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

ROOFERS LOCAL 30 COMBINED, WELFARE FUND, et al.,	:	CIVIL ACTION
Plaintiffs,	:	NO. 04-00714
v.	:	
PLATO CONSTRUCTION CORP, et al.,	:	
Defendants.	:	

Stengel, J. March 1, 2006

MEMORANDUM AND ORDER

Plaintiffs[1] bring this action alleging that defendants Plato Construction Corporation ("Plato"), Themistoklis Mpourdoudis (individually "Thomas"), and National Grange Mutual Insurance Company (individually "National Grange") (collectively "Defendants") failed to pay sufficient monthly employee benefit contributions due under a union collective bargaining agreement. Presently before the Court is Defendants' Motion for Summary Judgment (Docket No. 16). For the reasons set forth below, I will deny Defendants' motion.

[1]Plaintiffs in this case are (1) Roofers Local 30 Combined Welfare Fund; (2) Roofers Local No. 30 Combined Pension Fund; (3) Roofers Local Combined Vacation Fund; (4) Roofers Local 30 Combined Annuity Fund; (5) Roofers Local 30 Political Action and Education Fund; (6) Composition Roofers Union Local No. 30 Apprenticeship Fund; (7) Roofing Contractors Association Industry Fund (collectively the "Funds"); and (8) Local Union No. 30 of the United Union of Roofers, Waterproofers, and Allied Workers (collectively "Plaintiffs" or "Local 30"). Plaintiffs are entities and associations that advance the interests of union members.

I. BACKGROUND

On April 25, 2002, Plato, a New York corporation, contracted with the Southeastern Pennsylvania Transportation Association ("SEPTA") to perform roofing services at SEPTA's Allegheny Garage (the "Allegheny Project"). Plato initially commenced work without any union employees and instead used an out-of-town crew of non-union employees. Soon after work commenced on the Allegheny Project, Local 30 representatives began pressuring Plato to hire union employees. Plato initially refused to hire any union employees, and Local 30 set up a picket line at the Allegheny Project work site to disrupt deliveries between Plato and its suppliers.

Gus Stamos, employed by Plato as both a roofer and a foreman during the Allegheny Project, testified that a Local 30 representative approached him at the work site and requested that Plato hire six workers from the union. Stamos declined, but the union representative continued to pressure him. The same Local 30 representative asked Stamos to hire two union workers for the Allegheny Project approximately one month later. Stamos communicated this request to Thomas, the sole officer, director, and shareholder of Plato, who was vacationing in Greece at the time. In order to appease the union and to avoid further disruptions of work, Thomas allegedly agreed to hire "two or three" union workers. Thomas never spoke directly to anyone from Local 30, and instead communicated his hiring instructions through Stamos.

According to Defendants' version of the facts, the Local 30 representative approached Stamos again on July 8, 2002. This time, the representative asked Stamos to sign two pieces of paper. Stamos testified that both pieces of paper were blank other than the signature lines, the date, the union's name, and the contractor's name. The Local 30 representative told Stamos that the blank papers would be completed at Local 30's office and would contain language reflecting an agreement that Plato would hire "two or three" union workers. The Local 30 representative also promised Stamos that if he (Stamos) signed the two pieces of paper, he would receive money from the representative in exchange. Stamos testified that he never told anyone at Plato that he had signed the papers, and that he had never signed any other documents for or on behalf of Plato while employed by the company. Stamos eventually left Plato's employ, and Thomas learned of the two signed pieces of paper only upon the commencement of this lawsuit.

Defendants maintain that, consistent with their understanding of the agreement between Plato and Local 30, Plato has remitted the proper contribution amounts to the Funds. Thomas testified that Plato's bookkeeper contacted Local 30 on multiple occasions to ensure that the proper contributions were being made on behalf of Plato's union workers. Defendants also assert that Local 30 never objected to the amount of benefits Plato remitted to the Funds, and that Plato never received any letters or other communications from Local 30 regarding the contributions until this lawsuit began.

Plaintiffs present a different account of the facts. In their version, Keith Lypka, a business agent of Local 30, spoke with an unidentified person on the Allegheny Project work site who claimed to be on the phone with Thomas. According to Lypka, this person secured permission to negotiate with Local 30 on Plato's behalf and ultimately signed a Memorandum of Agreement (the "Memorandum") between Plato and Local 30. The Memorandum purports to require that Plato comply with all of the terms and conditions of Local 30's master collective bargaining agreement (the "CBA"), including the requirement that Plato make employee benefit contributions to the Funds on behalf of all its employees, union and non-union workers alike. Specifically, the Memorandum provides in pertinent part that "[t]he Plato Construction Corp. . . . hereby agree[s] to abide by all of the terms and conditions of collective bargaining agreements in effect as of July 8, 2002 . . . ." Pls.' Mem. of Law in Resp. to Defs.' Mot. for Summ. J., Ex. 4. Plaintiffs maintain that the Memorandum's terms and conditions were fully set forth and agreed to by the person who signed on behalf of Plato at the Allegheny Project work site. Plaintiffs have included a copy of the Memorandum dated July 7, 2002 and bearing a signature on the "Contractor" signature line with their response to Defendants' motion.[2]

Plaintiffs also allege that Local 30 attempted to contact Plato on a number of different occasions seeking the allegedly delinquent contributions after Plato's failure to make all of the required contributions to the Funds became apparent. First, Plaintiffs

[2]While never explicitly stated, the obvious inference from the parties' briefs is that the two blank pages allegedly signed by Stamos ultimately became the Memorandum that purports to bind Plato to the CBA.

allege that on November 26, 2002, Local 30 representatives mailed a demand letter to Plato seeking additional contributions for the Allegheny Project. Second, Plaintiffs allege that on December 6, 2002, Plaintiffs' former counsel Linda Martin forwarded a copy of the Memorandum to Defendants and again requested additional union worker contributions from Plato.[3]

Plato has repeatedly refused to pay the alleged contribution deficiency, and on March 13, 2003, attorney Martin filed a Proof of Claim on behalf of Local 30 on the labor and materials bond issued by defendant National Grange for $145,271.48.[4] Plato and National Grange rejected the Proof of Claim, arguing that the Memorandum did not bind Plato to the terms of the CBA.

On April 23, 2004, Local 30 filed an Amended Complaint against Defendants seeking recovery of the alleged contribution deficiency.[5] The Amended Complaint seeks (1) contributions under contract; (2) contributions under the Employee Retirement Income Security Act of 1974 ("ERISA"); (3) an audit; (4) contributions under contract after an audit; (5) contributions under ERISA after an audit; (6) damages for breach of fiduciary duty under ERISA; (7) injunctive relief; and (8) breach of surety bond. Plaintiffs seek

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[3]Plaintiffs have included a copy of both of these letters with their response to Defendants' motion for summary judgment.

[4]Local 30 based its Proof of Claim amount "on certified payroll records and [the Memorandum] that required Plato to comply with the [CBA]." Pls.' Mem. of Law in Resp. to Defs.' Mot. for Summ. J., Ex. 4.

[5]Local 30 originally filed separate complaints seeking recovery of the alleged deficiency against (1) National Grange; and (2) Plato and Thomas in their individual capacities. The Court consolidated these lawsuits on April 26, 2004.

damages of $145,271.48 for the alleged contribution deficiency, as well as their attorneys' fees and litigation costs. Defendants filed the instant motion for summary judgment on August 31, 2005.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is "material" only when it could affect the result of the lawsuit under the applicable law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which it bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted). The moving party need not offer evidence to negate matters on which the non-moving party bears the burden of proof at trial if the evidence offered in support of the moving party's motion establishes each essential element of that party's claim or defense. Celotex, 477 U.S. at 323.

Once the moving party has carried its burden, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings, and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. The non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id. This specificity requirement upholds the underlying purpose of summary judgment, which is to "avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." Fries v. Metro. Mgmt. Corp., 293 F. Supp. 2d 498, 500 (E.D. Pa. 2004) (citing Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1975), cert. denied, 429 U.S. 1038 (1977)).

When analyzing a motion for summary judgment, a district court "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citation omitted). Summary judgment is thus appropriate when the district court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Defendants' Fraud in the Execution Argument

Defendants argue first that they never agreed to be bound by the CBA, and that consequently they do not owe additional contributions to the Funds because the Memorandum is unenforceable as a result of Plaintiffs' fraud. Specifically, Defendants raise the defense of fraud in the execution, arguing that Plaintiffs' actions surrounding the execution of the Memorandum render it void *ab initio.* As the party bearing the burden of proving this affirmative defense at trial, Defendants must establish that there is no triable issue of fact as to each element of fraud in the execution.[6]

Union employee benefit plans are third-party beneficiaries to any contract between an employer and the union. See Agathos v. Starlite Motel, 977 F.2d 1500, 1505 (3d Cir. 1992) (citing J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 17-10 (3d ed. 1987)). Generally, the rights of a third-party beneficiary are subject to any defenses that the promisor could raise against the promisee. Id. An employer-promisor to a collective bargaining agreement, however, has fewer available defenses against a third-party beneficiary employee benefit plan. See Lewis v. Benedict Coal Corp., 361 U.S. 459, 470-71 (1960) (holding that employer could not raise union's breach of collective bargaining agreement as a defense to an employee benefit plan's lawsuit); Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, 85 F.3d 1098, 1102 (3d Cir. 1996). In fact, the

[6]Fraud is listed as an affirmative defense in Rule 8(c) of the Federal Rules of Civil Procedure.

Third Circuit has recognized only three defenses that an employer-promisor may raise in such a situation: (1) the pension contributions were illegal; (2) the collective bargaining agreement is void *ab initio*; and (3) the union employees have voted to decertify the union as its bargaining representative. Agathos, 977 F.2d at 1505.

A collective bargaining agreement is void *ab initio* when there is fraud in the execution. Id. The Third Circuit has noted the importance of distinguishing between fraud in the execution, which is a valid defense to a third-party beneficiary suit to enforce a collective bargaining agreement, and fraud in the inducement, which is not. Compare Agathos, 977 F.2d at 1505 (holding that fraud in the execution is a valid defense to employer's failure to pay benefit fund in violation of collective bargaining agreement), with Connors v. Fawn Mining Corp., 30 F.3d 483, 490 (3d Cir. 1994) ("Fraud in the inducement . . . is an invalid defense for an employer to use in response to a benefit plan's claim for delinquent contributions").

The distinction between the two defenses lies in the type of inducement used by one of the parties to a contract. Fraud in the inducement occurs when one party induces another to assent to something that he would not have assented to otherwise. Connors, 30 F.3d at 491. Fraud in the execution, by contrast, occurs when one party induces the other to believe that he has agreed to something entirely different from that to which he actually agreed. Id. Specifically, "[f]raud in the execution arises when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its

character or its essential terms," and may be found where a party "sign[s] an instrument that is radically different from that which [he] is led to believe that he is signing." Connors, 30 F.3d at 491. In other words, a party to an agreement may claim fraud in the execution when it can demonstrate that it knew it was entering into an agreement, but as a result of another party's fraud the nature of the agreement signed is completely different from what the signing party believed.

Defendants argue that the facts in this case are similar to those presented in Operating Eng'rs Pension Trust v. Gilliam, 737 F.2d 1501, 1503 (9th Cir. 1984), cited by the Third Circuit in Connors. In Gilliam, the defendant employer claimed to have signed a document which the union represented to him as being an application to join the union as the owner-operator of a bulldozer. Gilliam, 737 F.2d at 1503. In reality, the document was a collective bargaining agreement requiring the defendant to make contributions to a trust fund on behalf of all of his employees. Id. at 1503. The Ninth Circuit found that the defense of fraud in the execution applied and held that the defendant had no obligation to make contributions to the trust fund because he had reasonably relied on the union's representation regarding the identity of the signed document. Id. at 1504-05.

In this case, there is a genuine issue of material fact as to whether Local 30's actions constitute fraud in the execution of the Memorandum. Defendants' version of the facts has a Local 30 representative asking Stamos to sign two blank pieces of paper and thereafter assuring Stamos that the papers would ultimately reflect an agreement to hire

two or three union employees. Stamos Dep. at 15-16, 18. Implied in Defendants' statement of the facts is that these blank pieces of paper ultimately became the Memorandum, which purportedly requires Plato to make employee contributions to the Funds on behalf of all of its employees. Stamos has testified, Defendants argue, that he believed he had agreed to one thing (to hire and make benefit payments for two or three union employees), when in actuality he had agreed to something entirely different (to be bound by the CBA and to make contributions on behalf of all of Plato's employees).

Plaintiffs' version of the facts, however, raises a genuine issue of material fact as to the issue of fraud in the execution of the Memorandum. First, Lypka testified that Local 30 never allowed an employer to sign an agreement without having the entire document in front of it. Lypka Dep. at 24-25. This testimony casts into doubt Stamos's assertion that the two pieces of paper he signed were blank and that Local 30 misrepresented the identity of the Memorandum. Second, Lypka testified to the effect that Local 30 did not make oral agreements which deviated from the CBA. See id. at 50. Thus, Lypka's testimony also counters Stamos's contention that he relied on the Local 30 representative's statement that the papers Stamos signed would ultimately reflect an agreement to hire only two or three union employees. Finally, the Memorandum bears a signature that could be Stamos's signature, and, as described infra, there is a genuine issue of material

fact as to whether Stamos had authority to bind Plato. See Pls.' Mem. of Law in Resp. to Defs.' Mot. for Summ. J., Ex. 4. Stamos's signature on the Memorandum could suggest that he examined its terms and agreed to bind Plato to them.

Based on Plaintiffs' evidence, a reasonable jury could find that Plaintiffs did not fraudulently mischaracterize the nature of the papers to Stamos, and consequently that Plaintiffs' actions did not constitute fraud in the execution of the Memorandum. Moreover, this issue of fact depends upon a credibility determination of the parties' witnesses, and courts generally will not resolve issues of witness credibility on a motion for summary judgment. See Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989). The record therefore does not conclusively support Defendants' claim that the Memorandum is void *ab initio* as a result of Local 30's fraud in the execution. Accordingly, I will deny Defendants' motion as to this argument.

B. Defendants' Lack of Authority Argument

Defendants assert that Stamos had neither actual nor apparent authority to legally bind Plato to the Memorandum or the CBA. Therefore, Defendants conclude, Plato is not bound by the terms of the CBA even if Stamos did sign the Memorandum. Plaintiffs do not contest Defendants' argument that Stamos lacked actual authority. Accordingly, I will only consider whether there is a genuine issue of material fact as to whether Stamos had apparent authority to bind Plato to the Memorandum.

Apparent authority is defined by Pennsylvania courts as "that authority which, although not actually granted, the principal knowingly permits the agent to exercise, or holds him out as possessing." In re Mushroom Transp. Co., 382 F.3d 325, 345 (3d Cir. 2004) (citation omitted). An agent has apparent authority under Pennsylvania law when:

> [A] principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he or she purports to exercise. The third party is entitled to believe the agent has the authority he purports to exercise only where a person of ordinary prudence, diligence and discretion would so believe. Thus, *a third party can rely on the apparent authority of an agent when this is a reasonable interpretation of the manifestations of the principal*.

Joyner v. Harleysville Ins. Co., 574 A.2d 664, 667-68 (1990 Pa. Super. Ct.) (citations omitted) (emphasis added). See also Am. Telephone and Telegraph Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1441 (3d Cir. 1994) (noting that the doctrine of apparent authority applies to both agents and non-agents reasonably believed to have agency relationship with principal). Therefore, it is the actions of the principal, and not the actions of the agent, that create apparent authority. Whether the doctrine of apparent authority applies in a case is rarely a proper issue for a court considering a motion for summary judgment in the Third Circuit. See Gizzi v. Texaco, Inc., 437 F.2d 308, 310 (3d Cir. 1971) ("Questions of apparent authority are questions of fact and are therefore for the jury to determine").

There is a triable issue of fact as to whether Stamos had apparent authority to bind Plato to the Memorandum in the instant case. Defendants cite to a number of facts in the record to bolster their argument that Stamos did not have apparent authority. First, they argue that Thomas's testimony indicates that Stamos did not have apparent authority. Thomas Dep. at 40 (testifying that Stamos did not have authority to sign a document on behalf of Plato). Second, Defendants note that Thomas testified that he did not know Stamos had signed the Memorandum until the filing of this lawsuit. Thomas Dep. at 38. Finally, Defendants argue that Pedrick's testimony that he had "no firsthand knowledge of Mr. Stamos" or "whether [Stamos] had actual or apparent authority" indicates that Local 30 knew Stamos lacked apparent authority to sign on behalf of Plato. Pedrick Dep. at 45.

Other facts in the record, when viewed in the light most favorable to Plaintiffs, indicate that there is an issue for trial as to whether Stamos had apparent authority to bind Plato. First, Stamos testified that he held various positions during his employment with Plato, including responsibilities as both a roofer and a foreman. Stamos Dep. at 10. In fact, Stamos testified that he held a supervisory role while employed by Plato. Id. at 10. Such testimony could infer that Thomas had granted Stamos at least some authority to legally bind Plato. Second, Lypka testified that Thomas had spoken with "someone" over the telephone and gave that unidentified person permission to sign the Memorandum on Plato's behalf. Lypka Dep. at 42. Other evidence demonstrates Stamos's presence at the Allegheny Project work site and that he had been in contact with Thomas. Finally,

Thomas testified that he had given Stamos at least some authority to enter into an agreement to hire two or three union employees over the telephone. Thomas Dep. at 22, 27. Based on these facts, Local 30 could have reasonably believed that Thomas had granted Stamos the authority to hire any number of union employees.

After viewing these facts in the light most favorable to Plaintiffs, I find that a reasonable jury could conclude that the actions of Thomas and Plato manifested to Local 30 that Stamos had apparent authority to bind Plato to the Memorandum. Whether Stamos had apparent authority is a highly consequential issue of disputed fact on this record that should await trial. In addition, as described above, the Gizzi case cautions district courts against deciding the issue of apparent authority on a motion for summary judgment. Accordingly, I will deny Defendants' motion based on this argument.

IV. CONCLUSION

For the foregoing reasons, I find that there are genuine issues of material fact in this case that must be resolved at trial. Accordingly, Defendants' motion for summary judgment is denied. An appropriate Order follows.

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Defendants.	:	

ORDER

AND NOW, this 1st day of March, 2006, upon consideration of Defendants' Motion for Summary Judgment Pursuant to FED. R. CIV. P. 56 (Docket No. 16) and Plaintiffs' response thereto (Docket No. 19), it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s Lawrence F. Stengel
LAWRENCE F. STENGEL, J.