

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

GENERAL ELECTRIC CAPITAL CORPORATION,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
ALLECO INC., MORTON M. LAPIDES, SR., HARRY A. WADSWORTH, CHARLES W. LOCKYER, JR., VR HOLDINGS, INC., formerly known as MML, INC., and JOHN DOES 1-20, ABC CORPORATIONS 1-20, and XYZ CORPORATIONS 1-20,	:	
	:	
Defendants.	:	NO. 00-5226

Reed, S.J.

January 17, 2002

M E M O R A N D U M

This action arises out of a dispute over the monthly interest payments on funds that served as collateral for surety bonds that were issued to cover workers compensation claims. Plaintiff General Electric Capital Corporation (“GECC”) has brought suit against the following defendants: Alleco Inc. (“Alleco”); VR Holdings, Inc., formerly known as MML, Inc., which owns 100% of the issued and outstanding stock of Alleco; Morton M. Lapidés Sr. (“Lapidés”), a director and officer of Alleco and sole shareholder of MML, Inc.; and two other officers of Alleco. Plaintiff has brought a motion for partial summary judgment against Alleco and Lapidés on the following causes of action: conversion, breach of fiduciary duty, breach of contract and unjust enrichment. For the reasons set forth below, plaintiff’s motion for partial summary judgment will be denied.

I. Background

From 1984, the Insurance Company of North America (“CIGNA”) issued workers’ compensation surety bonds for Alleco and its subsidiaries, including Service America Corporation (“SAC”). To secure the surety bonds, CIGNA required a letter of credit as collateral. On June 30, 1986, Barclays Bank of New York, N.A. (“Barclays”) issued a letter of credit in the amount of \$2,962,500 (“Letter of Credit”). In April 1987, CIGNA drew upon the Letter of Credit, and deposited the full amount (“the Funds”) in an interest-bearing bank account with PNC Bank, N.A., account number 35-35-008-1023098, in Philadelphia, Pennsylvania (the “Account”). The interest on the Funds was paid on a monthly basis to Alleco. In 1987, SAC split off from Alleco; until 1992, 76% of the interest payments from the Funds were allocated to SAC.

On June 1, 1992, Alleco filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Maryland (“the Bankruptcy Court”), and SAC filed a claim against Alleco’s estate in the bankruptcy proceedings. To settle the claim, Alleco and SAC entered into a settlement agreement on October 19, 1992 (the “Settlement Agreement”) (amended July 30, 1993). Section 3 (a) of the Settlement Agreement states in pertinent part:

Alleco will arrange for the purchase of, as soon as possible after the Effective Date of the [Reorganization] Plan, an insurance policy to provide for insurance coverage for all existing workers’ compensation claims currently administered by Alexis, Inc., attached hereto as Exhibit A. Thereafter, Alleco will use its best efforts, including the initiation of proceedings in the Court, to secure the return of the cash being held by CIGNA Insurance Companies (estimated to be \$2,962,500.00) to secure the payment of such workers’ compensation liabilities. To the extent that Alleco secures the recovery of any funds from CIGNA (net of the cost of the insurance policy to be purchased simultaneously with the release of the cash by CIGNA), Alleco shall pay to SAC eighty percent (80%) of the net recovery within thirty (30) days after receipt by Alleco. SAC and its counsel shall be permitted to participate with Alleco in seeking and securing any recovery from CIGNA.

(Pl. Mot., Exh. A to Exh. L at ¶ 3(a).)

This settlement arrangement was incorporated into Alleco's reorganization plan, dated January 29, 1993, modified on March 29, 1993 ("Reorganization Plan"). Section 4.3.a.(1) of the Reorganization Plan states:

The Debtor will use its best efforts to purchase, as soon as possible, after the Effective Date, an insurance policy to provide for insurance coverage for all existing workers' compensation claims then outstanding. Thereafter, the Debtor will utilize its best efforts including the initiation of proceedings in the Bankruptcy Court, to secure the return of the cash being held by [CIGNA] to secure the repayment of such workers compensation liability. To the extent that the Debtor secures the recovery of any funds from [CIGNA], the Debtor shall pay to Service America 80% of the net recovery within thirty (30) days after receipt by the Debtor, with the remaining 20% being included in Exhibit A. Service America and its counsel shall be permitted to participate with the Debtor in seeking and securing the recovery from [CIGNA].

(Pl. Mot., Exh. M at ¶ 4.3.a(a).)

On August 18, 1993 the Bankruptcy Court approved the Settlement Agreement. From that date until June 1999 when CIGNA ceased payment to Alleco, Alleco continued to receive monthly interest payments on the Funds but did not allocate any of the interest payments to SAC. These interest payments amount to \$718,424.54.

In the spring of 1999, SAC began proceedings to recover the Funds from CIGNA. The recovery process was confirmed by a letter sent on April 6, 1999, from counsel for SAC to counsel for CIGNA, that was countersigned by counsel for Alleco (the "Letter Agreement"). The Letter Agreement stated in pertinent part:

. . . SAC and the Liquidation Committee ("the Committee") wish to memorialize in this letter agreement the manner in which CIGNA will release certain funds it holds as security for certain workers compensation bonds it issued as surety for the Debtor, Alleco, Inc. ("the Bonds") . . . CIGNA disclosed that it currently holds the principal sum of \$2,529,136.39 as security for the Bonds in an interest-bearing account at PNC

Bank in Philadelphia (the “Funds”). According to CIGNA’s initial calculation, its maximum remaining exposure as surety derives from eight outstanding Bonds (the “Open Bonds”). . . . Subject to CIGNA’s final calculation of its exposure on the Open Bonds, CIGNA will release the difference between the Funds and the amount of its maximum remaining exposure on the Open Bonds (the “Initial Payment”). . . . After the Initial Payment is made, SAC and the Committee will take all steps necessary to determine the total liability, if any, remaining with respect to the workers’ compensation claims that are covered by the Open Bonds. . . . When and as SAC and the Committee demonstrate to CIGNA’s reasonable satisfaction that CIGNA’s exposure under a particular Open Bond has been eliminated or reduced (a “Resolved Bond”), CIGNA will release a pro rata share of the remaining Funds it holds that correlates to its reduced exposure on a Resolved Bond (a “Subsequent Payment”).

(Pl. Mot., Exh. N at 1.)

In December 1999, the Bankruptcy Court, upon the joint motion of SAC and the Liquidation Committee of Alleco (“the Committee”), issued an order directing CIGNA to pay the \$2,529,136.39 held in the Account, “plus certain accrued interest,” in a manner similar to the allocation formula set forth in the Letter Agreement (the “Bankruptcy Order”). The Bankruptcy Order further directed CIGNA to pay to SAC and the Committee on a quarterly basis the interest that would continue to accrue in the Account from the date of the Bankruptcy Order onwards. It was noted in the Bankruptcy Order that sufficient notice of the motion had been given, and the Bankruptcy Court had received no objections from the parties.

In October 2000, GECC, SAC’s successor-in-interest, instituted the instant action, seeking recovery of the interest on the Funds paid to Alleco from August 1993 to June 1999. Plaintiff has brought the instant motion for partial summary judgment against Alleco and Lapides, Alleco’s director and officer, on the counts of conversion, unjust enrichment, breach of fiduciary duty and breach of contract.

II. Legal Standard

Federal Rule of Civil Procedure 56 (c) states that summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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.” For a dispute to be “genuine,” the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. See Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. Analysis¹

A. Issue Preclusion

Plaintiff contends that because the Bankruptcy Court ordered CIGNA to pay to SAC and the Committee both the principal in the Account as well as the accrued interest, defendants were

¹ Based upon the allegations of the complaint and according to the plaintiff’s motion, there are at least three states whose laws may govern the substantive issues here: (1) Pennsylvania, the state in which the Account is kept (Complaint, Exh. A); (2) Connecticut, the principal place of business of plaintiff and SAC (Complaint at ¶ 2, Pl. Mot. at 26); and (3) Maryland, the residence of business of defendants and the location of relevant bankruptcy proceedings (Id. at ¶¶ 3-7, 22). Although no determination has been made with regard to which state’s law will govern, plaintiff contends, and defendant does not dispute, that the laws of the other states are substantially similar to Pennsylvania law in all relevant aspects. “Where the different laws do not produce different results, courts presume that the law of the forum state shall apply.” Financial Software Systems, Inc. v. First Union Nat’l Bank, Civ. No. 99-623, 1999 WL 1241088, at *3 (E.D. Pa. 1999) (citing McFadden v. Burton, 645 F. Supp. 457, 461 (E.D. Pa. 1986)); Denenberg v. American Family Corp., 566 F. Supp. 1242, 1251 (E.D. Pa. 1983), superseded on other grounds as explained in Miniscalco v. Gordon, 916 F. Supp. 478, 481 (E.D. Pa. 1996). Accordingly, I will analyze the claims pursuant to Pennsylvania law.

precluded from arguing that they were entitled to the interest payments. Issue preclusion “precludes the relitigation of an issue that has been put in issue and directly determined adversely to the party against whom the estoppel is asserted.” Melikian v. Corradetti, 791 F.2d 274, 277 (3d Cir. 1986). The doctrine may be explained as follows:

The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

Burlington N. R.R. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1232 (3d Cir. 1995)

(quoting Southern P. R.R. Co. v. United States, 168 U.S. 1, 48-49, 18 S. Ct. 18, 27, 42 L. Ed. 355 (1897) (Harlan, J.)). The following elements must be satisfied for issue preclusion to apply: “(1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment.” Burlington N. R.R. Co., 63 F.3d at 1231-32 (citations omitted).

The Bankruptcy Order specifically directs CIGNA to deliver to SAC and the Committee the Funds in the Account, “plus certain accrued interest . . . which CIGNA is holding and will continue to hold . . .” (Pl. Mot., Exh. O at ¶ 1) (emphasis added.) The Bankruptcy Order thus does not deal with any interest payments already delivered to Alleco and not held in the Account. Indeed, there was no need for the Bankruptcy Court to reach the merits of the instant issue, in light of SAC and the Committee’s request in their joint motion filed on October 1, 1999 (the “Joint Motion”). (Pl. Mot., Exh. U.) With regard to the interest on the Funds, SAC and the

Committee had requested the disbursement only of the interest accrued on the Funds “that [was] on deposit in the bank as of the date of the [Bankruptcy] Court’s Order . . . ,” as well as the monthly interest accrued on the Funds after the date of the Bankruptcy Order. (Pl. Mot., Exh. U at ¶ 43(b) and (c).) Consequently, the Bankruptcy Order does not indicate that the Bankruptcy Court had made any judicial determination as to the rightful recipient of the interest on the Funds previously disbursed to Alleco prior to the date of the Bankruptcy Order.

Moreover, the issue of who, under the Settlement Agreement and the Reorganization Plan, was entitled to the interest on the Funds prior to the issuance of the Bankruptcy Order, was not directly set forth before the Bankruptcy Court. The purpose of the Bankruptcy Order, as represented in the Joint Motion, was to resolve CIGNA’s concerns about the possible claims to the Funds that could be brought by Barclays Bank of New York, N.A. or the Bank of New York, N.A., as the issuer and holder of the Letter of Credit, respectively. (*Id.* at ¶¶ 3, 28-37.) The Joint Motion did not raise the dispute regarding the previous disposition to Alleco of the interest on the Funds; SAC and the Committee specifically, if inaccurately, affirmed that “Alleco acknowledged that the Funds, including interest, belong solely to SAC and the Committee.” (*Id.* at ¶ 31.)² Accordingly, even if the Bankruptcy Order may be construed as having adopted the GECC’s interpretation of the disbursement clause in the Settlement Agreement and Reorganization Plan, the order to disburse the interest was collateral to the ultimate purpose of the Bankruptcy Order, which was to enable CIGNA to disburse the Funds.

² The Court notes that the complaint alleges that SAC learned in March 1999 of Alleco’s receipt of the interest during the relevant time period. (Pl Mot., Exh. A, Compl. at ¶ 32.) Thus, SAC should not have been under any misconception that the accrued interest on the Funds over the time period in question had remained in the Account when the Joint Motion was filed.

In conclusion, plaintiff has not shown that the Bankruptcy Order determined the issue of whether Alleco had no right to the interest on the Funds prior to the date of the Bankruptcy Order, nor can plaintiff show that this issue was essential to the prior adjudication as required by law. Consequently, issue preclusion does not apply to the instant action, and defendants are not precluded from arguing that they were entitled to the interest payments prior to the date of the Bankruptcy Order.

B. Settlement Agreement and Reorganization Plan

Plaintiff further contends that even in the absence of issue preclusion, GECC is entitled as a matter of law to the interest on the Funds paid to Alleco between 1993 and 1999. Plaintiff argues that under the language of the Settlement Agreement and Reorganization Plan, Alleco was obligated to disburse 80% of any money it received from the Account to SAC.

It is a “firmly settled” point of Pennsylvania law that “the intent of the parties to a written contract is contained in the writing itself.” Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 92 (3d Cir. 2001) (citing Krizovensky v. Krizovensky, 425 Pa. Super. 204, 624 A.2d 638, 642 (Pa. Super. Ct. 1993)). When the language of a contract is clear and unequivocal, courts interpret its meaning by its content alone. Bohler-Uddeholm, 247 F.3d at 92-93. When the contract’s terms are unclear, however, a court may look outside the four corners of the contract. Id. at 92. “[A contract] will be found ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning.” Id. (quoting Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995)). “To determine whether ambiguity exists in a contract, the court may consider ‘the words of the

contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.” Bohler-Uddeholm, 247 F.3d at 92 (quoting Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980)).

The language used in both the Settlement Agreement and the Reorganization Plan is almost identical. The Settlement Agreement states, in pertinent part, that

Alleco will use its best efforts, including the initiation of proceedings in the Court, to secure the return of the cash being held by CIGNA Insurance Companies (estimated to be \$2,962,500.00) to secure the payment of such workers’ compensation liabilities. To the extent that Alleco secures the recovery of any funds from CIGNA (net of the cost of the insurance policy to be purchased simultaneously with the release of the cash by CIGNA), Alleco shall pay to SAC eighty percent (80%) of the net recovery within thirty (30) days after receipt by Alleco.

(Pl. Mot., Exh. A to Exh. L at ¶ 3(a).) Similarly, the Reorganization Plan states, in pertinent part:

[Alleco] will utilize its best efforts including the initiation of proceedings in the Bankruptcy Court, to secure the return of the cash being held by [CIGNA] to secure the repayment of such workers compensation liability. To the extent that [Alleco] secures the recovery of any funds from [CIGNA], [Alleco] shall pay to Service America 80% of the net recovery within thirty (30) days after receipt by [Alleco], with the remaining 20% being included in Exhibit A.

(Pl. Mot., Exh. M at ¶ 4.3.a(1).)

The key to the issue at hand lies in the interpretation of “any funds” as used in the Settlement Agreement and Reorganization Plan above. Plaintiff argues that the term “any funds” encompasses any money received from CIGNA, and thereby includes both the principal and the interest held in the Account. Defendant argues that the term “any funds” refers only to the funds from the “cash being held” as collateral by CIGNA. The interest accrued on the Funds was not cash “held” as collateral; thus, defendant argues, the disbursement of the interest was not

contemplated within the context of the agreement. Both parties acknowledge that neither the Settlement Agreement nor the Reorganization Plan expressly state who was entitled to receive the interest that accrued on the Funds. I find that the language in the Settlement Agreement and Reorganization Plan is reasonably and fairly susceptible of the constructions propounded by both parties. Consequently, I conclude that the Settlement Agreement and the Reorganization Plan are ambiguous as a matter of law on the issue of who was to receive the interest accrued on the Funds. It will be for a jury to determine what the parties had intended on this point.

Finally, plaintiff further argues that because SAC was entitled to 80% of the principal in the Account under the Settlement Agreement and Reorganization Plan, SAC should be entitled to 80% of the interest accrued on the Funds as a matter of law. Nevertheless, the language of the Settlement Agreement and Reorganization Plan does not support plaintiff's claim of ownership of the Funds. As stated above, "to the extent Alleco secure[d] the recovery of any funds from CIGNA," it was to pay 80% of the net recovery to SAC; however, ownership over the Funds was never conveyed directly to SAC in the Settlement Agreement. Not until the issuance of the Bankruptcy Order was SAC entitled to receive the Funds directly from CIGNA. Thus, the fact that Alleco was to disburse the Funds to SAC alone is not sufficient to resolve the issue.

IV. Conclusion

In conclusion, because there is at least a genuine issue of material fact regarding which party under the Settlement Agreement and Reorganization Plan was to receive the interest accrued on the Funds, plaintiff's motion for partial summary judgment on the claims of

conversion, unjust enrichment, breach of fiduciary duty and breach of contract will be denied.³

An appropriate Order follows.

³ Because I conclude that there is a genuine issue of material fact regarding the proper recipient of the interest accrued on the Funds, I will not reach defendant's arguments regarding the statute of limitations defense. I note, however, that defendant improperly requested that the complaint be dismissed as time-barred in its response to plaintiff's motion for summary judgment. Such requests must be (with leave of Court at this juncture) brought by way of motion rather than by response in opposition to the other party's motion.

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GENERAL ELECTRIC CAPITAL CORPORATION	:	CIVIL ACTION
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Plaintiff,	:	
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ALLECO INC., MORTON M. LAPIDES, SR., HARRY A. WADSWORTH, CHARLES W. LOCKYER, JR., VR HOLDINGS, INC., formerly known as MML, INC., and JOHN DOES 1-20, ABC CORPORATIONS 1-20 and XYZ CORPORATIONS 1-20,	:	
	:	
Defendants.	:	NO. 00-5226

ORDER

AND NOW, this 17th day of January, 2002, upon consideration of the plaintiff's motion for partial summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure (Doc. No. 42), the defendant's response (Doc. No. 45), and the reply thereto (Doc. No. 47), and the pleadings, depositions, answers to interrogatories, admissions on file and affidavits of record, and having concluded that there is at least a genuine issue of material fact for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion of plaintiff for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that no later than February 20, 2002, the parties shall provide the Court in Chambers with a joint letter report on the possibility of settlement.

LOWELL A. REED, JR., S.J.