action, one "'must of necessity allege with certainty and definiteness facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant.'" *RRC Northeast,* 413 Md. at 655 (citing *Continental Masonry Co., Inc. v. Verdel Constr. Co., Inc.,* 279 Md. 476, 480 (1977)).

The two causes of action are not the same, as we inferred in *Sass v. Andrew,* 152 Md. App. 406 (2003), when we stated, "[W]hen one may be induced by fraud to enter into a contract, the tort in that instance cannot be said to arise out of the contractual relationship. It is the tortious conduct which conversely induces the innocent party to enter into the contractual relationship." *Id.* at 432 (quoting *Wedeman v. City Chevrolet Co.,* 278 Md. 524, 529 (1976)) (internal quotation marks omitted). The Supreme Court, Appellate Division of New York, in *Gosmile v. Levine,* 81 A.D.3d 77, 915 N.Y.S.2d 521 (2010), did directly address the relationship between the two causes of action and determined that breach of contract and fraudulent inducement are not the same.

In *Gosmile,* the court reviewed the grant of a motion to dismiss for failure to state a claim upon which relief could be granted of a count in which fraudulent inducement had been plead, which had been entered by the trial judge, who had allowed the breach of contract claim to go forward. The case itself presented the spectre of a former owner, Levine, who had the controlling interest in his corporation, Gosmile that was sold to others, although Levine had been kept as an employee.

Levine eventually was terminated from employment. In an ensuing settlement of Levine's claims of wrongful termination, Levine "warranted" that he had not breached any of the agreements contained in a non-competition contract that he had entered before

to gain employment with the corporation. *Id.* at 79, 523. After discovering a year later that Levine had in fact breached the covenant not to compete, the corporation sued for breach of contract and fraudulent inducement.

Reviewing the trial court's dismissal of the fraudulent claim as duplicative of the breach of contract claim, the New York intermediate appellate court disagreed and explained:

> To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury (*Sokolow, Dunaud, Mercadier & Carreras, LLP v. Lacher,* 299 A.D.2d 64, 70, 747 N.Y.S.2d 441 [2002]). Generally, to recover damages for a tort, such as fraud, in a contract action, plaintiff needs to plead and prove "a breach of duty distinct from, or in addition to, the breach of contract" (*Non–Linear Trading Co. v. Braddis Assoc.,* 243 A.D.2d 107, 118, 675 N.Y.S.2d 5 [1998] [internal quotation marks omitted]).
>
> This Court, as well as the Court of Appeals, has held that a misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty (*Deerfield Communications Corp. v. Chesebrough–Ponds, Inc.,* 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88, 502 N.E.2d 1003 § 1986]; *see also First Bank of Ams. v. Motor Car Funding,* 257 A.D.2d 287, 291–292, 690 N.Y.S.2d 17 [1999] [concurrent causes of action for fraud and breach of contract may lie where plaintiff alleges it was induced to enter into a contract based on defendant's misrepresentation of material facts]).

Id. at 81, 524. The court concluded that Gosmile's "fraudulent inducement claim is, therefore, separate from and may be maintained in addition to its breach of contract claim." *Id.* at 82, 525.

We find the court's reasoning in *Gosmile* persuasive, based upon its iteration of the elements of breach of contract and fraudulent inducement. Because Mr. Klassou's allegations sounded in fraudulent inducement, then, he did not allege a cause of action for breach of contract, and Judge McCally did not err.

Mr. Klassou, however, contends that fraudulent inducement can support a claim for breach of contract, based upon *Gross v. Sussex, Inc.,* 332 Md. 247 (1993). In that case, Mr. and Mrs. Gross contracted with a homebuilder to build after a realtor had

shown them the lot. The realtor and the homebuilder repeatedly assured Mr. and Mrs. Gross that the necessary building permits had been secured. The house was not constructed, however, until almost eighteen months after the contract was signed, in part because the necessary permits had not been signed. Mr. and Mrs. Gross filed suit for breach of contract, fraud, and negligent misrepresentation. The trial court granted summary judgment in favor of the realtor and the builder as to the counts alleging fraud and negligent misrepresentation but allowed the breach of contract count to go forward. Before Mr. and Mrs. Gross appealed, however, the parties voluntarily dismissed the contract claim. *Id.* at 253-54, n. 2. Clearly, then, Gross does not stand for the proposition that fraudulent inducement is "actionable" as a breach of contract.[8]

The second count, entitled "fraud," alleged:

> 121. Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU incorporate herein and reallege the factual allegations of the above paragraphs, as if fully set forth herein.
>
> 122. The Defendants induced the Plaintiffs to enter into the Agreements as alleged by making false and misleading statements to the Plaintiffs as alleged, knowing that these statements were false and misleading, making these statements with the intention that Plaintiffs rely on said statements to their detriment as alleged, and the Plaintiffs reasonably relied on said false, misleading and fraudulent statements.
>
> 123. Said fraudulent misrepresentations also induced the Plaintiffs to continue to invest in the gasoline service station and continue to fund its losing operation until the Plaintiffs lost virtually everything that they own.
>
> 124. The Defendants further defrauded Plaintiffs by failing to sell gas to Plaintiffs at the agreed upon rate, by deliberately and repeatedly understating credit card revenues payable to Plaintiffs, by manipulating gasoline deliveries resulting in a higher cost to Plaintiffs, by maintenance and leasing cost overcharges.
>
> 125. Defendants had an arrangement to process all credit card sales for the Plaintiff for business operations that the gasoline station. Under this arrangement, Defendant PETROLEUM MARKETING GROUP, INC. and its agents and

[8] Mr. Klassou, seemingly attempting to save the first count from dismissal with prejudice, raises a new theory to support breach of contract, alleging there was a duty of good faith and fair dealing that allegedly was breached by Mr. Ejtemai. Mr. Klassou's complaint did not contain the allegations of lack of good faith and fair dealing nor was the theory argued below. As it was not raised, we will not consider this new argument.

> employees agreed to process credit card charges for sales at the Mobil Station, and remit the balances collected from these charges to the Plaintiffs [sic] net of processing fees.
>
> 126. Defendants systematically underpaid the Plaintiffs [sic] proceeds for all credit card sales anD [sic] refused to properly account to Plaintiffs for the credit card sales, despite repeated demands.
>
> 127. Upon information and belief, the Defendants have systematically underpaid and undercredited other gas station dealers for credit card charges, and they have paid or credited credit card charges late.
>
> 128. By failing to pay the credit card charges to the Plaintiffs and other dealers, and by paying these charges late, the Defendants have systematically weakened the financial position of the Plaintiffs and other dealers.
>
> 129. By financially weakening the financial position of the Plaintiffs and other dealers, the Defendants are in a position to declare the agreements with these entities in default and/or to force the Plaintiffs and other dealers out of business so as to retain their down payments, deposit and all other funds, and to sell or lease the gas station locations to others, who will, in turn, pay an additional deposit, down payment, and other funds.

Judge McCally dismissed the fraud count with prejudice, because it was not alleged with specificity:

> Count 2 with regard to the fraud count, fraud has to be pled with specific particularity. The complaint must contain specific allegations of how the fraud kept the plaintiff in ignorance of this cause of action, how the fraud was discovered and why there was a delay in discovering the fraud. For example, paragraph 122 reads:
>
> "The defendant induced the plaintiffs to enter into the agreement as alleged by making false and misleading statements to the plaintiffs as alleged knowing these statements were false and misleading, making these statements with the intention that the plaintiff relied on said statement to their detriment as alleged, and the plaintiff reasonably relied on said false misleading and fraudulent statements."
>
> There is simply nothing that puts anybody on notice other than Mr. Klassou's opinion that this was fraudulent.
>
> I certainly understand he believes he was not, the gas was not sold to him, gasoline was not sold to him at the price he contracted to pay, but the facts as set forth do not amount to sufficient notice. So, as to Count 2, I am going to dismiss with prejudice.

There are different types of fraud that can be plead, as we identified in *Sass,* 152 Md. App. 406. "Fraud encompasses, among other things, theories of fraudulent

misrepresentation, fraudulent concealment, and fraudulent inducement." *Id.* at 432 (quoting *Iverson v. Johnson Gas Appliance Co.,* 172 F.3d 524, 529 (8th Cir.1999) (footnote omitted) (applying Minnesota law)) (quotation marks omitted). In order to prevail with regard to any type of fraud, the complaint must allege:

> 1) that the defendant made a false representation to the plaintiff;
> 2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth;
> 3) that the misrepresentation was made for the purpose of defrauding the plaintiff;
> 4) that the plaintiff relied on the misrepresentation and had the right to rely on it; and
> 5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

Id. at 429. We have reiterated the requirement for pleading fraud with particularity:

> The requirement of particularity ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (*i.e.,* orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (*i.e.,* that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement. *See, e.g., Spaulding v. Wells Fargo Bank, N.A.,* 714 F.3d 769, 781 (4th Cir.2013) (Davis, J.) (concerning the analogous federal rule).

McCormick v. Medtronic, 219 Md. App. 485, 528 (2014).

Here, Mr. Klassou fails to state a claim for fraud, which seemingly sounds in fraudulent inducement, because he alleged conclusory statements, as discussed above, rather than with particularity. His bald and conclusory statements included:

> 122. The Defendants induced the Plaintiffs to enter into the Agreements as alleged by making false and misleading statements to the Plaintiffs as alleged, knowing that these statements were false and misleading, making these statements with the intention that Plaintiffs rely on said statements to their detriment as alleged, and the Plaintiffs reasonably relied on said false, misleading and fraudulent statements.
>
> 123. Said fraudulent misrepresentations also induced the Plaintiffs to continue to invest in the gasoline service station and continue to fund its losing operation until the Plaintiffs lost virtually everything that they own.

These statements, thus, fail to identify "who made what false statement, when, and in what manner" and what would lead the finder of fact to conclude that the defendant acted

with scienter and intent. We must agree with Judge McCally that Mr. Klassou has failed to state a claim for fraud upon which relief may be granted.

Mr. Klassou's third cause of action for "unjust enrichment" recited:

> 133. Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU incorporate herein and reallege the factual allegations of the above paragraphs, as if fully set forth herein.
>
> 134. Causing the failure of Plaintiffs [sic] business while benefiting from Plaintiffs [sic] repairs and buildout to the Mobile Station without recompense to Plaintiffs was wrongful and without cause.
>
> 135. Under the circumstances aforesaid, it is unjust and inequitable, and against fundamental principles of justice and equity, for Defendants to retain Plaintiffs [sic] investment in and the improvements to the Mobil Station without paying for their fair and reasonable value.

Judge McCally dismissed Count Three, "unjust enrichment," because the allegations failed to state a claim for which relief could be granted:

> And I did say before, let's see, well, I'm sorry. What I was going, intending to say is that previously at the last hearing, I, when previous counsel was there, I did dismiss as to Count 3 of the original complaint and those, that included paragraphs 127, 148, 149, 151. They are identical to what is in this amended complaint of paragraphs 125, 126, 127, 128 and 129. So, there is nothing new that has been presented to the Court.
>
> Count 3, unjust enrichment. With regard to this count, there are three elements that comprise the claim of unjust enrichment, a benefit conferred upon the defendant by the plaintiff, an appreciation or knowledge by the defendant of the benefit, and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. So, for example, if one goes to a store and gives a $20 dollar bill to pay and they get change for a blouse they bought of $100 dollars, that's a mistake. That's not what was intended. There's a benefit there that was never intended and that has to be repaid.
>
> Count 3 again is a recitation of broad conclusory statements. Paragraph 134 says:
>
> > "Causing the failure of plaintiff's business while benefitting from plaintiff's repairs and build-out to the mobile station without recompense to plaintiffs was wrongful and without cause.
> >
> > 135. Under the circumstances, it is unjust and inequitable and against fundamental principles of justice and equity for defendants to retain plaintiff's investment in and the improvements to their mobile station without paying for their fair and reasonable value"

> There's nothing here that puts anybody on notice of what it is that has been retained, what it, what, what is the build-out? What is it that has been retained as opposed to what was there to begin with, and what is the allegation as to the harm that the plaintiff has been caused by the retention of the defendant and the benefit without recompense?
>
> Paragraph 136 is completely conclusory.
>
> "The action of the defendants are tortious and merit imposition of punitive damages to restrain such behavior."
>
> What behavior? It's not set forth. So, the motion as to Count 3 is granted with prejudice.

The Court of Appeals has propounded the elements of unjust enrichment:

> A claim of unjust enrichment is established when: (1) the plaintiff confers a benefit upon the defendant; (2) the defendant knows or appreciates the benefit; and (3) the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return.

Benson v. State, 389 Md. 615, 651-52 (2005) (citing *Caroline County v. Dashiell,* 358 Md. 83, 95 n. 7 (2000)). Our decision in *Mohiuddin v. Doctors Billing and Management, Inc.,* 196 Md. App. 439 (2010) animates the elements of the test.

In *Mohiuddin,* we affirmed the dismissal of a second amended complaint alleging unjust enrichment, which had been brought by Mohiuddin against Physician's House Calls, a company that provided patients with home visits from physicians, and Doctor's Billing and Management Service, with which PCH was associated. Mohiuddin alleged in the complaint that he had not fully been compensated for work that that he had performed over a ten week period in doing home visits.

In affirming, we opined that the doctor made specific "alleg[ations] that he benefited PCH's by serving its patients, and PCH knowingly accepted these benefits without paying him." *Id.* at 449. As for the third prong of unjust enrichment, however, we determined that the complaint lacked specificity, sufficient to meet the pleading requirement, because "[t]he complaint fail[ed] to assert that PHC was enriched as a result of circumstances, such as fraud or misrepresentation, that might make it inequitable for the company to retain the value of appellant's services without paying for them." *Id.* at

450. We concluded that "[t]he second amended complaint left the trial court, and now this Court, guessing" as to why the doctor was entitled to compensation. *Id.*

In the instant case, Mr. Klassou failed to state a claim for unjust enrichment upon which relief could be granted, because he failed to allege facts establishing any of the elements of the cause of action. He only included conclusory allegations in his cause of action and failed to allege with particularity that he conferred a benefit upon the Mr. Ejtemai and what it was; that Mr. Ejtemai knew or appreciated the benefit; and that under the circumstances as such that it would be inequitable to allow Mr. Ejtemai to retain the benefit without paying for it. Accordingly, Judge McCally did not err in dismissing the third count entitled enjust enrichment.

The fourth cause of action was entitled "detrimental reliance":

> 138. Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU incorporate herein and reallege the factual allegations of the above paragraphs, as if fully set forth herein.
>
> 139. Defendants promised to Plaintiffs that Plaintiffs were to receive the gas station and car repair businesses in exchange for hard work, and future work and investments under Defendants' direction.
>
> 140. Defendants made other misrepresentations to Plaintiffs as aforesaid.
>
> 141. Plaintiffs reasonably relied on the aforesaid representations, to their detriment.
>
> 142. Defendants reasonably expected that their promises would induce substantial action by the Plaintiffs, such as investments in the Mobil Station and purchase of gasoline at unfair prices.
>
> 143. Defendants' promises did induce Plaintiffs to act on the basis of those promises, which has proved costly to Plaintiffs because the promises have not been enforced, including but not limited to the failure to provide gasoline at the agreed upon pricing.
>
> 144. There has been such a change in Plaintiffs' position in reliance on Defendants' promises as to make it enforceable and to create a property right in Plaintiffs.

Judge McCally determined that Mr. Klassou failed to state a claim for detrimental reliance upon which relief could be granted:

> Count 4, detrimental reliance. Same reasons. It carries word for word the same paragraphs in the original complaint, 139 through 146 in the amended complaint are the same as paragraphs 225 through 232 of the original complaint. And again, you make the broad conclusory statements that the original counts 10

in the original complaint made now housed under Court 4 of detrimental reliance. Paragraph 139, as an example:

> "Defendants promised to pay plaintiffs, that plaintiffs were to receive the gas station and car repair business in exchange for hard work and future work and investments under defendant's direction."

Paragraph 140, "Defendants made other misrepresentations to plaintiffs as aforesaid," and paragraph 141, "Plaintiffs reasonably relied on the aforesaid representations to their detriment." There's nothing contained here that puts the defendant on notice of what it is they are alleged to have done. Count 4 is granted with prejudice.

Klassou's case represented his claim as "detrimental reliance," which is generally referred to as promissory estoppel. In *Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc.,* 342 Md. 143, 166 (1996), the Court of Appeals articulated four elements of promissory estoppel, adopted from Section 90(1) of the Restatement (Second) of Contracts (1979):

> 1. a clear and definite promise;
> 2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;
> 3. which does induce actual and reasonable action or forbearance by the promisee; and
> 4. causes a detriment which can only be avoided by the enforcement of the promise.

Id. at 166 (emphasis omitted) (footnote removed).

We agree with Judge McCally that Mr. Klassou asserted only conclusory allegations and failed to state a claim for promissory estoppel or detrimental reliance upon which relief could be granted. He did not allege the required elements, but alleged only bald and conclusory statements that, "Defendants reasonably expected that their promises would induce substantial action by the Plaintiffs," and that, "Plaintiffs reasonably relied on the aforesaid representations, to their detriment," rather than the clear and definite promise, the basis for any expectation and any forbearance, and the detriment that resulted.

The fifth count alleged "Breach of Petroleum Marketing Practices Act," which was the only count that Judge McCally determined was barred by the statute of limitations:

The count alleged that:

147. Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU incorporate herein and realleges the factual allegations of the above paragraphs, as if fully set forth herein.

148. The Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2801 to 2806) is intended to protect franchised distributors and retailers of gasoline and diesel motor fuel against arbitrarily or discriminatory termination or nonrenewal of franchises and establishes substantive and procedural rules for ending a franchise relationship, including compensating the franchisee defining "franchise" as the contract between (1) a refiner and distributor, (2) refiner and retailer, (3) a distributor and another distributor, or (4) a distributor and a retailer under which a refiner or distributor allows a retailer or distributor to use a trademark owned or controlled by the refiner or distributor in connection with the sale, distribution, or consignment of gasoline and requires a supplier to give proper notice, usually 90 days, before taking any such action.

149. The PMPA authorizes franchisees to sue in federal or state court to enforce the rights it establishes authorizing courts to grant equitable relief and must grant a preliminary injunction if the franchisee shows (1) that his franchise has been terminated or not renewed and that there are "sufficiently serious questions going to the merits" and (2) the court determines that, on balance, that the hardship imposed on the supplier by granting temporary relief is less than that imposed on the franchisee if relief were not granted.

150. The conduct of the Defendant forced an end to Plaintiffs [sic] use of the franchisor's trademark, purchase of the franchisor's fuel, and occupation of the franchisor's service station terminating Plaintiffs [sic] contract without just or legal cause or proper notice in violation of the PMPA for which Plaintiffs are entitled to compensation including whatever equitable relief is necessary to remedy the effects of Defendants failure to comply with the requirements of the Act, declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief, actual damages, exemplary (punitive) damages under certain circumstances, and reasonable attorney and expert witness fees.

WHEREFORE, Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU demand that the Court determine and adjudicate the rights and liabilities of the parties pursuant to the PMPA, including whatever equitable relief is necessary to remedy the effects of Defendants failure to comply with the requirements of the Act, declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief, actual damages in the principal amount of $300,000 in compensatory damages, or in such amount as may be proved at trial, exemplary (punitive) damages, and reasonable attorney and expert witness fees.

Judge McCally specifically determined that the PMPA claim had to have been filed by April 15, 2015, within a year after the alleged violation of the statute. The claim alleging the PMPA violation was not asserted until January 15, 2016 when the First Amended Complaint was filed and did not relate back to the original complaint filed on April 3, 2015, because it was a new cause of action:

> I'm going to start with Count 5. Count 5 is a completely new allegation, and do -- can I see the file? The, do we have the first -- this original bill of complaint was filed April 3, 2015, and at no time was Count 5 that is before me today in the amended, in the new complaint, amended complaint filed by counsel, new counsel on behalf of, Ms. Crawford, on behalf of Mr. Klassou, and the date that is set forth in the complaint filed, this amended complaint, that plaintiff relies on in his allegation that says the complaint, the relationship ended on April 16, 2014, I'm paraphrasing that first part, when the plaintiff reluctantly accepted that he would continue to operate service bays at the station but that the gasoline sale portion was concluded. That, that's the date he set forth. Those are the kind of facts that, specific, that any party being sued has a right to know in detail what are the facts the plaintiff is relying on to set forth the elements of each claim that they're making.
>
> In this instance, we do have a date certain. April 16, 2014. Mr. Schwager has given me the statute for this area of law, 2805, which specifically prescribes a one year statute of limitations for a suit to be brought under this theory, and that date would be April 16, 2015. It was not set forth in the original complaint. Had it been set forth on April 3, 2015, I would agree with you, Ms. Crawford, that you would be able to amend that count, depending on whatever the Court had ruled at the last motion to dismiss hearing. But a motion to dismiss and leave to refile is not an invitation to start bringing up other causes of actions, especially where there is a prescribed statute of limitations that shortens the time from the general statute of limitations of three years to put a party opponent on notice of what they're being sued for.
>
> So, this is a brand new cause of action. It was not raised. There's no way that I know of to go back and piggyback that in because we could have filed it but we didn't. That's the whole point of a statute of limitations. And so, the statute makes it clear what the law is in this area.
>
> He, your client acknowledges notice as of that date that he would no longer be selling gas reluctantly, and as I understand, the eviction took place after the service, I'm sorry. It was not at the same time as the issue with the pumps. So, I am going to grant with prejudice the motion to dismiss as to Count 5.

We agree with Judge McCally.

The claim under the PMPA was not alleged in Klassou's initial complaint. The claim was new to the amended complaint, which was filed beyond the year long statute of limitations provided in the statute. Claims under the PMPA are subject to a one year statute of limitations:

> If a franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—
>
> (1) the date of termination of the franchise or nonrenewal of the franchise relationship; or
>
> (2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title.

15 U.S.C. § 2805(a) (2007).

Here, Mr. Klassou alleged that his franchise was terminated on April 16, 2014. He filed the PMPA claim in the First Amended Complaint on January 15, 2016, which was clearly beyond the statute of limitations of one year.

Amendments and pleadings are governed by Rule 2-341, in which section (c) governs scope:

> **(c) Scope.** An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

The Rule does not address the consequences of a raising a new cause of action in an amended complaint. Those consequences were addressed in *Jane Doe v. Montgomery County Board of Elections,* 406 Md. 697 (2008):

> [W]e explained the relation-back principle, iterating that "an amended [complaint] filed after the expiration of a statute of limitations will be barred, if [it] states a new cause of action or a new theory of liability." We also have held, on numerous other occasions, that when the amendment does not state a new cause of action or theory of liability, it will relate back to the filing of the original.

Id. at 719-20 (citations omitted). To relate back, then, an amended complaint must not state a new cause of action.

There was no allegation of a violation of the PMPA in the first complaint. The PMPA violation was added in the First Amended Complaint and thus cannot relate back to the original complaint. Judge McCally did not err.

Nevertheless, even were Mr. Klassou's claim under the PMPA not time barred, it still failed to state a claim upon which relief can be granted.

The parameters of the PMPA have been explained by the Supreme Court in *Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC,* 559 U.S. 175 (2010), in which the Court stated that:

> Under the Act's operative provisions, a franchisor may "terminate" a "franchise" during the term stated in the franchise agreement and may "fail to renew" a "franchise relationship" at the conclusion of that term only if the franchisor provides written notice and takes the action in question for a reason specifically recognized in the statute. 15 U.S.C. §§ 2802, 2804. Consistent with the typical franchise arrangement, a "franchise" is defined as "any contract" that authorizes a franchisee to use the franchisor's trademark, as well as any associated agreement providing for the supply of motor fuel or authorizing the franchisee to occupy a service station owned by the franchisor. § 2801(1). The Act defines a "franchise relationship" in more general terms: the parties' "respective motor fuel marketing or distribution obligations and responsibilities" that result from the franchise arrangement. § 2801(2).

Id. at 178-79 (footnote omitted).

In *Meghani v. Shell Oil Co.,* 115 F.Supp 747 (S.D. Tex.2000), *aff'd per curiam,* 273 F.3d 1098 (5th Cir.2001), Judge Atlas of the United States District Court for the Southern District of Texas explored the prohibitions of the Act:

> The PMPA regulates the termination and non-renewal of franchise relationships. 15 U.S.C. § 2801 *et seq.* Plaintiffs base their PMPA claim on § 2802(a), which is a general prohibition against termination or non-renewal of

> franchises. The PMPA mandates that a franchisor may terminate a franchise or may decline to renew any franchise relationship only when (1) the notification requirements of 15 U.S.C. § 2804 are met, and (2) the termination or non-renewal is based on grounds described in § 2802(b) of the statute. *See* 15 U.S.C. § 2802(b)(1).

Id. at 751 (footnote omitted). Judge Atlas also defined the elements necessary to allege a cause of action under the PMPA:

> Under the Act's enforcement provision, a franchisee may maintain a civil action against a franchisor who fails to comply with the requirements of §§ 2802, 2803 or 2804. 15 U.S.C. § 2805(a). "In order to establish a claim under the PMPA, the plaintiffs must prove as a threshold matter a termination or non-renewal of their franchise relationship within the meaning of the PMPA*." Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.,* 940 F.2d 744, 748 (1st Cir.1991) (citing 15 U.S.C. § 2805(c), and quoting *Ackley v. Gulf Oil Corp.,* 726 F.Supp. 353, 359 (D.Conn), *aff'd per curiam,* 889 F.2d 1281 (3rd Cir.1989). *Accord Duff v. Marathon Petroleum Co.,* 51 F.3d 741, 744 (7th Cir.1995) (same). Once the franchisee establishes either termination or non-renewal, the franchisor has the burden to show that the termination or non-renewal is based on permissible factors under the PMPA. *Duff,* 51 F.3d at 744.

Id. at 752.

In *Meghani*, Judge Atlas granted a motion to dismiss a complaint for failure to state a claim by which relief can be granted, under Rule 12(b)(6) of the Federal Rules of Civil Procedure,[9] brought by the owners of 21 Shell gas stations against the Shell Oil Company. The franchise relationship between the parties had been controlled by two lessee-dealer agreements which Shell Oil sought to replace. Shell gave lessee-dealers with time remaining under their old agreements the choice of operating under the old agreement until the end of its term or terminate the old agreement and begin operating under the new agreement.

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[9] Federal Rule 12(b)(6) states:
(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

***

(6) failure to state a claim upon which relief can be granted….

The gas station owners in the complaint alleged their franchises had been terminated by Shell:

> These new agreements, Plaintiffs contend, were accompanied by a letter from Shell … that stated that Shell would consider a request to
>
> > terminate the existing agreement by Plaintiff's execution of a mutual termination agreement together with the signing of the newly presented retail sales agreement, lease, ETD or auto care paper as applicable.
>
> Plaintiffs allege that the September 1999 letter advised that if the lessee-dealer did not return the executed documents by October 31, 1999, a "request for renewal" would not be considered. Shell disputes this interpretation of the September 1999 letter, contending that Plaintiffs add an interpretive gloss that simply is not in the correspondence. Furthermore, Plaintiffs contend that Shell stated that it would not, under any circumstances, renew the franchise relationship if Plaintiffs did not execute the new agreements. Shell also disputes this characterization of its September 1999 letter.

Id. at 750 (citations omitted) (footnote omitted). Judge Atlas dismissed the complaint on the basis that the gas station owners had failed to state a claim under which relief could be granted, because Shell had neither terminated nor failed to renew the franchise:

> Plaintiffs allege that Shell stated in the September 1999 letter that it would consider a request by the lessee-dealer to terminate its existing lessee-dealer arrangement if all the documents proffered with the letter were executed by both the lessee-dealer and Shell by a specified deadline. This communication was a proposal and specified a possible future course of action; it was not an actual termination or non-renewal. Plaintiffs nowhere in their Complaint allege that Shell actually terminated these three stations' month-to-month arrangements or the entire franchise relationship.

Id. at 754 (footnote omitted). The same result inures in the instant case.

In the First Amended Complaint, in Count Five entitled, "Breach of Petroleum Marketing Practices Act," Mr. Klassou alleged:

> 148. The Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2801 to 2806) is intended to protect franchised distributors and retailers of gasoline and diesel motor fuel against arbitrarily or discriminatory termination or nonrenewal of franchises and establishes substantive and procedural rules for ending a franchise relationship, including compensating the franchisee defining "franchise" as the contract between (1) a refiner and distributor, (2) refiner and retailer, (3) a distributor and another distributor, or (4) a distributor and a retailer under which a refiner or distributor allows a retailer or distributor to use a trademark owned or

> controlled by the refiner or distributor in connection with the sale, distribution, or consignment of gasoline and requires a supplier to give proper notice, usually 90 days, before taking any such action.
>
> 149. The PMPA authorizes franchisees to sue in federal or state court to enforce the rights it establishes authorizing courts to grant equitable relief and must grant a preliminary injunction if the franchisee shows (1) that his franchise has been terminated or not renewed and that there are "sufficiently serious questions going to the merits" and (2) the court determines that, on balance, that the hardship imposed on the supplier by granting temporary relief is less than that imposed on the franchisee if relief were not granted.
>
> 150. The conduct of the Defendant forced an end to Plaintiffs [sic] use of the franchisor's trademark, purchase of the franchisor's fuel, and occupation of the franchisor's service station terminating Plaintiffs [sic] contract without just or legal cause or proper notice in violation of the PMPA for which Plaintiffs are entitled to compensation including whatever equitable relief is necessary to remedy the effects of Defendants failure to comply with the requirements of the Act, declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief, actual damages, exemplary (punitive) damages under certain circumstances, and reasonable attorney and expert witness fees.
>
> WHEREFORE, Plaintiffs WINTERGREEN MOBIL, INC. and KOSSI KLASSOU demand that the Court determine and adjudicate the rights and liabilities of the parties pursuant to the PMPA, including whatever equitable relief is necessary to remedy the effects of Defendants failure to comply with the requirements of the Act, declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief, actual damages in the principal amount of $300,000 in compensatory damages, or in such amount as may be proved at trial, exemplary (punitive) damages, and reasonable attorney and expert witness fees.

The allegations are merely conclusory, without any articulation of the franchise agreement, the franchise relationship or the bases for the conclusion that Mr. Ejtemai terminated or failed to renew the franchise.

With respect to whether Judge McCally appropriately dismissed Count Five related to the PMPA with prejudice, it is obvious that a dismissal must be with prejudice because the PMPA claim was not filed within the applicable statute of limitations. *See North American Specialty Ins. Co. v. Boston Medical Group,* 170 Md. App. 128, 146 (2006). With reference to the other four counts dismissed with prejudice, Judge McCally remonstrated regarding the fact that the four counts in the First Amended Complaint contained similar, if not identical, allegations as those pleaded in the initial complaint,

which was dismissed without prejudice. Dismissal of the First Amended Complaint with prejudice was within Judge McCally's discretion, and she appropriately dismissed with prejudice the claims that were similar to those recitations in the original complaint, which did not state a claim upon which relief could be granted. *See Beyond Systems, Inc. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 29 (2005).

As a result, we agree with Judge McCally that Mr. Klassou's First Amended Complaint must be dismissed with prejudice.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.