IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JACK J. MORRIS ASSOCIATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-04-023-RFS
	)	
MISPILLION STREET PARTNERS, LLC,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Plaintiff's Motion for Summary Judgment. Denied.

Submitted: May 5, 2008
Decided: August 26, 2008

Scott G. Wilcox, Esquire, The Bayard Firm, Wilmington, Delaware, Attorney for Plaintiff.

Bonnie M. Benson, Esquire, Camden, Delaware, Attorney for Defendant.

STOKES, Judge

Pending before this Court is a summary judgment motion filed by Plaintiff, Jack J. Morris Associates ("Plaintiff") against Mispillion Street Partners, LLC ("Defendant"). The suit seeks $115,506.30 in damages alleging breach of contract and on a quantum merit basis. For the following reasons, Plaintiff's Motion for Summary Judgement is denied.

FACTS

Plaintiff, a Virginia corporation, allegedly contracted with Defendant to promote, market, and advertise the sale of residences for a project named FisherHawke Landing on the Mispillion River in Milford. Defendant, is a limited liability company that is composed of two limited liability companies as members. These companies are Mispillion Ventures LLC ("Ventures") and Double L & S Partners, LLC ("Double L"). Ventures is owned by Charles Burton ("Burton") and Marvin Ingram. Eighty percent of Double L is owned by Donald Lockwood ("Lockwood") and his son, with the remaining twenty percent owned by Eric Sugrue. The members contributed property for the project and obtained funding from Wilmington Trust Company to begin work. However, the market declined, and no building has been done.

Before the downturn, Burton signed a Letter Agreement ("Agreement") with Plaintiff on July 21, 2005. Although Burton was originally named as one of the general managers, Defendant's Operating Agreement was amended on July 19, 2005 to remove

him. Before then, Burton had obligated the Defendant in various ways to promote the project which would appear to fall within the scope of a general manager's authority. When the Agreement was signed, Plaintiff received six thousand dollars ($6,000) representing a retainer for part of July and August at its rate of four thousand dollars per month ($4,000).

Plaintiff provided marketing services for FisherHawke Landing, such as creating the marketing logo, conducting marketing analysis to assist in the sale of units, setting up a media center, building displays, drafting brochures, and creating a website. Plaintiff issued invoices for its services on the first of each month beginning in August 2005. Defendant paid for Plaintiff's services for September and October 2005. In December 2005, Burton allegedly advised Plaintiff that a change in Defendant's loan would delay payments of future invoices. However, he assured Plaintiff that payments would ultimately be made. Thereafter, Defendant failed to pay for Plaintiff's services for November and December 2005. Burton explained that Defendant's members were having differences but again assured Plaintiff that its invoices would be paid. Thereafter, Burton advised Plaintiff that Defendant could not pay its bills.

The invoices from November 2005 through August 2006 have not been paid. Allegedly, Defendant owes Plaintiff $115, 506.30. Defendant denied that Burton was authorized to sign the Agreement. Further, Defendant denied it would be unjustly enriched if the outstanding balance is not paid. Defendant alleges it does not have

knowledge or sufficient information about Plaintiff's services for the FisherHawke Landing.

As indicated, initially, Burton was one of the general managers of the Plaintiff along with Lockwood. General managers have the authority to conduct day to day operations.[1] Burton stated that the operating agreement was amended on July 19, 2005 to facilitate the Wilmington Trust loan. Not only was Burton removed as a general manager but Ventures' ownership interest was reduced from fifty-five percent (55%) to fifty percent (50%) and Double L's was increased from forty-five percent (45%) to fifty percent (50%). Burton explained the situation this way:

> Q: Can you tell me why it was amended?
>
> A: [B]ecause I had had a Chancery Court suit that I had filed against previous partnership that I was involved in, was not comfortable with me being on the note and they wanted the management to be changed in the partnership for there to be oversight. . . I . . . initially refused to be involved in the project any more. My partner, Marvin Ingram, brought me back to the table and we negotiated a change in ownership interest from 55/45 to 50/50 because I was not going to be bound to any of the future larger debts of the project, namely with the banks, the Double L & S partnership felt that they should be given an additional five percent interest in the project because they would be taking a greater risk and I would not have that

[1]Burton Dep.16:15-24, February 4 ,2008.

risk.[2]

Despite the changes, Burton continued to operate as a manager and entered contracts. Further he held himself out as "a representative of the partnership. . . to the public and to all vendors, suppliers, and subcontractors for the partnership."[3] He stated that all the members of Defendant were aware of his actions and did not question them.[4] Burton used the following example to show that other members never questioned his managerial role:

> Q. Okay. So were you compensated for doing anything else besides obtaining governmental approvals?
>
> A. Well, I submitted invoices to the LLC just like all of our other vendors did on a monthly basis of $7500 a month basically was the way that we had agreed as a partnership. That would work up to the $135,000, and for that I ran all of the day-to-day activities fo the LLC, whatever was required in order to get approvals for the project and to continue to move forward in releasing the project to the public.
>
> Q. Okay. Would those activities have been engaged in after July 19th, 2005?
>
> A. Yes.
>
> Q. Okay. Would those invoices that you suggested you submitted to the LLC have

---

[2]Burton Dep. 20-21.

[3]Burton Dep. 24.

[4]Burton Dep. 24.

been viewed by any other members of the LLC?

A. Yes.

Q. Okay. Would any of those members had authority to determine whether you should or shouldn't be paid that $7500 a month?

A. Absolutely they would have. If they had decided not to pay me, they could have.[5]

Burton and Lockwood provided conflicting statements regarding the existence of Burton's authority, and Lockwood's awareness or knowledge of the alleged contract between Plaintiff and Defendant[6]. Lockwood stated that he had no knowledge of the Agreement and of any communications between Plaintiff and Defendant.[7] He also stated that he was not aware of Plaintiff's involvement in FisherHawke Landing project and any actual or proposed payments to Plaintiff until the law suit.

STANDARD OF REVIEW

Summary judgment cannot be granted where material issues of fact exist; only a jury can resolve them.[8] The moving party must establish the lack of such issues.[9] Should the moving party establish the absence of material factual issues, the nonmoving party

---

[5]Burton Dep.25-26.

[6]Burton was deposed in his individual capacity. Lockwood participated in a deposition in his individual capacity and in his capacity as the representative of Defendant pursuant to *Super. Ct. Civ R.* 30 (b)(6).

[7]Lockwood Dep. 35-37.

[8]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[9]*Id.*

must prove the presence of such issues in order to prevent summary judgment.[10] In consideration of a motion for summary judgment, the evidence is viewed in a light most favorable to the nonmoving party.[11] Where the moving party has produced sufficient evidence to support its motion under Superior Court Civil Rule 56, the non-moving party may not rely solely upon her pleadings, but must produce evidence showing a genuine issue of a material fact for trial.[12] Summary judgment is not appropriate if the Court determines that it does not have sufficient facts to enable it to apply the law.[13]

DISCUSSION

Did Burton have authority to sign the Agreement with Plaintiff? A disclosed or partially disclosed principal is a party to a contract, when executed by an authorized agent.[14] In the ordinary course of business dealings, an agent may be cloaked with three types of authority: express, implied and apparent authority.[15] Express authority may be conveyed to the agent, either orally or in writing. Implied authority may be evidenced by conduct of the principal. Apparent authority may be evidenced by the conduct of an agent

---

[10] *Id*. at 681.

[11] *Id*. at 680.

[12] *Super. Ct. Div. R. 56(e)*; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

[13] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)), *rev'd in part and aff'd in part*, 208 A.2d 495 (Del. 1965).

[14] *Capital Broadcasting Corp. v. Dover Downs. Ins.*, 1976 WL 177784, at *3 (Del. Com. Pl. Jan. 11, 1976).

[15] *Liberty Mut. Ins. Co. V. Enjay Chemical Co. (Now Exxon-Corp.)*, 316 A.2d 219, 222 (Del. Super. 1974).

who holds himself out as possessing authority with the apparent consent or knowledge of the principal. In these circumstances, the principal cannot deny the agent's authority. Express and implied authority is also known as actual authority.[16]

In *Wilson v. Active Crane Rentals, Inc.*, the Court observed that "an agency relationship may be created by the act of the parties or by operation of law."[17] The facts must be examined to assess whether Burton had express or implied authority to act as Defendant's agent. Defendant argues that Burton did not have actual authority to enter into the Agreement with Plaintiff and that Defendant was not aware of Burton's action entering into a contract with Plaintiff. Lockwood testified that Burton was out of the picture after the amendment to the operating agreement. However, he acknowledged that Burton was practically "still the manger."[18]

In contrast, Burton testified that Defendant was aware of Plaintiff's involvement in the project and his actions concerning the Agreement. There is no record of Defendant conveying express authority to Burton either orally or written on July 21, 2005. However, actual authority can still exist when the principal implicitly grants such authority to an agent.[19]

---

[16] *Billops v. Magress Const. Co.*, 391 A.2d 196, 197 (Del. 1978).

[17] *Wilson v. Active Crane Rentals, Inc.*, 2004 WL 1732275 at *1 (Del. Super. July 8, 2004).

[18] Lockwood Dep. 28:22-24, January 16, 2008.

[19] *Wilson*, 2004 WL 1732275 at * 2.

In this regard: "The determination of implied authority depends on the relationship between the principal and agent, not what a third party believes about the relationship. That is, implied authority is authority that the agent reasonably believes he has as a result of the principal's actions."[20] The Restatement of Agency states that an agent's belief is reasonable "if it accords with the principal's manifestations and the inferences that a reasonable person in the agent's position would draw from the circumstances creating the agency."[21] Whether Burton reasonably believed that he had Defendant's authority to enter into a contract with Plaintiff based on his relationship with Defendant is for the jury to decide.[22] Burton had authority to act before the operating agreement was amended. However, Burton testified that he continued to act as if there was no amendment with Defendant's knowledge. This position is contrary to the amendment that was executed forty eight hours before the Agreement. Lockwood asserts a Delaware real estate firm was engaged to perform advertising and marketing services.

Even if Burton did not have actual authority, the facts would then be evaluated to determine whether Burton had apparent authority to act as Defendant's agent. "A principal is bound by an agent's apparent authority which he knowingly permits the agent to assume of which he holds the agent out as possessing."[23] The determination of apparent

---

[20] *Id.*

[21] Restatement (Third) of Agency § 2.02 (2006).

[22] *Id.*

[23] *Liberty Mut. Ins. Co.*, 316 A.2d at 223.

authority would involve an examination of the interactions among Burton, Defendant's members, and Plaintiff. This is a factually based inquiry which must consider whether Defendant made representations to Plaintiff indicating that Burton was its agent, whether Plaintiff relied on them, and whether that reliance was reasonable.[24]

Whether an agency relationship exists is normally a question of fact.[25] In the instant case, there is a factual dispute as to whether an agency relationship existed between Burton and Defendant and Burton's authority to enter into an agreement with Plaintiff on behalf of Defendant on July 21, 2005. Credibility questions about Burton, Lockwood, and other interested persons are the usual grist of the jury mill.

CONCLUSION

Considering the foregoing, Plaintiff's Motion for Summary Judgment is denied.

IT IS SO ORDERED.

[24] *Wilson*, 2004 WL 1732275 at * 1.

[25] *Montgomery v. Achenbach*, 2007 WL 3105812 at * 3 (Del. Super. July 26, 2007) (*citing Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. Super. 1997)).