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

MICHAEL E. TAYLOR	:	CIVIL ACTION
	:	
v.	:	
	:	
CREDITEL CORPORATION and	:	
JOHN OSBORNE[1]	:	NO. 04-2702

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE January 19 , 2006

The Defendant has filed a summary judgment motion in this fraud case. In this action, Plaintiff seeks damages for the breach of a promissory note and his reliance on an offer of employment that never came to fruition. For the reasons that follow, we will grant the Defendant's Motion with respect to the breach of the promissory note. However, because we find that material issues of fact remain, we will deny the remainder of the Defendant's Motion.

Factual Background

In June or July of 2001, Plaintiff's friend, William Yates, introduced Plaintiff to John Osborne, who had been identified in a newspaper article as the Director of Corporate Planning of Creditel. (Taylor Dep., at 9). Yates had previously met Osborne and was considering investing in Creditel. (Taylor Dep., at 11). Yates had suggested to Taylor that Creditel might be interested in hiring Taylor. (Taylor Dep., at 11-12). Yates passed Taylor's phone number along to Osborne

[1]Some confusion exists over the proper name of the corporate Defendant in this case. In the Motion for Summary Judgment, the corporate Defendant states that its proper designation is Virtual Fonlink, Inc. d/b/a Creditel. At this point, the Court will continue to refer to the corporate Defendant as Creditel. However, where Virtual Fonlink is referenced in the supporting documentation, the Court will use the name Virtual Fonlink. In addition, although the Complaint was filed against Creditel Corporation and John Osborne, it does not appear that Mr. Osborne was ever served with the Complaint and no counsel has ever entered an appearance on his behalf. Therefore, in this Memorandum, when reference is made to the Defendant, we are referring to Creditel.

and Osborne contacted Taylor. (Taylor Dep., at 13-14). During their initial conversation, they discussed both employment and investment opportunities with Creditel. (Taylor Dep., 14-15). Osborne stated that Creditel could offer Taylor a position as National Sales Manager at a salary of $120,000 a year. (Taylor Dep., 26-27). After this telephone conversation, Osborne sent Taylor Creditel's prospectus and Taylor drafted an employment contract. (Taylor Dep., 31-33).

Thereafter, Osborne and Yates showed Taylor a newspaper article about Creditel, including its office addresses, website addresses, and identifying George Elias as Creditel's CEO. The article also included a caution that Creditel was a "start up" company. (Taylor Dep., 114-15). Yates also showed Taylor an un-executed subscription agreement for Creditel stock. (Taylor Dep., 33-35). In mid-July, Osborne and Taylor met in Philadelphia. (Taylor Dep., at 40). At that time, Osborne and Taylor executed the first of a series of Notes,[2] Taylor gave Osborne a check for $25,000, made out to Osborne alone, and the two discussed more particulars with respect to Taylor's job with Creditel. (Taylor Dep., 40-43).

When Osborne left Philadelphia after his mid-July visit, he attempted to cash Taylor's $25,000 check, but was unable to do so because he had an out-of-state license. (Taylor Dep., 43-44). When Taylor was contacted by the bank, he stopped payment on the check. Taylor stated that he doesn't remember what Osborne's explanation was when he questioned Osborne about his attempt to cash the check. (Taylor Dep., at 47). In late July, Yates contacted George Elias, the CEO of Creditel, regarding his possible investment in the company and mentioning that his

[2]A draft of this Promissory Note was faxed to Taylor before the meeting and he reviewed it with a lawyer. When Osborne and Taylor met, Taylor made some changes to it and requested a "cleaned up" copy. When the changes were incorporated, the Note was re-executed in August, 2001. The Note for $50,000 plus 12% interest, matured on January 1, 2002.

friend, Taylor had been in contact with Osborne about investing, himself. Yates also posed a number of questions about Osborne. In response, Elias described Osborne as a "co-founder" of Creditel. With Elias's knowledge, Yates forwarded the emails to Taylor. See Emails attached to Response, at Exhibits B, C, and D).

In August, Osborne and Taylor continued their employment discussions, including a start-date of October, 2001. (Taylor Dep., 38-39, 58). Also in August, Osborne sent Taylor a cleaned-up version of the Promissory Note, incorporating the changes they had discussed in July. The Note lists Osborne as the co-founder of Creditel, and Osborne's signature appears under the corporate name, Virtual Fonlink. See Convertible Promissory Note, attached to Defendant's Exhibit H. When Taylor signed the note, he returned it to Osborne with a $50,000 money order, payable to Osborne. (Taylor Dep., at 57). He included with this investment, his draft of the employment agreement. (Taylor Dep., 31-32). .

From August through September, 2001, Osborne did not fulfill his promises that he would be sending an employment application, an employment agreement, and a cellphone. (Taylor Dep., at 60-61, 66, 80). According to Taylor, Osborne disappeared in mid September, when he was no longer able to reach Osborne at all. (Taylor Dep., at 66). In the meantime, based on the representations by Osborne, Taylor had resigned his $109,000 position at Burger King. (Taylor Dep., at 75-77). In October or November, Taylor wrote to Osborne at the California offices of Creditel. (Taylor Dep., at 72). He also contacted the California offices via telephone and was told that they would take a message for Osborne. (Taylor Dep., 80-81). Osborne then phoned Taylor and told him that his employment start date was delayed until 2002. (Declaration of Taylor).

When the Note matured in January, 2002, Osborne told Taylor that the payment would be made before the end of the second quarter, 2002. Osborne explained that delays in funding delayed the payment. (Declaration of Taylor).

On March 1, 2002, Taylor filed suit against Osborne, Elias, Creditel, and other officers of the management company running Creditel. The Honorable William H. Yohn, to whom the original case was assigned, dismissed the Complaint without prejudice on January 22, 2004. The Complaint was dismissed for lack of personal jurisdiction over the three individual defendants and lack of service of process upon the individuals and the corporation. On June 18, 2004, Taylor filed this case against Creditel and Osborne. It appears that Osborne has never been served with the Complaint. On December 13, 2004, the Honorable Bruce Kauffman, to whom the case was assigned before its referral to the undersigned, dismissed the unfair practices claim that was contained in the Complaint.

On December 13, 2005, Creditel filed this motion for summary judgment, arguing that the fraud claims are untimely; that the Plaintiff has failed to make out the prima facie case of fraud; that there is no evidence to support the Note default claim; and that the note is not enforceable.

Summary Judgment Standard

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, 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. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla

of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

Default on the Promissory Note

The Defendant argues that the Promissory Note issued by Osborne is an unambiguous contract, requiring performance by Osborne alone, not Creditel. The Plaintiff argues that Creditel is bound by the terms of the Note because Osborne was acting as its agent in executing the Note, with Creditel's knowledge and blessing.

The Plaintiff's argument is based on an agency theory – that an agent can bind the principal by the acts the agent does with or within the actual or apparent authority from the principal. See Turner v. Hydraulics, Inc. V. Susquehanna Construction Corp., 606 A.2d 532, 534 (Pa. Super. 1992). Focusing on the emails sent between Yates and Elias, see supra, at , the Plaintiff argues that Elias "cloaked" Osborne with the authority to act for Creditel. Similarly, Plaintiff argues that Elias's failure to seek a retraction of a newspaper article provided further corporate support for Osborne's activities. In the article appearing in a Florida newspaper, Osborne was identified as the Director of Corporate Planning of Creditel. (Article attached to Plaintiff's Response).[3]

The Plaintiff's argument fails to acknowledge one key fact, however. The Promissory Note is not ambiguous and does not bind Creditel or Virtual Fonlink. Two cases are instructive in our determination. In Viso v. Werner, 369 A.2d 1185 (Pa. 1977), the Pennsylvania Supreme

[3]During his deposition, Mr. Elias stated that Osborne was not authorized to do anything for the company and never received any paycheck. (Elias Dep., at 99, 110-11).

Court concluded that there was no individual liability for a breach of contract when the individual defendant entered the contract as an agent of the corporate defendant. In coming to this conclusion, the Court relied on the following facts: the contract was printed on the letterhead of the corporation; it was styled in the first person plural; and it was signed "Werner Contracting Co. By: s/Michael N. Werner." Id. at 1187. "Thus, a facial inspection of the contract would indicate that the [individual defendant] was contracting on behalf of the disclosed principal." Id.

The Court specifically noted, however,

> [T]he mere signature of the appellant preceded by the word 'by' and following the typed name of the corporation on the corporation's letterhead is not conclusive that he was acting in a representative capacity, if the alleged contract showed an intent to bind appellant individually. However, no such intent appeared either in the written contract, or in the evidence proffered by the appellees at trial.

Id. at 1188.

The second case, In re Estate of Duran, 692 A.2d 176, 179 (Pa. Super. 1997), picks up where the caveat in Viso left off. In Duran, the owner of a company had contracted to purchase a life insurance policy on himself, naming an employee as the beneficiary, until such time as a pension plan could be funded for the employee.

> I, Jay Duran, promise to purchase an insurance policy on myself for $50,000 with Tim Redlinger as sole beneficiary, in the interim of establishing a retirement plan for Tim, which will consist of $100,000 and represents contributions and accumulated interest retroactive to Tim's 21st year of age, August 20, 1976. When the retirement plan is established, I will change the beneficiary of the life insurance plan to whomever I choose.
> JAY DURAN ASSOCIATES INC.
> */s/ Jay Duran*
> Jay Duran
> JD/tk

Duran, at 177.

The company owner died without having purchased the promised insurance policy. The employee brought suit against the estate. The Superior Court, relying in part on the caveat in Viso, concluded that the contract's terms were unambiguous and the owner of the company had taken on a personal obligation.

> [F]rom our reading, we conclude that Duran clearly undertook a personal obligation to purchase an insurance policy on his life in the *interim* before the establishment of a pension plan by the corporation. The mere presence of the corporate name above the signature line does not exclusively indicate corporate liability.

Duran, at 179.

The facts before us are remarkably similar to those in Duran and the caveat of Viso. Although written on Creditel letterhead and signed "VIRTUAL FONLINK, INC BY J.L. OSBORNE," the content of the Note unambiguously binds only J.L. Osborne. The "Obligation" portion of the Note reads as follows:

> J.L. OSBORNE CO-FOUNDER OF CREDITEL, AND MAJOR SHARE HOLDER OF VIRTUAL FONLINK, INC . . . FOR VALUE RECEIVED HEREBY PROMISES TO PAY MICHAEL TAYLOR OUT OF HIS OWN SHARES OF VIRTUAL FONLINK, INC ON OR BEFORE JANUARY 1, 2002 THE PRINCIPAL SUM OF FIFTY THOUSAND DOLLARS, AND TO PAY INTEREST ON SUCH PRINCIPAL SUM FROM THE DATE HEREOF AT THE RATE OF 12% PER ANNUM . . . .

Promissory Note, at ¶1. The "Default" section only references a default by Osborne. "THE FOLLOWING EVENTS CONSTITUTE A DEFAULT IN THE PERFORMANCE OF NOTE BY J.L. OSBORNE." Similarly, the "Attorneys Fees" section of the Note refers only to Osborne.

> IF J.L. OSBORNE FAILS TO MAKE PAYMENT TO THE HOLDER OF THE NOTE AS PROVIDED HEREIN THE HOLDER OF THE NOTE WILL BE ENTITLED AND EMPOWERED TO TAKE SUCH MEASURES AS MAY BE APPROPRIATE TO ENFORCE OSBORNE'S OBLIGATIONS UNDER THE NOTE . . . .

Promissory Note, at ¶7. Not only are the references to Osborne only, but it is clear that he has made a personal guarantee by pledging his own stock to satisfy the Note. We therefore find no liability flowing to Creditel for the breach of the Promissory Note.[4]

We realize that this conclusion is contrary to that found by Judge Kauffman when this issue was considered in the Motion to Dismiss. However, Judge Kauffman never addressed whether there was any ambiguity in the Note. Because we find that there is no ambiguity, we find no reason to consider any extrinsic evidence regarding Osborne's representations to the Plaintiff and conclude that the Note clearly establishes Osborne's personal liability for the Note only.

Fraud

Statute of Limitations

Defendant argues that Plaintiff's fraud and negligent misrepresentation claims are barred by the applicable two year statute of limitations. See Beauty Time, Inc. V. VU Skin Systems, Inc., 118 F.3d 140 (3d Cir. 1997)(Pennsylvania has a two-year statute of limitations for fraud). The statute begins to run when "the right to institute and maintain the suit arises." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). Pennsylvania employs the "discovery rule," which provides that the limitations period begins to run when the "plaintiff knows or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party's conduct." Redenze by Redenze v. Rosenberg,

[4]This conclusion is further bolstered by the fact that Taylor had reviewed a stock subscription agreement prior to executing the Note. During his deposition, Taylor stated that Yates had given him a copy of the stock subscription agreement. (Taylor Dep., at 33). Clearly the Promissory Note was not the subscription agreement sent by the company to its potential stockholders.

520 A.2d 883, 885 (Pa. Super. 1987), *allocatur denied,* 533 A.2d 93 (Pa. 1987).

When Judge Kauffman ruled on the motion to dismiss, he allowed the fraud claims to proceed. Relying on the discovery rule, he determined that "the question of when the statute of limitations commenced is one of fact, to be determined by the jury." (Kauffman order, at 9). Creditel now claims with the completion of discovery, there is no doubt that the statute of limitations expired, at the latest, in late 2003. (Defendant's Memorandum, at 9-10).

In support of this argument, the Defendant points to a number of red flags -- instances that, according to the Defendant, should have alerted the Plaintiff to the fact that he had suffered an injury. For example, in mid-October, when Plaintiff had already left his job at Burger King, Taylor was aware that Osborne had failed to fulfill the promises of employment. Similarly, when Osborne had "disappeared," a term used by the Plaintiff, Plaintiff had his counsel draft a letter to Creditel's California office, indicating that Osborne had perpetrated a fraud. (Taylor Dep., at 94-95). However, each time one of these flags was raised, Osborne had contact with Taylor to alleviate his fears or, in the case of Taylor's contact with Creditel, Creditel did nothing to alert Taylor to the fact that Osborne was not authorized to solicit funds or make employment decisions. Thus, we do not find the Defendant's argument compelling.

The Defendant also relies on the filing of the earlier lawsuit to establish the time at which Taylor was aware of the fraud. The Defendant argues that, at the latest, the limitations period began to run when Taylor signed his "Verification" in the first lawsuit, June 7, 2002. Because the current lawsuit was not filed until June 18, 2004, the Defendant argues, the fraud claim is untimely. The Plaintiff responds that the two lawsuits, although related, are not identical. Notably, the original Complaint filed in the earlier suit did not allege any wrongdoing on the part

of Creditel. It was not until June 24, 2002, when the Amended Complaint was filed, that any claims were made against Creditel. The Plaintiff also draws the court's attention to the Plaintiff's Declaration attached to his Response, in which Taylor states that it was not until July, 2002, that he "became aware that Mr. Osborne and Creditel had no intention of satisfying the Promissory Note, and began to suspect that [he] had been defrauded." (Verification, at ¶10). Thus, argues the Plaintiff, a genuine issue of material fact exists regarding Taylor's knowledge of the fraud and its alleged perpetrator.

As Judge Kauffman found in deciding the Motion to Dismiss, ordinarily, when faced with the assertion of the discovery rule, the pertinent question is left for the jury. Only "where reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law." Fine v. Checcio, 582 Pa. 253, 267 (2005).

Here, the Complaint and Verification in the earlier suit provide strong support for the Defendant's argument. However, considering the Plaintiff's Declaration, we cannot conclude that reasonable minds could not differ regarding when Taylor became aware of the fraud and its cause. This credibility determination will have to be made by the jury.

Justifiable Reliance on the Statements of Osborne

The Defendant next claims that the Plaintiff cannot prove the "justifiable reliance" element of the *prima facie* fraud case. In order to prove both fraud and negligent misrepresentation, the Plaintiff must establish the following: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness

as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aid Corp., 315 F.Supp.2d 666, 686 (E.D. Pa. 2004)(quoting Gibbs v. Ernst, 647 A.2d 882, 889, 538 Pa. 193, 207 (1994)).

With respect to the *prima facie* fraud claim, Creditel first argues that Taylor cannot establish justifiable reliance on Osborne's statements. Justifiable reliance requires not only that the Plaintiff relied on a representation made, but also that the reliance on the representation must be reasonable. See Argent, at 686;In re Allegheny International, Inc. , 954 F.2d 167, 178 (3d Cir. 1992). In sum, the Defendant argues that there was no reasonable basis for Plaintiff's reliance on Osborne's representations.

This argument hearkens back to the earlier argument that Taylor should have been alerted to the fraud by numerous red flags. However, as we pointed out in discussing this claim's earlier iteration, each time something "fishy" occurred, Osborne had contact with Taylor to offer an explanation.[5] See supra, at 9. Whether or not the explanations were reasonable will be decided by the jury.

Statements by George Elias

Creditel next argues that George Elias, the CEO of Creditel, never made any representations to Taylor. In an earlier Declaration, Taylor stated that Elias had represented that

[5]The term "fishy" was used by Taylor during his deposition, in describing the basis for his concern in November of 2001. (Taylor Dep., at 96).

Osborne was a co-founder of the company, who played a major role in developing key relationships for the company. He also stated that Elias was aware that Osborne had solicited investments in Creditel from Taylor. (Declaration of Taylor, attached to Response to Motion to Dismiss). Now that discovery is complete, the Defendant argues that Elias never made any representations to Taylor.

In fact, the "representations" to which Taylor made reference in his Declaration, were from a series of emails forwarded to him by Yates. Yates contacted Elias via email regarding "a relationship" with Creditel. (Exhibit B, attached to Plaintiff's Response). In the first email, Yates propounds numerous questions regarding Creditel, its capitalization, and its relationship with Mr. Osborne. In that email, Yates refers to Taylor, "Mr. Michael Taylor, a friend whom I told about Creditel (and who has had discussions with Mr Osborne) may have additional questions as well." (Exhibit B, attached to Plaintiff's Response).

In response to the original email, Mr. Elias describes Osborne as a co-founder of Creditel and explains that "Mr. Osborne has played and currently plays a major role in developing and maintaining key relationships for [Creditel]." In responding to a question about Osborne's background, Elias describes Osborne as an "integral member of its management team," and directs any further questions to Osborne. (Exhibit D, attached to Plaintiff's Response). Upon receipt of Elias's response, Yates responded to Elias, declining the opportunity to invest in the company, but advising Elias that he is forwarding these answers to Taylor. (Exhibit D., attached to Plaintiff's Response). Based on these facts, Creditel argues that Elias never made any representation to Taylor.

Considering the facts, we believe Creditel takes too narrow a view. At the outset, Yates made Elias aware that Taylor might also have an interest in Creditel and Taylor had already met Mr. Osborne. Once Elias answered Yates's questions, Yates told him that he was going to forward the answers on to Taylor. Thus, the fact that Elias did not address his emails directly to Taylor is immaterial.

Proximate Cause

Creditel next argues that the Plaintiff cannot establish that the employment damages he seeks were proximately caused by Creditel. Specifically, the Plaintiff seeks damages for salary, benefits, and stock options he lost as a result of his resignation from Burger King. The Defendant argues that the Plaintiff, after resigning his position, never made any attempt to reacquire it, and did not begin to look for alternative employment until February or March, 2002. We reject the Defendant's argument. Although these facts may be relevant to the issue of mitigation, to be considered by the jury, the facts, considered in the light most favorable to the Plaintiff, establish that the job offer by Osborne led to his resignation.

An appropriate Order follows.

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JOHN OSBORNE	:	NO. 04-2702

O R D E R

AND NOW, this 19th day of January , 2006, upon consideration of Creditel's Motion for Summary Judgment, the response, thereto, and for the reasons stated in the accompanying Memorandum, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and DENIED IN PART. To the extent Creditel sought judgment on Count IV of the Complaint, alleging default on the note against Creditel, the Motion is GRANTED. In addition, the Motion is GRANTED to the extent Taylor seeks damages for the breach of the note through the other theories of liability. In all other respects, the Motion is DENIED.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE