

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

BROCK & COMPANY, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-cv-2096
KINGS ROW ASSOCIATES and	:	
APARTMENT INVESTMENT &	:	
MANAGEMENT COMPANY (AIMCO)	:	

MEMORANDUM

Baylson, J.

November 17, 2004

I. Introduction

Presently before this Court are Motions to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by Defendants Kings Row Associates (“Kings Row”) and Apartment Investment & Management Company (AIMCO). For the reasons set forth below, the Motions to Dismiss will be denied in part and granted in part.

II. Background

A. Procedural Background

On May 14, 2004, Brock & Company, Inc. (“Plaintiff” or “Brock”) filed a four-count complaint asserting causes of action for breach of contract against Defendant Kings Row and promissory estoppel, civil conspiracy, and constructive trust against both Kings Row and AIMCO. On September 13, 2004, AIMCO filed a Motion to Dismiss. Plaintiff filed a Response on October 4, 2004. On September 30, 2004, Kings Row filed a Motion to Dismiss Counts II, III, and IV of the Complaint. Plaintiff filed a Response on October 15, 2004. Plaintiff seeks damages as well as declaratory relief. Count IV also requests that both Defendants be converted

into trustees of a constructive trust of monies to be paid to Plaintiff.

B. Allegations of the Parties

1. Brock & Co.

At the heart of this dispute is an agreement between Plaintiff and Defendant Kings Row under which Plaintiff agreed to manage and operate Defendant's food and vending services operations facilities located in Middletown, New Jersey.¹ (Compl. at ¶ 6). In connection with the agreement, Defendant AIMCO was the managing agent for Kings Row and was authorized to negotiate all terms and conditions. *Id.* at ¶5, 7. After the agreement was signed and prior to August 2003, Plaintiff alleges that Kings Row fell behind in their payments several times. *Id.* at ¶10. Plaintiff states that even though it provided Defendants with a Notice of Termination, the contract was not terminated because a meeting was held "at which time it was agreed that Kings Row/AIMCO would pay. . ." and based on assurances from both Kings Row and AIMCO that the past due amounts would be brought current. *Id.* at ¶11. Because Defendants had paid their arrears in the past, Plaintiff relied on the promises of Defendants and continued to provide services. *Id.* at ¶12. After receiving no payment, Plaintiff notified Defendant AIMCO by letter dated March 15, 2004, that Plaintiff was terminating services as of April 3, 2004. Plaintiff claims that Kings Row/AIMCO owes Plaintiff \$297, 970, plus late fees, interest, and costs.

2. AIMCO

AIMCO argues that Counts II-IV do not set forth cognizable causes of action and must be

¹Plaintiff attached a copy of the "Food and Vending Services Management Agreement," dated March 13, 2001, to the Complaint as Exhibit B. The Agreement is effective as of April 1, 2001 between Brock and Kings Row. The initial term of the Agreement was for a five year period commencing April 1, 2001 and ending March 31, 2006. Agreement, Article 2. AIMCO is identified as the agent for Kings Row. Agreement, §10.1.

dismissed. (Def's Memorandum in Support of Motion at 1).

First, AIMCO argues that the promissory estoppel claim in Count II ignores the principle of law that an agent is not liable under its principal's contracts. Id. Thus, Plaintiff is trying to hold AIMCO liable under a theory of promissory estoppel for the same payments as in its breach of contract claim against Kings Row. Id. AIMCO contends that because it was not a party to the contract but acted only as Kings Row's managing agent, and did not act outside its representative capacity, it is not independently liable as a matter of law. Id. Further, AIMCO argues that one cannot assert a claim for promissory estoppel where a valid contract exists. Id. at 6. In response, Plaintiff argues that the Complaint alleges that AIMCO went well beyond its agency capacity and made specific representations that it would make good on the debt incurred by Kings Row. (Pl's Response at 3). Further, Plaintiff argues that the promissory estoppel claim is not based on the written agreement between Kings Row and Plaintiff, but on the subsequent oral promise by AIMCO to bring the Kings Row account current.

Second, AIMCO argues that Count III, alleging civil conspiracy, must be dismissed because Plaintiff did not allege an underlying cause of action. Id. at 2. In response, Plaintiff contends that the Complaint implies that the predicate tort cause of action is the fraud committed against Plaintiff by both Defendants. Id. at 4. According to Plaintiff, Defendants fraudulently induced Plaintiff to continue providing food services after serving notice of termination. Id. Plaintiff requests an opportunity to amend its Complaint if the court finds that the Complaint is insufficient as to any other material element of this claim. Id.

Finally, AIMCO argues that Count IV, which makes a claim for constructive trust, must be dismissed because no such cause of action exists. Rather, it is an equitable form of relief. Id.

In response, Plaintiff argues that unjust enrichment is the underlying claim supporting the need for a constructive trust. Failing to establish a constructive trust would result in injustice and unjust enrichment. Id. at 5. Plaintiff requests an opportunity to amend its Complaint to more clearly delineate the unjust enrichment cause of action if the court believes that the Complaint is unclear or insufficient.

2. Kings Row

Similarly, Kings Row argues that Plaintiff fails to state a cause of action under Counts II, III or IV.

First, Kings Row argues that the promissory estoppel claim must be dismissed because the Plaintiff and Defendant Kings Row had an express agreement. Because Plaintiff alleged that there was an enforceable contract, a claim for promissory estoppel must fail. (Def's Memorandum in Support of Motion to Dismiss at 2-3). Further, Kings Row argues that Plaintiff has failed to plead all the necessary elements of promissory estoppel as to Kings Row. Id. at 3. Specifically, Plaintiff has not alleged that Kings Row made a promise that it should have reasonably expected would induce action or forbearance on the part of the promisee. Id. Therefore, Defendant contends that Count II fails to state a claim and should be dismissed as to Kings Row. In response, Plaintiff argues that in addition to the original contract, it entered into an oral agreement with AIMCO, representing itself and Kings Row, to stay current with the billings and to pay an additional \$5,313.75 per week in order to cover the total due in arrears at that time. Thus, Plaintiff contends that Count II addresses the breached oral contract and seeks promissory estoppel against both AIMCO and Kings Row. Plaintiff maintains that the Complaint alleges sufficient facts that a promise was made, upon which Plaintiff relied, to its

detriment. Plaintiff requests an opportunity to amend if the court finds the Complaint insufficient.

Second, Kings Row argues that Count III, alleging civil conspiracy, must be dismissed. According to Defendant, under Pennsylvania and New Jersey law, the “intracorporate conspiracy doctrine” states that an entity cannot conspire with one who acts as its agent. Id. at 4. Because Plaintiff alleges AIMCO was the agent of Kings Row, there can be no conspiracy between them. Id. Additionally, Defendant Kings Row argues that Plaintiff has not plead the required elements of civil conspiracy, which requires both an agreement and either a criminal act or an intentional tort. Id. Thus, Count III must be dismissed as against Kings Row. In response, Plaintiff argues that the civil conspiracy is based upon the underlying fraud committed by both AIMCO and Kings Row to induce Plaintiff to continue to provide food services to Kings Row. (Pl’s Response at 3). Plaintiff requests an opportunity to amend if the court finds that the Complaint is insufficient.

Finally, Defendant Kings Row argues that Count IV must be dismissed because a constructive trust is an equitable form of relief, not a cause of action. Plaintiff responds that Count IV’s cause of action is unjust enrichment and the requested remedy is a constructive trust. Plaintiff seeks an opportunity to amend its Complaint if the court finds that the allegations are unclear or insufficient.

III. Discussion

A. Jurisdiction and Legal Standard

This court has jurisdiction pursuant to 28 U.S.C. § 1332, as the parties are citizens of

different states and the amount in controversy exceeds \$75,000.² The requirement of complete diversity among the parties is satisfied and thus, this court has diversity jurisdiction.³ See Strawbridge v. Curtiss, 7 U.S. 267 (1806) (requiring complete diversity).

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may grant the motion only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. Doug Grant, Inc. V. Greate Bay Casino Corp., 232 F.3d 173, 183 (3d Cir. 2000). Accordingly, a federal court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001).

B. Sufficiency of Complaint

1. Count II

Count II asserts a claim for promissory estoppel against Defendants Kings Row and

² 28 U.S.C. § 1332 states, in pertinent part:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States.

³According to the Complaint, Plaintiff is a Pennsylvania corporation with its principal place of business in Malvern, PA. (Compl. at 1, ¶1). Defendant Kings Row is a New Jersey Limited Partnership with its principal place of business in Middletown, NJ. (Compl. at 1, ¶2). Defendant AIMCO is a Maryland corporation with its principal place of business in Denver, Colorado. (Compl. at 2, ¶3). The court notes that the briefs are not in agreement as to whether Pennsylvania or New Jersey law will apply to this dispute. With regard to the arguments made in the Motions to Dismiss, the laws in Pennsylvania and New Jersey are the same.

AIMCO.⁴ This claim is based on an oral promise allegedly made by AIMCO, representing itself and Kings Row, to stay current with the billings and to pay an additional \$5,313.75 per week in order to cover the total amount due in arrears under the contract at that time. Compl. at ¶¶20-22. Initially, the Court finds that Paragraph 11 of the Complaint fails to state that AIMCO undertook an independent obligation to pay, which is arguably inconsistent with its status as agent. The e-mail sent (Exhibit C to Complaint) is insufficient to suggest such an independent obligation. In support of its claim, Plaintiff contends that Brock reasonably relied on the promise and incurred a significant detriment because of its reliance. Compl. at 23-24. Importantly, Count II ignores two of the essential elements of promissory estoppel by 1) failing to allege that Defendants should have reasonably expected to induce action or forbearance, and 2) failing to indicate how enforcement of the oral promise is necessary to avoid injustice. Plaintiff has an adequate legal remedy and can recover past due amounts on the contract under Count I of the Complaint. Even if Plaintiff chooses to plead Count II in the alternative, all of the required elements of the claim must be stated. See Thatcher's Drug Store v. Consolidated Supermarkets, 636 A.2d 156 (Pa. 1994) (reversing order granting injunctive relief because appellee failed to meet its burden of establishing essential elements of its claim of promissory estoppel); Peck v. Imedia, Inc., 679 A.2d 745 (N.J. Super. Ct. 1996) (reversing summary judgment in favor of defendant because plaintiff established sufficient facts to satisfy all elements of promissory estoppel).

⁴Section 90 of the Restatement 2d of Contracts addresses the elements of promissory estoppel:
§ 90 Promise Reasonably Inducing Action or Forbearance
(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

In addition, under Pennsylvania and New Jersey law, if a valid contract exists, a claim for promissory estoppel must fail. See Constar, Inc. v. National Distribution Ctrs., Inc., 101 F. Supp. 2d 319, 323 (E.D. Pa., 2000) (applying Pennsylvania law and dismissing promissory estoppel claim where express contract existed); Dluhos v. Strasberg, 2001 WL 1720272, *9 (D.N.J. 2001), aff'd in part, rev'd in part on other grounds, 321 F.3d 365 (3d Cir. 2003) (stating that New Jersey law recognizes rule that existence of express contract excludes implied contract). Plaintiff not only admits that it entered into a valid express contract with Defendant Kings Row, but also seeks to enforce it.

Because there was an express contract between Plaintiff and Defendant Kings Row, the promissory estoppel claim seeking the same damages against Kings Row must be dismissed with prejudice. However, because AIMCO was not a party to the express contract between Kings Row and Brock, in theory, a promissory estoppel claim against AIMCO may be asserted if the facts warrant. However, because Plaintiff failed to plead that AIMCO undertook an independent obligation to pay, which is one of several missing essential elements of promissory estoppel, Count II against Defendant AIMCO will be dismissed without prejudice. Although there are no facts alleged to warrant a promissory estoppel claim, the Court will give Plaintiff leave to amend the Complaint.

2. Count III

Count III asserts a claim of civil conspiracy against Defendants Kings Row and AIMCO.⁵

⁵The tort of civil conspiracy requires “a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.” Morgan v. Union County Bd. of Chosen Freeholders, 633 A.2d 985, 998 (N.J. Super. Ct. App. Div. 1993); Allegheny General Hospital v. Philip Morris, Inc., 228 F.3d 429, 446 (3d Cir.

Defendants argue that this count must be dismissed for two reasons. First, the Court agrees that under the “intracorporate conspiracy doctrine” an entity cannot conspire with its agent. See Sunkett v. Misci, 183 F. Supp. 2d 691, 722 (D.N.J. 2002) (applying New Jersey law and granting in part and denying in part Defendants’ motion for summary judgment); General Refractories Co. v. Fireman’s Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (applying Pennsylvania law and affirming in part and reversing in part district court’s dismissal) (citing Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999)). Second, the Complaint does not allege an underlying intentional tort or criminal act.⁶ Plaintiff does not respond to the intracorporate conspiracy doctrine argument but merely states that the claim of civil conspiracy is based on the underlying fraud committed by AIMCO and Kings Row that was designed to induce Plaintiff to continue providing services. (Pl’s Response at 3). Upon review, the Complaint does not allege any of these facts. Thus, because of the intracorporate conspiracy doctrine and because Plaintiff fails to sufficiently allege the required underlying tort cause of action to state a claim for civil conspiracy, Count III will be dismissed with prejudice.

3. Count IV

Count IV is entitled “Constructive Trusts Against Kings Row and AIMCO” and attempts to assert a cause of action based on Defendants’ alleged improper retention of monies received

2000).

⁶Civil conspiracy requires an agreement and either a criminal act or intentional tort. See Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 406 (3d Cir. 2000) (applying Pennsylvania law and reversing judgment for civil conspiracy); Board of Education v. Hoek, 183 A.2d 633 (N.J., 1962) (reversing judgment for defendant and remanding for new trial because jury was confused and damages were excessive).

from the Department of Housing and Urban Development (“HUD”). Both Defendants correctly point out that a constructive trust is an equitable form of relief, not a separate cause of action. See Lerario v. Provident Life & Accident Ins. CO., 1996 WL 532491, *4 (E.D.Pa., Sept. 20, 1996) (applying Pennsylvania law and dismissing cause of action for constructive trust). In response, Plaintiff argues that Count IV is a claim for unjust enrichment and the constructive trust is the requested form of relief. (Pl’s Response to Defendant AIMCO’s Motion at 5).

Upon review, the Complaint states that “allow[ing] AIMCO and Kings Row to retain the HUD monies would result in an unjust enrichment of the defendants.” Compl. at ¶ 31. Although the caption does not state a valid cause of action, the allegations within Count IV are sufficient to state a claim for unjust enrichment for which Plaintiff seeks constructive trusts. Because a constructive trust is an equitable remedy and not a separate, specific cause of action, Count IV will be construed as a claim for unjust enrichment and the Motion to Dismiss will be denied.

IV. Conclusion

For the foregoing reasons, Count II against Defendant AIMCO is dismissed without prejudice. Plaintiffs are given leave to amend if they can, consistent with Rule 11, Fed. R. Civ. P., assert the required elements of promissory estoppel. Because there is an express contract between Kings Row and Brock, Count II against Defendant Kings Row is dismissed with prejudice. Count III is also dismissed with prejudice. Finally, the Motions to Dismiss Count IV are denied. Count IV will be construed as a claim for unjust enrichment.

An appropriate Order follows.

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

BROCK & COMPANY, INC. : CIVIL ACTION
v. :
KINGS ROW ASSOCIATES and : NO. 04-cv-2096
APARTMENT INVESTMENT & :
MANAGEMENT COMPANY (AIMCO) :

ORDER

AND NOW, this 17th day of November, 2004, it is hereby ORDERED that Defendant AIMCO's Motion to Dismiss (Doc. No. 7) be DENIED in part and GRANTED in part, as follows:

- Count II against Defendant AIMCO is dismissed without prejudice, with leave to amend within ten (10) days.
- Count III is dismissed with prejudice.
- The Motion to Dismiss Count IV is denied.

It is further ORDERED that Defendant Kings Row's Motion to Dismiss (Doc. No. 11) will be DENIED in part and GRANTED in part, as follows:

- Count II against Defendant Kings Row is dismissed with prejudice. Kings Row is hereby terminated as a party to Count II.
- Count III is dismissed with prejudice.
- The Motion to Dismiss Count IV is denied.

BY THE COURT:

s/Michael M. Baylson
MICHAEL M. BAYLSON, U.S.D.J.