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

CARY W. TONER	:	CIVIL ACTION
	:	
v.	:	
	:	
TESSA R. MILLER, et al.	:	NO. 03-3498

MEMORANDUM

Padova, J. **February 4, 2004**

Plaintiff Cary W. Toner brought this diversity action against Defendants Tessa R. Miller and William M. Kettler for damages resulting from Defendants' alleged breach of a contract between the parties. Defendants have filed an Amended Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and the matter has been fully briefed by the parties. For the reasons that follow, the Court denies Defendants' Amended Motion for Summary Judgment in its entirety.

I. BACKGROUND

The following facts are essentially undisputed. Plaintiff is the former President, Chief Executive Officer and sole shareholder of a Pennsylvania corporation known as the Toner Organization. (Toner Dep., Def. Ex. A at 27-28.) Although the Toner Organization operated primarily as an insurance agency, the company also provided loans to start-up businesses to fund their initial operating costs. (Id. at 50-51.) In early 1999, Jack Kettler, who was then serving as the President of the Toner Organization, advised Plaintiff that his son, Defendant William Kettler, wanted to form a title insurance company in Ohio, but lacked the necessary start-up capital. (Id. at 37-38, 42-43.) Jack Kettler asked Plaintiff to consider loaning his son the start-up capital for this new venture. (Id.) Plaintiff agreed to meet with Defendant Kettler and his business partner, Defendant Tessa Miller, to discuss the matter. (Id. at 50.)

During this initial meeting in June 1999, Defendants presented Plaintiff with a business plan for their new company, Expedient. (Business Plan, Def. Ex. A-1.) The business plan sought $145,000 in start-up capital, which Defendants promised to repay “by the end of fiscal year 2001,” and forecast “net profits of over $750,000 by the end of fiscal year 2002 from an investment of under $150,000.” (Id.) The business plan also offered an equity stake in Expedient to whomever would agree to provide the start-up capital. (Id.)

On behalf of the Toner Organization, Plaintiff agreed to loan all of the start-up capital needed to fund Expedient’s initial operations. (Toner Dep., Def. Ex. A at 73.) Plaintiff declined, however, to take an equity position in Expedient. (Id. at 103-104.) Instead, Plaintiff asked for an interest in Expedient’s profits, if any, as well as sufficient management rights to be able to monitor and protect his investment. (Id.)

The parties then drafted a Management Contract to formalize their agreement. (Id. at 77.) Defendant Kettler’s father, Jack Kettler, drafted the Management Contract. (Id.) The Management Contract provides, in its entirety, as follows:

Management Contract

This contract, made this 7th day of October, 1999, between Tessa R. Miller and William M. Kettler (principals) and Cary Toner (manager), defines the certain terms the above parties agree to adhere to with regard to the operation of Expedient Title, LLC (company):

1. This contract will be in effect until one of the following occurs:
    - manager terminates said contract.
    - principals pay manager $1,000,000.00 to terminate said contract.
    - ten years elapse, terminating said contract.
2. Manager will have the authority to override any operating decisions made by principals.
3. Manager will make final decisions on salary and staffing level increases based on proposals presented by principals.
4. Initial investment made by manager will be paid back at an annual percentage rate of 15%.
5. Manager will have the right to 40% of net profit until the initial investment is repaid at which time the manager's right to profit will drop to 30%.
6. Net profit distribution to principals will not occur until the initial investment is repaid except for funds necessary to pay tax liability incurred as a result of LLC tax laws.

(Management Contract, Def. Ex. B.) After the Management Contract was signed by the parties, the document was modified by Plaintiff's accountant, Michael Stewart, who inserted a handwritten amendment noting that Plaintiff had signed the Management Contract "for Toner Organization." (Toner Dep., Def. Ex. A at 110-11).

From September 1999 through March 2000, the Toner Organization loaned Defendants approximately $79,126.55 in start-up capital, pursuant to a series of funding requests that Defendants submitted to Steven Rickel, Chief Financial Officer of the Toner Organization. (See Pl. Ex. 1-3.) Although the initial checks issued by the Toner Organization were made payable to Defendants personally, Defendants subsequently requested that the Toner Organization make checks payable to Expedient. (See Pl. Ex. 2; Toner Dep., Def. Ex. A at 148.) Defendants, who are the sole members and owners of Expedient and control all of its day-to-day operations, used this money to pay their own salaries, for office furniture and supplies, and for other related expenses. (See Pl. Ex. 3.) While monthly status reports and projections were transmitted to the Toner Organization by Expedient for some period of time following the signing of the Management Contract, Plaintiff never reviewed the personal financial information of either Defendant. (Toner Dep., Ex. A at 94-95.)

On April 17, 2001, Defendants began repaying the initial loan by making out a $5,000 check payable to the Toner Organization. (See Pl. Ex. 4.) On May 17, 2001 and June 6, 2001, Defendants submitted loan repayment checks, made payable to the Toner Organization, in the respective amounts of $2,500 and $10,000. (Id.) On June 27, 2001, the Toner Organization sold most of its assets to BISYS Insurance Services, Inc. ("BISYS") pursuant to a

Stock Purchase Agreement between BISYS, the Toner Organization, and Plaintiff. (See Stock Purchase Agreement, Pl. Ex. 6.) Pursuant to Section 4.14(a) of the Stock Purchase Agreement, Plaintiff personally purchased the Toner Organization's rights under the Management Contract from the Toner Organization for $79,126.55. (See id.) Defendants thereafter made their loan repayment checks payable to Plaintiff, rather than the Toner Organization. (See Pl. Ex. 4.)

By March 2002, Defendants had fully satisfied their obligation under the Management Contract to pay off the initial loan amount, thus reducing Plaintiff's profit interest to 30 percent. (See Pl. Ex. 7.) On August 27, 2002, Defendants issued a check to Plaintiff in the amount of $40,589.20, representing his 40 percent share of Expedient's profits for 2001. (Pl. Ex. 8.) All of the loan repayment and profit-share checks written to the Toner Organization and Toner during this period were signed by either Defendant Kettler or Defendant Miller or both, and paid out of Expedient's accounts. (See Pl. Ex. 3.) Plaintiff made no complaints with respect to the payments by Defendants being drawn from Expedient's accounts. (Toner Dep., Def. Ex. A. at 148-49.)

By August 2002, Defendants had become interested in buying out Plaintiff's profit interest and management rights in Expedient under the Management Contract. (See Pl. Ex. 8.) On or about February 4, 2003, Plaintiff and Expedient executed a

Confidentiality Agreement, which was signed by Plaintiff and, on behalf of Expedient, by Defendants. (See Confidentiality Agreement, Def. Ex. A-2.) The Confidentiality Agreement facilitated the exchange between Plaintiff and Expedient of "certain confidential knowledge and information about Expedient" so that the parties could "examine the feasibility of the termination of the document entitled 'Management Contract' dated October 7, 1999 . . . ." (Id.)

The financial data that Expedient subsequently disclosed to Plaintiff pursuant to the Confidentiality Agreement raised concerns to him about how Defendants had been running Expedient, and whether they had satisfied their obligations to pay a percentage of the company's profits to him. Plaintiff's accountant, Mr. Stewart, sent a spreadsheet of allegedly questionable "business" expenses totaling $15,360.41 to Defendants' accountant, Brian Long, for explanation. (See Pl. Ex. 9; Long Dep., Pl. Ex. 10 at 105-06.) Mr. Long shared the spreadsheet with Defendant Kettler, who denied that any of these expenses were for his or Defendant Miller's personal use. (See Long Dep., Pl. Ex. 10 at 105-06.)

On June 5, 2003, Plaintiff filed the instant action against Defendants, alleging four claims for relief. In Count One, Plaintiff alleges that Defendants breached the Management Contract by refusing to obtain or solicit Plaintiff's managerial advice on operating decisions or to permit Plaintiff to become involved in the management of Expedient whatsoever; by unilaterally increasing their salaries and the staffing levels of Expedient; and by failing to pay Plaintiff the full net profits from Expedient’s operations due under the Management Contract. In Count Two, Plaintiff alleges that Defendants have been unjustly enriched by retaining the benefit of 100 percent of Expedient’s net profits and using Expedient’s company funds owed to Plaintiff to satisfy their personal expenses. In Count Three, Plaintiff asserts that he is entitled to an accounting to determine the exact amount of monies representing the profits or other benefits derived or received by Defendants as a result of unjust enrichment and/or Defendants’ unlawful acts and conduct. In Count Four, Plaintiff asserts that he is entitled to the imposition of a constructive trust on such sums as are currently due to him.

II. LEGAL 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. When considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party and must resolve all doubts in favor of the non-moving party. S.E.C. v. Hughes Capital Corp., 124 F.3d 449, 452 (3d Cir. 1997).

A party seeking summary judgment always bears the initial responsibility for informing the district 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. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v.

Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)).

III. DISCUSSION

Defendants argue that this Court should enter summary judgment in their favor because, as a matter of law, they have no personal obligation to make payments to Plaintiff under the Management Contract.[1] Defendants further argue that they are entitled to judgment as a matter of law because Plaintiff is estopped from asserting claims against them under the Management Contract. Defendants finally contend that this Court should dismiss this action pursuant to Federal Rule of Civil Procedure 19, as Plaintiff has failed to join a necessary and indispensable party.

A. Defendants' Personal Liability Under Management Contract

Defendants first argue that they have no personal obligation to make payments to Plaintiff under the plain language of the Management Contract. Specifically, Defendants maintain that the

[1] The parties appear to agree that Pennsylvania law governs this diversity action for breach of contract. As neither party has raised an objection, the Court finds that Pennsylvania law controls the instant action. See Barrett v. Catacombs Press, 64 F. Supp. 2d 440, 443 (E.D. Pa. 1999)(applying law cited by parties where neither party objected).

Management Contract grants the Toner Organization a right to a certain percentage of Expedient's net profits, and not an allocation of Defendants' personal funds. Defendants stress the language in the Management Contract which states that "[t]his contract . . . defines the certain terms the above parties agree to adhere to *with regard to the operation of Expedient Title, LLC*" (emphasis added). Defendants also emphasize that the Management Contract provides only that the "manager" was to have the right to a certain percentage of *Expedient's* profits; it does not provide for any payments to Plaintiff or to the Toner Organization by Defendants' *own personal funds*, nor does it indicate that Defendants have any obligation to garner funds from sources other than Expedient.

In essence, Defendants' argument is grounded on the well-established tenet that "an individual acting as an agent for a disclosed [principal] is not personally liable on a contract between the [principal] and a third party unless the agent specifically agrees to assume liability." In re Estate of Duran, 692 A.2d 176, 179 (Pa. Super. Ct. 1997)(citation omitted). Even if Defendants did, in fact, act as Expedient's agents in connection with the Management Contract, "a person who is contracting as an agent may be found to be personally liable where he or she either executes a contact in his or her name or voluntarily incurs a personal liability." Id. Viewing the evidence in the light most favorable to Plaintiff, the Court cannot conclude, as a matter of law, that Defendants are shielded from personal liability on the Management Contract under principles of agency. Indeed, the plain language of the Management Contract identifies Defendants as "principals," rather than as "agents," and further identifies Expedient as "company," rather than as "principal." See Kiska v. Rosen, 124 A.2d 468, 509 (Pa. Super. Ct. 1956)("A person known to be acting as an agent in signing a contract may still incur personal liability if in signing the contract he purports to act as a principal."). Furthermore, whereas Plaintiff's status as an agent for the Toner Organization was clarified by the handwritten modification stating "on behalf of Toner Organization,"[2] no such language was utilized to convey a similar relationship between Defendants and Expedient. Accordingly, the Court denies Defendants' Motion for Summary Judgment on this ground.

B. Equitable Estoppel

Defendants next argue that Plaintiff is estopped from asserting that Defendants are personally liable under the Management Contract. Under Pennsylvania law, the doctrine of

[2] Notably, Defendants ratified this modification to the Management Contract by, *inter alia*, making the initial repayment checks payable to the Toner Organization, prior to Plaintiff's acquisition of the Toner Organization's rights under the Management Contract in June 2001. See, e.g., Crown, Cork & Seal Co. v. Employers Ins. of Wausau, Civ. A. No. 99-4904, 2001 WL 9860, at *4 (E.D. Pa. Jan. 4, 2001)(noting that under Pennsylvania law "[a] written contract can be modified by subsequent agreement through words or conduct of the parties").

equitable estoppel "arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." Liberty Property Trust v. Day-Timers, Inc., 815 A.2d 1045, 1050 (Pa. Super. Ct. 2003)(citation omitted). The essential elements of equitable estoppel are (1) an inducement; (2) justifiable reliance on that inducement; and (3) prejudice to the one who relies. Chemical Bank v. Dippolito, 897 F. Supp. 221, 224 (E.D. Pa. 1995)(citing Zivari v. Willis, 611 A.2d 293, 295 (Pa. Super. Ct. 1992)). "The burden rests on the party asserting the estoppel to establish such estoppel by clear, precise and unequivocal evidence." Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502, 504 (Pa. 1983)(citation omitted). Whether an estoppel results from established facts is ordinarily a question of law. Starr v. O-I Brockway Glass, Inc., 637 A.2d 1371, 1374 (Pa. Super. Ct. 1994). However, "if credibility is involved or if more than one inference may be reasonably drawn, the question is for the jury." Hertz Corp. v. Hardy, 178 A.2d 833, 836 (Pa. Super. Ct. 1962)(citation omitted).

Defendants argue that the doctrine of equitable estoppel applies in this case because Plaintiff has behaved in a manner designed to cause Defendants to believe that they would not be personally liable for any payments to be made to Plaintiff. Specifically, Defendants note that Plaintiff asked only to review the financial documents pertaining to Expedient and not to Defendants, historically accepted payments from Expedient without complaint or objection, and signed the Confidentiality Agreement with Expedient, not Defendants, in contemplation of a negotiation to terminate the Management Contract. In response, Plaintiff fairly argues that he had no need to review Defendants' financial information since the payment due to him under the Management Contract were directly related to Expedient's performance. Plaintiff also maintains that his voluntary receipt of Expedient checks merely constituted his acceptance of Defendants' performance under the Management Contract. Plaintiff further asserts that he entered the Confidentiality Agreement with Expedient, as opposed to Defendants, to facilitate the production of financial information from Expedient that was relevant to the buy-out negotiations between Plaintiff and Defendants.

Viewing the facts alleged by Defendants in support of equitable estoppel in the light most favorable to Plaintiff, Defendants have failed to establish such estoppel by clear, precise and unequivocal evidence. In particular, Defendants have not identified any evidence that they detrimentally changed their positions in reliance on Plaintiff's representations. See Wilson

v. Southeastern Pennsylvania Transp. Auth., 709 F. Supp. 623, 629-30 (E.D. Pa. 1989)(noting that equitable estoppel claim under Pennsylvania law requires showing of detrimental change of position). Accordingly, the Court denies Defendants' Motion for Summary Judgment on this ground.

C. Failure to Join Necessary and Indispensable Party

Defendants' third argument is that this Court should dismiss the instant action because Plaintiff has failed to join Expedient, a necessary and indispensable party to this action. Federal Rule of Civil Procedure 19 provides, in pertinent part:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claim interest.

Fed. R. Civ. P. 19(a). When determining whether a party should be joined pursuant to Rule 19(a), the Court first examines "whether complete relief can be accorded to the parties to the action in the absence of the unjoined party." Drysdale v. Woerth, Civ. A. No. 98-3090, 1998 WL 966020, at *3 (E.D. Pa. Nov. 18, 1998). The purpose of Rule 19(a)(1) is "to avoid partial or hollow relief" because "the interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." Id. (citing Fed. R. Civ. P. 19 Advisory Committee's Notes). The moving party has the burden of showing why an absent party should be joined pursuant to Rule 19. Raytheon Co. v. Continental Cas. Co., 123 F. Supp. 2d 22, 33 (D. Mass. 2000).

Defendants note that Plaintiff's Complaint seeks, *inter alia*, an accounting and the imposition of a constructive trust upon all of the profits realized by Expedient from 2001 to date. Defendants maintain that these prayers for relief relate directly to Expedient and its operations. As such, Defendants assert that Expedient has an interest in this action and that complete relief cannot be accorded without joinder of Expedient as a party to this action.

As this Court stated in its September 8, 2003 Order-Memorandum denying Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7), "Plaintiff's lawsuit is predicated on the [Management Contract], to which Expedient is not a party. Complete relief can be accorded to Plaintiff by the named Defendants, who alone executed the [Management Contract] with Plaintiff." Toner v. Miller, Civ. A. No. 03-3498, 2003 WL 22358446, at *3 (E.D. Pa. Sept. 8, 2003). Moreover, Expedient's absence from this action will not impair or impede its ability to protect its interests, as

Plaintiff has clarified that he is only seeking relief from Defendants in their personal capacities. See (Pl. Mem. Opp. Summ. J. at 25-26). Accordingly, the Court declines to dismiss the instant action pursuant to Rule 19.

IV. Conclusion

For the foregoing reasons, Defendants' Amended Motion for Summary Judgment, and motion to dismiss pursuant to Rule 19, is denied in its entirety. An appropriate Order follows.

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ORDER

AND NOW, this 4th day of February, 2004, upon consideration of Defendants' Amended Motion for Summary Judgment (Docket No. 26),[1] Plaintiff's response thereto (Docket No. 34), and all related submissions, **IT IS HEREBY ORDERED** that Defendants' Motion is **DENIED** in its entirety.

BY THE COURT:

____
John R. Padova, J.

[1] Defendants' Amended Motion for Summary Judgment also includes a motion to dismiss pursuant to Federal Rule of Civil Procedure 19. The Court makes clear that its ruling on the instant Motion encompasses Defendants' Rule 19 motion.