

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KEITH ERVIN, et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 05-184
	:	
FIRST AMERICAN MARKETING CORP., et al.	:	
Defendants.	:	

MEMORANDUM

STENGEL, J.

August 21, 2006

Defendants Margaret Hall and the estate of Henry Hall move this Court for summary judgment arguing the plaintiffs' claims against them fail as a matter of law. The plaintiffs have responded to the motion. For the reasons that follow, I will grant the motion in part and deny it in part.

I. BACKGROUND

As described in the court's March 30, 2006, Memorandum and Order, the following is a background of the case's relevant facts.

On January 15, 2005, Keith Ervin, Kimberly Ervin, James Garcia, Pauline Serfass, and Ronald Bresel ("the former employees") resigned without notice from their positions at First American Marketing Corp. Shortly thereafter the former employees started their own company (United Integrity Group, Inc.) and then filed this suit against, First American Marketing Corp. ("FAMC"), First American Capital Corp. ("FACC"), Margaret Hall, and the estate of Henry Hall ("the Halls"). The former employees demanded unpaid commissions, declaratory relief from contracts entered into by Garcia, Serfass, and Bresel with FAMC, and compensation/dissolution of FAMC and FACC for ultra vires

acts committed by Margaret Hall (the current president of First American who took over following her husband's sudden death in December of 2004).

Ervin v. First Am. Mktg. Corp., No. 05-184, 2006 U.S. Dist. LEXIS 14259, at *1 (E.D. Pa. Mar. 30, 2006).

With discovery completed, the parties' roles in this case have become clear. To begin, Henry Hall was the founder of both FAMC and FACC. Until his death, Henry Hall was the holder of the majority of class B shares of FACC and about 7.7% of FACC's class A shares. (FACC also owned approximately 95% of the shares of FAMC.) At the time of his death in October 2004, his stock interests transferred to his widow, Margaret Hall. During his lifetime, Mr. Hall served as President and Chairman of the Board of both FAMC and FACC.

Margaret Hall has been a member of the Board of Directors of both FAMC and FACC since their inception and she continues to serve in that capacity today. Mrs. Hall had served as Corporate Secretary of FAMC from January 15, 1996 to October, 2004, and she served as the full-time bookkeeper for both corporations since November 1, 1998. In October 2004, after her husband's death, the Board of Directors appointed Mrs. Hall to serve as interim President while the company searched for a new President. Mrs. Hall is now the holder of all of the Class B shares of FACC.

Collectively, the plaintiffs/former employees are shareholders of both FACC and FAMC. According to the complaint, they had, and continue to have, a serious financial and emotional stake in the well being of both companies.

The specific causes of action alleged against the Halls fall into two distinct categories. The first set of claims (Counts I through IV) are common law breach of contract claims seeking unpaid wages and commissions for work allegedly performed by the plaintiffs and on behalf of FAMC or FACC. The second set of claims (Counts VII through IX) are “shareholder dispute” claims which allege that the Halls engaged in ultra vires acts, failed to act in the best interests of the corporate entities, and wasted corporate assets. The Halls moved the court for a grant of summary judgment with respect to all seven claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Liberty Lobby, 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. Id. at 252. If the non-moving party has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the

movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. Breach of Contract Claims

The four breach of contract claims in the plaintiffs' complaint seek relief against all defendants, including the Halls, for unpaid wages and commissions. Specifically, all four of the individual plaintiffs who claim an entitlement to either wages or commissions state that their respective claims for payment are derived "pursuant to [his/her] employment" and as a "portion of [his/her] salary from [FAMC or FACC]." Complaint at ¶¶ 23, 29, 34, and 39. As established through discovery, each of the plaintiffs had a written contract with either FAMC or FACC that set forth the amount of compensation they are/were to receive; the Halls, however, were not parties to those contracts.

Under Pennsylvania law, corporate officers are not personally liable for contracts entered into by the corporate entities unless they specifically agree to do so in their individual capacities, or if the plaintiffs are able to "pierce the corporate veil." See Loeffler v. McShane, 372 Pa. Super. 442, 447-48 (Pa. Super. Ct. 1998).¹ In this case, there has been no evidence presented that the Halls agreed to be personally liable for the compensation that was to be paid by either FAMC or FACC to the plaintiffs.

¹Although the defendants argue Maryland law should control on this issue, their choice of law argument is moot as the result would be the same under either Pennsylvania or Maryland law. See Curtis G. Testerman Co. v. Buck, 340 Md. 569, 577-78 (1995) (finding a corporate officer was not individually bound by an arbitration contract he signed as an agent for the company).

Furthermore, the plaintiffs have not alleged that the court should pierce the corporate veil to hold the Halls personally liable. In failing to produce any evidence that the Halls personally assumed liability for the contracts, plaintiffs have failed to pose a genuine issue of material fact tending to show the Halls could be liable under a breach of contract theory. The Halls motion for summary judgment will therefore be granted with regard to those counts.

B. Shareholder Dispute

Counts VII through IX of the plaintiffs' complaint seek: (1) orders for accounting; (2) copies of corporate books and records; (3) copies of tax returns; (4) copies of 1099s; (5) an injunction against the disbursement or withdrawal of any corporate funds by Mrs. Hall; and (6) damages, attorney's fees and costs against the defendants for ultra vires acts, failing to act in the best interest of the corporation and corporate waste. As established through discovery, the plaintiffs' basis for these claims arose out six distinct actions taken by the Halls. Drawing all factual inferences in favor of the plaintiffs, they are:

1. At the direction of the Halls, FACC took approximately two million dollars from FAMC in order to purchase all the stock of an insurance company named Old Reliance. The plaintiffs aver that since FAMC is not a shareholder of FACC or Old Reliance, and there is evidently no intention to pay the money back, there was no benefit to FAMC or its shareholders.

2. In its 2002 federal tax return, FAMC indicated that it paid \$228,281 to FACC for management fees, even though FACC did not have any employees at that time, or provided any management services.
3. In March, 2005, a shareholder meeting was scheduled in California on very short notice to the plaintiffs. Only two of the company's board members attended the meeting, which lasted less than fifteen minutes, but the companies paid a significant portion of the two members' expenses.
4. Shortly after the California meeting, Mrs. Hall voted to issue five million shares of Class A-1 Preferred stock in FACC to herself for .1 cents a share. Despite any possible conflict of interest in issuing herself additional shares in FACC, Mrs. Hall participated and voted as a Director.
5. Mrs. Hall orchestrated the incorporation of a new entity called Kaehall Senior Service Corporation that sells similar investment products and directly competes with FACC and FAMC, or has taken corporate opportunities away from FAMC.
6. The Halls moved monies between the Companies, as if they had the same shareholders, but they do not. The movement of said monies resulted in the significant devaluation of FAMC.

1. Choice of Law

As a preliminary matter, the parties disagree on the substantive state law to be applied. The Halls argue that Maryland law governs the issues in this summary judgment motion because FAMC and FACC are Maryland Corporations. The plaintiffs contend, however, that Pennsylvania has a superior interest in the outcome of this litigation and that its substantive law controls.

When deciding a conflict of law issue, this court must follow the choice of law rules of its forum state: the Commonwealth of Pennsylvania. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Furthermore, “in Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ” and “if not, no further analysis is necessary.” Highmark, Inc. v. Hosp. Serv. Ass’n of Ne. Pa., 2001 PA Super 278, P13 (Pa. Super. Ct. 2001) (citations omitted).

In this case, the Halls argue that they are precluded from being held liable under Maryland’s Business Judgment Rule. However, because both the Maryland Courts as well as the Pennsylvania Courts do not allow the Business Judgment rule to shield a defendant from self-dealings or actions taken in bad-faith, there is likely no true conflict of law for purposes of this motion. Danielewicz v. Arnold, 769 A.2d 274, 296 (Md. App. 2001) (quoting Wittman v. Crooke, 707 A.2d 422 (Md. App. 1998)); Cuker v. Mikalaukas, 692 A.2d 1042, 1045 (Pa. 1997).

2. Genuine Issues of Material Fact Exist

As required by Pennsylvania law, all corporate officers “shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation” 15

Pa.C.S. § 512 (2005). See also Md. Corp. & Ass’ns § 2-405.1(a) (2006).²

In this case, the plaintiffs have provided some evidence that the Halls’ actions fell far below what was in the best interest of the companies they controlled. The allegedly self-serving issuance of shares to Mrs. Hall, the creation of Kaehall Senior Services Corp., a company designed to directly compete against FACC and FAMC, and the purchase of Old Reliance with FAMC funds provide more than a “mere scintilla” of evidence to allow the claims against the Halls to survive. One logical and easy-to-draw inference from the Halls’ alleged actions is that they were taken in bad-faith to punish, and/or intentionally devalue the plaintiffs’ shares and limit their control of the companies. If proven at trial, these actions may fall outside of the scope of the Business Judgment rule and provide a basis for liability against the Halls. I will therefore deny the Halls’ motion for summary judgment as to these counts.

²The issue of whether plaintiffs’ are able to bring a direct suit, as opposed to a derivative cause of action, for actions taken by the directors and allegedly against the best interests of the corporations was not briefed by the parties. Furthermore, this court is without the necessary facts to raise the issue *sua sponte*.

IV. CONCLUSION

Given that the Halls never specifically agreed to be bound by the contracts at issue in the plaintiffs' breach of contract claims, summary judgment shall be granted as to those counts. However, given the alleged actions taken by the Halls, as fiduciaries, genuine issues of material fact remain as to the shareholder dispute. In particular, it is a question for the jury whether the Halls' alleged actions were taken in bad faith or as impermissible self-dealings. The Halls' motion for summary judgment shall be denied as to the shareholder dispute claims. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KEITH ERVIN, et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 05-184
	:	
FIRST AMERICAN MARKETING	:	
CORP., et al.	:	
Defendants.	:	

ORDER

AND NOW, this 21st day of August, 2006, upon consideration of defendants' Motion for Summary Judgment (Docket # 28), and plaintiffs' response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part. The Motion is granted as to plaintiffs' Counts I through IV against Margaret Hall and the Estate of Henry Hall, and denied as to plaintiffs' Counts VII through IX.

BY THE COURT:

s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.