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

PAUL BARSKY,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-1303
BEASLEY MEZZANINE HOLDINGS, L.L.C., et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JANUARY 11, 2005**

Presently before this Court is the Defendants', Beasley Mezzanine Holdings, LLC and Beasley Broadcast Group, Inc., Motion for Partial Summary Judgment.[1] For the reasons that follow, the Motion will be denied.

I. BACKGROUND

Plaintiff Paul Barsky is a morning radio show personality in the Philadelphia Metropolitan Area. Defendants Beasley Mezzanine Holdings, LLC and Beasley Broadcast Group, Inc. are the owners and operators of WPTP, 96.5 FM, a radio station in that market. The parties entered into a five-year employment agreement in March, 2003. The terms of that relationship were memorialized in a written Proposal signed and dated March 3, 2003. The Proposal provides in relevant part:

[1] This is the first of three dispositive motions in this case. In addition to the present motion, Plaintiff has filed a motion for summary judgment to which the Defendants' responded with an additional cross motion for summary judgment on separate issues from the issues presented in this motion. The remaining motions will be taken under advisement once Barsky has an opportunity to respond to the new matter raised by Defendants.

> [t]he Company will guarantee the Artists's employment for Year One of the Agreement. Beginning in Year Two and continuing throughout the remainder of the Agreement, should the Morning Drive, Monday – Friday 6AM – 10AM program fail to achieve a 3.0 AQH Metro Share or a #13 rank or above for Adults 25-54 for two consecutive rating periods, the Company would have the option to cancel the Agreement with an immediate payment equivalent to six (6) months of the Base Salary then in effect.
>
> In the event the Company chooses not to exercise its option to terminate and the Metro Share for Adults 25-54 rises back above the 3.0 or a rant [sic] position of #13 or above threshold for two consecutive rating periods, the Company will again guarantee the employment of the Artist. Whenever the Share for adults 25-54 is 3.0 or rank #14 or below for at least two consecutive rating periods, the guarantee is off. Whenever the share exceeds 3.0 or #13 rank or above for at least two consecutive periods, the guarantee is on.
> . . . .
> In the event the Company should choose to change the format of the station to a format that is by mutual agreement, incompatible with the Artist, the Agreement shall terminate and the Artist shall receive an immediate payment equivalent to six (6) months of the Base Salary then in effect with no post employment restrictions.

(Compl. at Ex. A).

On November 17, 2003, Defendants changed the format of the Radio Station from an "adult pop" format to a format with a "rhythmic contemporary sound." Barsky was removed from the air effective with the format change, and the parties entered discussions regarding Barsky's compatibility with the new station format. Barsky was paid his salary for the entire time he was employed, including the period during which the parties were in discussions regarding Barsky's compatibility with the new format. Defendants terminated Barsky's employment by letter effective December 30, 2003.

Barsky commenced the present action on March 3, 2004 by filing a complaint in the Montgomery County Pennsylvania Court of Common Pleas. Defendants removed the action to this Court based upon diversity of citizenship on March 25, 2004. The present motion is Defendants' third attempt to preclude Barsky from recovering damages in excess of the wages remaining during the first year of employment. A motion for judgment on the pleadings was filed on June 24, 2004, seeking dismissal of Barsky's Wage Payment and Collection Law violation count and a damages limitation. In an Order of August 30, 2004, I concluded that discussions on damages were premature at the pleadings stage and denied that part of the motion. I denied reconsideration of that decision on October 14, 2004. Defendants filed the instant motion for partial summary judgment on December 16, 2004, the deadline for dispositive motions in this case.

II. STANDARD

The Federal Rules of Civil Procedure permit any party to seek summary judgment upon "all or part" of a claim. Fed. R. Civ. P. 56. "Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party carries the initial burden of

demonstrating the absence of any genuine issues of material fact.[2] Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the non-movant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

The sole question properly before the Court on the present motion is whether, when the evidence is taken in the light most favorable to him, Barsky can present evidence to the jury from which they can make a calculation of damages with a reasonable amount of certainty.

Pennsylvania law requires that a plaintiff seeking to proceed with a breach of contract action must establish "'(1) the existence of a contract, including its essential terms,(2) a breach of a duty imposed by the contract, and (3) resultant damages.'"[3] Ware v. Rodale Press,

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[2] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

[3] Defendants' Cross Motion for Summary Judgment places the existence of a contract and the sufficiency of its terms in issue. However, for the purposes of this motion they purportedly concede that a contract exists and is in breach, although arguments over both issues have been presented on this motion by both sides with varying levels of vehemence. I will defer decision on these issues to their proper place, Plaintiff's Motion for Summary Judgment and the associated Cross-Motion.

Inc., 322 F.3d 218, 225 (3d Cir. 2003) (quoting CoreStates Bank, N.A. v. Cutillo, 773 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). To prove damages, the plaintiff must give the factfinder evidence from which damages may be calculated to a "reasonable certainty." Id. at 226 (quoting ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 668 (3d Cir. 1998)). The general rule in an employment case is that "the measure of damages is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence in seeking other similar employment." Delliponti v. DeAngelis, 545 Pa. 434, 443, 681 A.2d 1261, 1266 (1996). The burden is on the breaching party to show that the losses could have been avoided. Id.

Defendants argue that the requirements in the contract that Barsky's morning radio show achieve minimum ratings after the first year of the agreement renders any calculation of damages by Barsky overly speculative and impossible. In support of their argument, Defendants rely principally upon Higbie v. Tonerland Corporation, 1994 Tex. App. LEXIS 137 (Tex. App. Jan. 20, 1994), because of its purported factual similarity to this case. In that case, David E. Higbie was hired by Tonerland as Vice President of Sales. Mr. Higbie's term of employment was for one year, and he was to be compensated by a minimum monthly salary and commissions, set at sixty percent of the gross profits he generated. Higbie's monthly salary was recoverable by Tonerland against Higbie's commissions. As a result, Higbie's salary was determined entirely by his sales commissions. However, Higbie left Tonerland after two months and never made an equipment sale. In order to determine damages, Higbie resorted to a lost profits analysis, but was unable reach any result as he had no sales figures for comparison. The trial court entered summary judgement in favor of Tonerland because Higbie presented no

evidence beyond guessing and conjecture from which a jury could calculate damages. Higbie, 1994 Tex. App. LEXIS 137 at *2-4.

I fail to see how Higbie controls the present case. To begin, Higbie is an unpublished opinion from the Texas Court of Appeals that is of no precedential value in Texas, see Tex. R. App. P. 47.7. Furthermore, the facts of Higbie differ significantly from the instant case. While it is true that Barsky's employment agreement provided him with several types of commission-like compensation in the form of bonuses for high ratings, live spot compensation and appearance fees, this contingent compensation is essentially *de minimus* in value when compared to Barsky's agreed upon base salary. When compared to Mr. Higbie's essentially commission-only compensation scheme, Barsky's contract provides ample evidence from which a jury could draw conclusions about damages. In the present case, Barsky was to receive an agreed upon base salary with upward adjustments. As a result, it is possible to calculate damages from the language of the contract. Barsky himself offers two different calculations of damages using the contract language.

At his most expansive, Barsky presents an argument that Defendants are not entitled to rely upon the ratings conditions in the agreement to prevent him calculating damages because Defendants' breach of the contract excuses his failure to meet the ratings conditions for the entire four year term of the contract to which they apply. Barsky relies on the principle of contract law that conduct of one party that prevents the other from performing is an excuse for nonperformance to support his position. Liddle v. Scholze, 768 A.2d 1183, 1185 (Pa. Super. Ct. 2001) (citing United States v. Peck, 102 U.S. 64, 65 (1880)). Barsky argues that because Defendants are the party to breach the contract, they have precluded Barsky from even attempting

to meet the ratings conditions. As a result, they are, in effect, relying upon their own breach to render Barsky's damages speculative, which Barsky argues is impermissible under contract law. In that event, the ratings condition would be inapplicable and Barsky would be entitled to all the wages named in the contract, approximately $1.75 million.

Defendants bitterly contest this proffered calculation of damages, although they do not appear to directly refute the legal conclusions upon which it rests. Instead, Defendants contend that this calculation abandons the rule that damages must be proven with reasonable certainty for a regime in which Defendants would be required to assume the risk of any and all variables in the contract solely because they were in breach. Further, Defendants argue that Barsky relies only upon the general rules to calculate damages and has presented no law compelling this Court to award damages of this scale to Barsky. However, such an argument appears to ignore the burden on Defendants created by the present motion. Barsky has presented an interpretation of the contract and the conduct of the parties under which the ratings conditions would be nullified and Barsky would be entitled to all wages. The burden is now upon Defendants to show that the interpretation is invalid as a matter of law.

Barsky's narrower calculation of damages is based upon a literal application of the contract terms if he cannot escape the ratings conditions. The guarantee provisions of the contract provide that beginning in the second year, Barsky's employment could be terminated if his ratings were deficient for two consecutive ratings periods. As a result, Barsky would have been guaranteed at least two ratings periods, each three months in duration, of employment under the terms of the agreement, approximately six months plus approximately three more weeks for the ratings information to be compiled and reported to survey subscribers. The agreement further

provides that if Defendants exercised their termination rights for deficient ratings, Barksy would receive a severance payment equivalent to six months of the base salary then in effect. As a result, Barsky argues that he would be entitled to wages for the six month guarantee to meet the ratings condition, the time necessary for the ratings to be complied and released, and severance payment of six months base salary for a grand total of approximately thirteen months. Using the base salary set forth in the agreement, Barsky proffers $406,250.00 as a "minimum amount due."

Defendants argue that this minimum calculation is also incorrect because the contract does not explicitly grant Barsky guaranteed employment, and that as a result, Barsky should be treated as an at-will employee because of the vagueness of the contract. In principle they rely upon Buckwalter v. ICI Explosives, USA, Inc., No. 96-4795, 1998 WL 54355, at *6 (E.D. Pa. Jan. 8, 1998); however, Mr. Buckwalter was unable to prove the existence of a contract at all. In the present exercise, Defendants have conceded that the contract exists. As a result, I am bound to apply it by its terms, and courts have read employment guarantees in contracts vaguer than the one presently before this Court. See Steinman v. Kennedy House, Inc., No. 90-195, 1990 WL 200688, at *3 (E.D. Pa. Dec. 10, 1990). In Steinman, the court read an agreement for guaranteed employment from an agreement to which the employee was not a party. The agreement between a building board of directors and a management agency provided only that the management agency agreed to employ the employee and named his salary levels for each year of the agreement. When faced with the question of whether the agreement provided for guaranteed employment of a specific duration, the court responded, "[p]lainly it does." Id. Given that example, the present agreement is sufficient in this context.

IV. CONCLUSION

As Barsky has provided two different calculations of damages in primary reliance upon the language of the employment agreement with Defendants demonstrating damages beyond the first year of the agreement, the Motion for Partial Summary Judgment will be denied.

An appropriate Order follows.

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Defendants.	:	

ORDER

AND NOW this 11th day of January, 2005, upon consideration of the Defendants' Motion for Partial Summary Judgment (Doc. No. 22), the Response in opposition, and the Reply thereto, it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/Robert F. Kelly
ROBERT F. KELLY Sr. J.