IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JERRY PISANO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 05C-03-132-FSS
	)	
DELAWARE SOLID WASTE AUTHORITY,	)	
	)	
	)	
Defendant.	)	

Submitted: July 6, 2006
Decided: November 30, 2006

MEMORANDUM OPINION and ORDER

Upon Defendant's Motion for Summary Judgment – ***GRANTED.***

R. Stokes Nolte, Esquire, Nolte & Associates, 1010 N. Bancroft Parkway , Suite 21, Wilmington, Delaware, 19805. Attorney for Plaintiff.

Jeremy W. Homer, Esquire, Parkowski, Guerke & Swayze, P.A., 116 West Water Street, P.O. Box 598, Dover, Delaware, 19904. Attorney for Defendant.

SILVERMAN, J.

This is Defendant's summary judgment in a breach of contract case. Generally, Plaintiff relies on agency principles and claims he had an unconditional contract to buy used equipment, worth millions, from Defendant. According to Plaintiff, Defendant breached when it sold the equipment to someone else. Not only that, Defendant refuses to return the purchase price, $150,000. Alternatively, Plaintiff alleges unjust enrichment and promissory estoppel.

I.

More specifically, Jerry Pisano alleges that in 1999, he obtained a contract through Delaware Solid Waste Authority's agent, Stanley Wong of Professional Systems Associates, Inc., to acquire the DSWA's defunct Energy Generating Facility, for scrap or resale. Pisano claims DSWA sold the EGF's multi-million dollar equipment to him, outright, for $150,000. He paid for the equipment up front, through a certified check he gave to Wong. DSWA, however, later sold part of the EGF's equipment, "the most valuable and indispensable part," to another, thereby breaching the alleged contract. Also, according to Pisano, DSWA unjustly forfeited the $150,000 he gave to Wong.

Defendant relies on the statute of limitations and the fact that it had no contractual relationship with Plaintiff. DSWA agrees that there was a contract between DSWA and Wong's company, Professional Services Associates, Inc, and not

Pisano. Wong, therefore, was PSA's principal, not DSWA's agent. The contract, as finally amended, stated that PSA would give $150,000 to DSWA for the right to remove and sell the EGF equipment. The money that Defendant kept came from Wong, not Plaintiff, as a non-refundable deposit.

Moreover, Plaintiff dealt with Wong and not Defendant. Also, Wong and Pisano were partners and joint venturers. PSA and Pisano then failed to perform on time. They failed to meet the contract's preconditions, such as posting a performance bond and letter of credit. After time extensions and repeated requests for performance, DSWA was entitled to cancel the contract, sell the equipment elsewhere, and keep the deposit that PSA, not Pisano, submitted.

Pisano answers that he bought the equipment with the money he gave to Wong. Pisano alleges PSA and Wong, on DSWA's behalf, waived the preconditions and extended the contract's deadlines. DSWA replies that Wong clearly had no authority to alter DSWA's contract with PSA, much less to give Pisano a seemingly open-ended extension.

Discovery is complete. On the record, starting with the clearly written contract between DSWA and PSA, a reasonable fact-finder could only conclude: Pisano was not a party to the contract; Wong never was DSWA's actual or apparent agent; Defendant did not misled Plaintiff about the contractor's relationship with

Defendant; and Pisano could not have reasonably believed that Wong was authorized by DSWA, directly or indirectly, to bind DSWA to an unconditional, open-ended sales contract with Pisano. Pisano's beliefs were unreasonable because they were based only on things Wong said or did, and Plaintiff's undeniable failure to investigate the facts is neither attributable to Defendant nor excusable. Besides, Plaintiff's beliefs were flatly refuted by Pisano's direct communication with DSWA, and Pisano failed to clear-up the obvious inconsistencies between what Wong and DSWA told him. Finally, Plaintiff never satisfied important, financial preconditions to qualify as the equipment's buyer.

Moreover, the disputed money came to DSWA from PSA, and it does not matter where PSA got it. Also, in effect, the money purchased an option on the equipment, which was potentially valuable to Pisano and PSA. Finally, after DSWA had obviously terminated the contract, Plaintiff waited too long to file suit. Accordingly, Defendant's motion for summary judgment must be granted.

II. Standard of Review

A. Issues of Fact

Summary judgment is proper if there is no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law.[1] The court considers the full record, including pleadings, depositions, and answers to interrogatories in deciding the motion.[2] The court must view the facts in a light most favorable to the non-moving party and accept as established all undisputed factual assertions.[3] All rational inferences will be drawn in favor of the non-moving party.[4] "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[5] "The non-movant cannot create a genuine issue for trial through bare assertions or conclusory allegations."[6]

Here, the credibility of Pisano's testimony was seemingly refuted, in part, by other evidence. Nevertheless, the court is taking Pisano's testimony as true. Even so, Pisano's testimony does not create a material dispute of fact making summary judgment inappropriate. Although Pisano's testimony is hard to believe, the

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[1] Super. Ct. Civ. R. 56(c).

[2] *Id.*

[3] *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99 (Del. 1992).

[4] *Id.*

[5] *Savor, Inc. v. FMR Corp.,* Del. Super., C.A. No. 00C-10-149, Slights, J. (Aug. 16, 2004) (Mem. Op.) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986)).

[6] *Board of Educ. of Caesar Rodney Sch. Dist. v. New Castle Roofing & Waterproofing, Inc.,* 2001 WL 1456870 (Del. Super.).

court is not discounting it for that reason. Instead, as seen below, other facts, including Pisano's actions, show that there is no material dispute of facts.

B. Contract Interpretation

Contract interpretation initially presents a question of law.[7] By reviewing the entire contract, the court must determine whether the contract is ambiguous. Ambiguity only exists when the contract's terms are "reasonably or fairly susceptible of different interpretations" or if the terms may have more than one meaning.[8] Contract terms, however, will not be twisted to create ambiguity if an ordinary reading leaves no room for uncertainty.[9] If the language is clear and unequivocal, the parties are bound by its plain meaning.[10] As discussed below, DSWA's written contract with PSA is unambiguous and supports DSWA's position clearly.

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[7] *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006). *See also O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 288 (Del. 2001). *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997).

[8] *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[9] *Id.* at 1197.

[10] *Emmons,* 697 A.2d at 745.

III.

A. The Energy Generating Facility

Delaware Solid Waste Authority is a public instrumentality[11] that owns and operates the Delaware Recycling Center at Pigeon Point Landfill. At the site was the Energy Generating Facility, built in the early 1980s and operated until 1991, when it was shut down for technical and economic reasons. The EGF was originally intended to burn trash and generate electricity, but DSWA used it as a transfer station to collect waste before sending it out-of-state.

According to the complaint, the EGF was a large building containing equipment, primarily consisting of an incinerator and "multiple units of major mechanical equipment," including oilers, turbine generators, electrostatic precipitators, cooling towers, and much more.

B. DSWA Contract 410's Formation

In June 1996, DSWA issued a Request for Proposals for the EGF's "dismantlement and removal." DSWA wanted an empty building for recycling work. Dismantling and removing the EGF building's contents, including the "gigantic" incinerator, would require an experienced, skillful and resourceful demolition company. It also would require a third-party to take the equipment, which even in its

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[11] 7 *Del. C.* § 6403(a).

used condition was potentially quite valuable.

DSWA rejected the first proposals as too costly. So, it issued another RFP. PSA, whose president was Stanley Wong, submitted a proposal, including $100,000 for the right to remove the equipment. No other offer guaranteed DSWA a definite sum. DSWA accepted PSA's proposal in September 1998. Pisano was not involved in these dealings.

Meanwhile, before the contract was signed, Pisano, "in partnership" with Wong, formed Nasprosa, Inc. to move the EGF to Santo Domingo in the Dominican Republic. The name Nasprosa combines Pisano's company's name, Northeastern Associated Services Affiliates, with Wong's company's name, PSA. The Nasprosa website listed Pisano as "President and Chairman of the Board," and Wong as "Vice President - R&D." Also, the website listed PSA as "coordinating the Construction and Operations for all projects."

On January 7, 1999, before any DSWA contract was let, Pisano sent a memorandum to an associate requesting help in finding financing for acquiring the EGF. Pisano's memo stated that he and Wong were "partners" and "would like to own this one." Pisano and Wong expected that the equipment was worth far more than it would cost to dismantle and remove it.

Nasprosa's formation, its principals, its objectives and even its name are

significant, undisputed facts. Much of Pisano's complaint turns on his claim that Wong and PSA were DSWA's alter egos. Pisano's relationship, however, with Wong and Nasprosa is inconsistent with his alleged belief that Wong was DSWA's employee or agent.

On February 2, 1999, DSWA and PSA entered into DSWA Contract 410, "Agreement for Dismantlement and Removal of Equipment Located at the Energy Generating Facility." Wong signed for PSA, the designated Contractor. Pisano and Nasprosa were neither parties to the contract, nor are they mentioned in it.

C. The Contract's Terms

Contract 410 granted PSA the exclusive right to remove the EGF's equipment "on or before September 1, 2000," and further provided that PSA would sell the dismantled EGF equipment to "a firm acceptable to DSWA." DSWA was not entitled to any proceeds from PSA's sale of the EGF's equipment. Under the contract, DSWA received the equipment's removal and $100,000 from PSA, nothing more. PSA was entitled to whatever the approved buyer would pay to PSA. DSWA's only interest in the EGF equipment's ultimate disposition was that PSA had to sell it to a DSWA-approved buyer.

As mentioned, the EGF equipment was massive, and according to Contract 410, dismantling and removing it was a highly regulated undertaking. The

contract specified what was to be removed, how it was to be removed, and what was to be left behind – from the roof down to the anchor bolts in the floor. The contract also contained many provisions concerning PSA's timely and satisfactory performance, including PSA's providing a million dollar, performance bond.

As mentioned above, the contract also called for PSA to find an acceptable buyer for the dismantled and removed equipment. The contract and the record are unclear as to why DSWA insisted on approving the buyer. Not that it matters here, presumably DSWA *qua* DSWA had to be assured that the buyer would be able to take the EGF equipment away and dispose of it properly.

Even though the contract provided for DSWA to approve the buyer, the contract was concerned primarily with getting the equipment out of the EGF building. Contract 410 contained 28 sections, covering nine pages, not counting the signature page. It also incorporated a major equipment list in an appendix. Of all that, only three sections, Sections 5, 6, and 7, related to the prospective buyer of the EGF's equipment.

Section 5 set a deadline and addressed the approved buyer. It gave PSA thirty days from the "commencement of the Agreement" to sign a sales agreement with "a firm acceptable to DSWA," at DSWA's discretion. If no acceptable buyer was found, Contract 410 could be cancelled. The section also allowed DSWA to

extend the deadline "in [DSWA's] best interest."

Section 6 required PSA to obtain a DSWA-approved, bona fide, $750,000 letter of credit from the equipment's buyer. The letter of credit was to "assure that all work described in [the] Agreement will be performed and completed and in the time frame required and that all subcontractors are paid. . . ." Section 11 called for PSA to also provide the $1,000,000 performance bond mentioned above.

Section 7 required PSA to pay DSWA $150,000 "[u]pon execution of a sales agreement with a firm acceptable to DSWA," with $100,000 comprising DSWA's "final net revenue," and $50,000 in escrow as retainage.

Thus, DSWA's interest in the contract was: having the EGF's equipment promptly removed by PSA, having the work done properly by PSA, and receiving $100,000 from PSA. Although DSWA benefitted by having the buyer take the dismantled equipment away, Contract 410 contemplated that PSA would strike its own deal with the buyer and PSA would keep the proceeds, whatever they turned out to be. DSWA had no real stake in the sale. PSA's interest in the contract was in whatever profit PSA could garner from its sale of the potentially valuable, dismantled and removed equipment. As presented below, PSA and Pisano thought the equipment was worth at least two million dollars, probably much more.

D. Pisano's Involvement

The record shows that Pisano first met Wong, apparently through an advertisement, either three weeks or three months before March 1999. On March 3, 1999, Pisano gave Wong, not DSWA, a $150,000 check, made out to himself and endorsed: "James Pisano in full payment for the Pigeon Point EGF. To PSA with $50,000 escrow." Pisano characterizes the check as "the actual contract between PSA and [him]." Pisano's case turns on his adamant insistence that although he gave his check to Wong, endorsed to PSA, he nevertheless bought the EGF's equipment directly from DSWA. Pisano's contention is refuted conclusively by Contract 410's terms, the record and the check, itself.

On March 4, 1999, before the first completion deadline, Wong notified DSWA that "a sales agreement has been executed between PSA, Inc. and J. Pisano T.A. Nasprosa Partnership." The letter promised PSA's performance bond and Nasprosa's letter of credit would be forthcoming, and Wong attached a PSA check for $150,000. Presumably, the funds for PSA's check to DSWA came from Pisano's March 3, 1999 check. There is no evidence, though, that DSWA knew how PSA came up with the money. Nor is there a reason why DSWA should have cared.

Wong did not disclose his relationship with Pisano and Nasprosa. In any event, the March 4, 1999 letter seems to be the first time DSWA became aware of

Pisano and Nasprosa. Meanwhile, Pisano claims that he thought Wong was a DSWA employee and PSA was part of DSWA. Pisano, however, has no evidence showing that his belief was based on any assurance by DSWA.

On March 6, 1999, Pisano, Wong, and two erstwhile partners agreed to form a corporation, Electag Corp., which would buy the EGF's equipment from Nasprosa. Although Electag was never actually formed, Pisano signed an agreement, as Electag's president and CEO, with Wong, as Nasprosa's president. Additionally, on May 14, 1999, an Electag principal sent a letter to a business associate in Santo Domingo acknowledging that they had "very limited time to meet [their] commitment to move [their] plant."

On July 2, 1999, Pisano sent another letter to Santo Domingo mentioning that Nasprosa was "committed to . . . move the plant by a certain date and that date is quickly approaching." And in an August 4, 1999 letter, Pisano promised Wong $2,000,000 for the EGF, acknowledging that PSA "has secured the rights to" the EGF. For the most part, the EGF's equipment would then end-up in the Dominican Republic. PSA, Nasprosa and Electag would profit from the final sale of the equipment abroad. At some point, at least $2,000,000, probably much more, was supposed to change hands, with none of it going to DSWA.

As explained above, not only was Pisano not a party to Contract 410, he

had nothing to do with the deal between DSWA and PSA. It is undisputed that DSWA first learned of Pisano two months after DSWA and PSA signed Contract 410. Nevertheless, for an unknown reason, Pisano allegedly "thought that PSA was Delaware Solid Waste," and Wong was DSWA's "man."

Viewing the evidence favorably to Pisano, it is possible that Wong was playing both ends against the middle, misleading DSWA and Pisano about what Wong was up to. Closely examining the record undermines that notion. There is reason to suspect that Pisano knew what was what. For present purposes, however, the court assumes that thanks to Wong and not because of anything done by DSWA, Pisano was initially confused about Wong's and PSA's character.

E. The December 9, 1999 Meeting

On December 9, 1999, DSWA staff, Pisano, and Wong finally met to discuss the equipment's removal and the sales agreement. Until then, DSWA had never communicated with Pisano and *vice versa*. This is also when Wong, Pisano and DSWA met face-to-face and when Pisano first met with DSWA. The December 9, 1999 meeting is pivotal to Pisano's agency theory.

As mentioned in the Standard of Review,[12] and as discussed in again in Section IV, Pisano claims that everyone at the meeting congratulated him on

[12] *See supra* Section II.

becoming the approved buyer of the EGF. Pisano admits, however, that during the meeting, DSWA also reviewed Contract 410's requirements, financial and otherwise. Pisano further admits that he disagreed with things said by DSWA concerning Nasprosa's obligations, but Pisano neither said nor did anything in response. He continued to rely on his belief that Wong was associated with DSWA and Wong was entitled to waive DSWA's written and agreed on requirements. That belief, however, as the record shows, was inspired only by Wong.

The following day, December 10, 1999, DSWA sent a letter, on DSWA letterhead, to Wong as president of PSA, with a copy to Pisano. The letter memorialized the meeting and recapitulated Contract 410's requirements, including its deadline and DSWA's insistence on receiving financial information and the letter of credit from Nasprosa. DSWA's letter also called for PSA's performance bond. After attending the meeting and reading DSWA's letter, Pisano can not maintain that he still believed that he had bought the equipment from DSWA unconditionally.

F. The Contract's Termination And Aftermath

Presumably, Pisano spent the next eight months trying unsuccessfully to find a real buyer for the equipment. DSWA sent Wong several letters complaining about the lack of progress. On August 23, 2000, Wong met with DSWA to discuss an extension. Subsequently, DSWA and PSA amended Contract 410 by Amendment

No. 1, pushing back the completion deadline to December 31, 2001.

Amendment No. 1 required PSA to comply with all previous contract requirements, as well as to remove one major piece of equipment by December 31, 2000. The amendment also provided that if the work did not go forward as required, DSWA would keep the entire $150,000 provided by PSA. Pisano argues that Wong's ability to obtain an extension demonstrated that Wong spoke for DSWA, and therefore, explains Pisano's belief that he was not subject to the December 10, 1999 letter's requirements. The fact that Wong got an extension is consistent with but does not justify Pisano's conclusion.

By January 9, 2001, past the extended deadline, the equipment's removal still had not begun, and neither PSA's performance bond nor Nasprosa's letter of credit had been provided. The problem, of course, was that Pisano had not resold the equipment. Pisano dismisses the extended deadline by asserting that Wong told him not be concerned about it.

On January 29, 2001, DSWA's counsel notified Wong, as PSA's president, that Contract 410 was in default, and it gave PSA until February 12, 2001 to cure the default in specific ways. On February 13, 2001, Wong replied directly to DSWA, with a copy to Pisano, implying that the deal was still good. Again, Pisano was content to blindly rely on Wong, despite DSWA's seemingly inconsistent

behavior.

In response to Wong's disingenuous reply, DSWA's counsel sent a letter, dated February 22, 2001, terminating the contract, barring PSA's employees from doing any work under the contract, and announcing DSWA's intent to hold PSA liable for damages. On November 24, 2002, over nine months after the termination, eleven months after DSWA's extended deadline had passed, and almost four years after Pisano gave his check to Wong, DSWA sold some of the equipment to someone else.

Meanwhile, although DSWA did not copy Pisano on its termination letter, Pisano admittedly knew about it. According to Pisano's testimony, "at around the time" that Wong replied to DSWA's January 29, 2001 letter, which would have been on or about February 13, 2001, DSWA stopped Pisano from removing the EGF's equipment. DSWA told Pisano, as he testified, "We didn't have any right to be in there. Every time we went in there they gave us a hard time." In other words, by mid-February 2001, Pisano knew DSWA would not let him have the EGF's equipment.

Pisano and Nasprosa did not react to the contract's February 2001 termination and their ouster until August 22, 2001. Then, Pisano sent a letter, on Nasprosa letterhead, to DSWA. In the letter, seemingly for the first time, Pisano referred to PSA and Wong as DSWA's agents.

Pisano's August 22, 2001 letter also darkly referred to Wong and another DSWA contractor as having been "forced on Nasprosa, Inc. as the only approved Contractors that had Special relationship the board members of [DSWA]." It also conveyed Nasprosa's belief that Nasprosa was the EGF's owner, "by virtue of the $150,000 paid to DSWA." The letter recited ways that Nasprosa had to "endure [DSWA's] meddling and bad faith," including DSWA's showing a competitor "the plant as for sale . . . ," and a vendor telling the Dominican Republic authorities that "Nasprosa, Inc. is not the owner of the plant . . . ." The August letter concluded by asking DSWA to "[p]lease be patient a short while longer," or Nasprosa would hire lawyers.

On January 25, 2002, Wong wrote a letter, also on Nasprosa letterhead, to DSWA. Wong asked for "90 days to have the exclusive on the EGF." Wong claimed that Nasprosa had a commitment for the EGF from "the Government of Zambia," funded through the European Economic Union, or alternatively, "another party from the Dominican Republic interested in the EGF." Apparently, Wong also was speaking to DSWA by telephone.

DSWA responded to Wong by letter dated February 6, 2002. DSWA wrote that "we anticipate issuing an RFP by the end of this year, subject to certain other activities under consideration . . . ." DSWA expressly refused to give Nasprosa

"any exclusive arrangement." But, DSWA closed with assurance that,"[DSWA] will include you on our list of firms to receive notification of the RFP . . . ."

IV.

As indicated above, DSWA's motion turns on whether a reasonable juror could conclude that: Pisano had an interest in Contract 410; whether Wong was authorized, directly or indirectly, to bind DSWA to an unconditional sales agreement between PSA and Nasprosa or Pisano; and whether DSWA was entitled to cancel Contract 410 and keep PSA's deposit, which unbeknownst to DSWA was funded by Pisano. Subsumed in this is Pisano's claim that he bought the EGF unconditionally when he gave Wong the $150,000 check.

The motion also presents Defendant's statute of limitations defense. Finally, DSWA's motion addresses Pisano's unjust enrichment and promissory estoppel claims.

A. Pisano Was Not a Party to The Contract

As suggested above, DSWA offers alternative arguments supporting summary judgment. It claims that regardless of how it handled the EGF equipment's sale, DSWA never had a contract with Pisano. Its deal, Contract 410, was with PSA. And although Contract 410 entitled PSA to sell the EGF to a third party, DSWA was never in privity with Pisano or Nasprosa. Accordingly, if anyone had a claim against

DSWA arising out of Contract 410, it would have been PSA, the only other party to the contract. Starting with Contract 410 and considering the events through July 1999, a reasonable jury, viewing the evidence most favorably to Pisano, could only conclude that DSWA hired PSA to promptly dismantle and remove the EGF's equipment in a workmanlike manner, to dispose of the equipment by selling it to an acceptable buyer, and to pay DSWA $100,000.

Pisano tacitly concedes, as he must, that neither he nor Nasprosa were parties to Contract 410. In fact, Pisano admits that he did not know Contract 410 existed until Wong introduced him to DSWA at the December 1999 meeting, ten months after DSWA and PSA signed the contract. Therefore, Pisano has no standing to sue DSWA outright for any breach of Contract 410.

As presented, Pisano claims that "the actual contract between PSA and [Pisano]" was his March 3, 1999 check, and the check was his contract to buy the equipment unconditionally. The way Pisano attempts to convert his "contract with PSA" into an unconditional contract of sale between him and DSWA is by claiming Wong was DSWA's broker and agent.

B. Wong Was Neither DSWA's Broker Nor Its Agent

Pisano claims that DSWA held Wong out as DSWA's broker or agent because Contract 410 authorized Wong to sell the EGF's equipment on DSWA's

behalf. Pisano claims that since there was no requirement in Contract 410 for PSA to communicate any performance obligations to a prospective buyer, DSWA mistakenly granted PSA authority to sell the equipment unconditionally.

Assuming the facts supported the claim that DSWA held Wong out as its broker or agent, which they do not, Pisano knew Wong was doing business as PSA, and technically, PSA was doing business with Nasprosa, not with Pisano. More importantly, as explained above, Contract 410 did not authorize PSA to sell the equipment on DSWA's behalf. The contract gave PSA the right to sell the equipment to an acceptable firm on PSA's behalf, after PSA dismantled and removed it. In return for that, DSWA was entitled to $100,000 from PSA. The only way to reasonably read Contract 410 is that once PSA met the contract's terms and removed the equipment, the equipment was PSA's, not DSWA's, to sell.

As a matter of law, based on the contract's terms, neither Wong nor PSA was DSWA's actual agent. Contract 410 does not create any agency. DSWA had no agency agreement, or any contract with Wong, Nasprosa, Pisano, Electag or anyone else. This point is subtle but it goes to the heart of the dispute. DSWA's only contractual relationship was with PSA, and PSA's status is clearly defined by the written contract.

By the same token, no matter what Pisano thought about Wong, and no

matter how Wong misled Pisano, Wong could not unilaterally cloak himself with authority to bind DSWA. As discussed next, the only way Wong could be characterized as DSWA's agent is if DSWA did something to make it reasonably appear to Pisano that Wong was DSWA's agent and as such, was authorized to bind DSWA in the way Pisano claims it was bound.

C. Wong Did Not Have Apparent Authority

Pisano's core argument is that Wong had apparent authority to bind DSWA and Pisano relied on it. The argument fails at different levels. First, although DSWA does not make the point, DSWA is a governmental entity. Pisano's Complaint refers to DSWA as "a State Agency of the State of Delaware." The American Law Institute's Third Restatement of the Law of Agency provides that the doctrine of apparent authority generally does not apply to governmental entities.[13]

For sound policy reasons, some courts will not consider apparent authority claims against governmental entities. At most, courts apply apparent authority against governmental entities reluctantly. Courts that consider exceptions to the rule against applicability usually require that injured parties must show that the rule against applicability will cause "substantial injustice." Usually, however, third parties dealing with governmental entities "take the risk of error regarding the agent's

[13] Restatement (Third) of Agency § 2.03 cmt. g (2006).

authority to a greater degree than do third parties dealing through agents with non-governmental principals."[14] If the court was willing to consider whether Pisano demonstrated substantial injustice, the record shows no unjust behavior by DSWA.

As a matter of law, based on the undisputed facts, this is the sort of case contemplated by the Restatement's general rule against applying the doctrine of apparent authority to a governmental entity. Based on a record like this one, allowing a claimant, like Pisano, to establish apparent authority of an actor, like Wong, on behalf of a governmental entity, like DSWA, would set a troublesome precedent.

Second, Pisano cannot prevail under the doctrine of apparent authority as it typically applies to ordinary business relations. It has long been held

> (1) that the law indulges in no bare presumptions that an agency exists; it must be proved or presumed from the facts; (2) that the agent cannot establish his own authority either by his representations or by assuming to exercise it. . . .[15]

Moreover, Delaware follows the Restatement of Agency.[16] According to the

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[14] *Id. See also Limestone Realty Co. v. Town & Country F.F. & C., Inc.* 256 A.2d 676, 678- 679 (Del. Ch. 1969) (citing *Zeeb v. Atlas Powder Co.,* 87 A.2d 123 (Del.1952) and *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467 (Del. Super. Ct. 1930)).

[15] *Arthur Jordan Piano*, 154 A. at 472.

[16] *See, e.g., Billops v. Magness Constr. Co.,* 391 A.2d 196, 198 (Del. 1978) (citing Restatement (Second) of Agency §§ 8, 8B, 27 (1958));

(continued...)

Restatement, paraphrasing slightly:

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with a third party when the third party reasonably believes the actor has authority to act on the principal's behalf and the belief is traceable to the principal's manifestations.[17]

To hold DSWA liable under the apparent authority doctrine, therefore, Pisano must be able to prove not only that Wong showed signs of authority to Pisano, the signs of authority were linked to DSWA's intentional or unwitting conduct. As a matter of law, Pisano could not rely only on Wong's representations. At the moment Pisano gave his money to PSA and Wong in March 1999, DSWA did not even know Pisano existed. And, the only authority Wong had was manifested in Contract 410.

DSWA's congratulations at the December 9, 2001 meeting came ten months after Pisano gave his money to Wong. The same goes for DSWA's relaxed enforcement of its contract deadlines. The congratulations and the deadline enforcement, individually and collectively, do not establish that Wong probably could

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[16](...continued)
Int'l Boiler Works, Co. v. Gen. Waterworks Corp., 372 A.2d 176, 177 (Del. 1977) (citing Restatement of Agency §135 (1958)).

[17] Restatement (Third) of Agency §2.03 (2006). *See also Limestone Realty,* 256 A.2d at 678- 679 (citing *Zeeb,* 87 A.2d 123 and *Arthur Jordan Piano,*154 A. 676).

sell the EGF on DSWA's behalf, without conditions or deadlines. Their insignificance pales further in light of DSWA's oral and written insistence on Pisano's meeting Contract 410's conditions. In short, there is insufficient evidence to support a jury's finding that Wong's putative authority was traceable to DSWA's manifestations.

Furthermore, as presented above, Pisano's reliance on Wong's apparent authority had to have been reasonable. Whether a belief is reasonable, of course, begs a jury's consideration.[18] But what constitutes a reasonable belief is neither an entirely subjective nor amorphous concept. Not every belief, no matter how sincere, is legally reasonable. The law provides normative standards by which the reasonableness of Pisano's belief about Wong's authority must be measured.

For one thing, Pisano's beliefs have to considered. Pisano's belief that Wong had unilateral authority to waive Contract 410's deadlines and conditions is unreasonable. Pisano offers no reason, much less evidence, explaining why DSWA would give Wong the *carte blanche* over its affairs that Pisano attributed to Wong.

Beyond that, Pisano "believed" that Wong was DSWA's broker. If he were correct, that meant Wong also was partnering with Pisano to become the buyer. In other words, Pisano cannot claim that he thought Wong was DSWA's broker while

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[18] *See, e.g., Billops,* 391 A.2d at 198.

knowing that Wong was self-dealing. Pisano cannot have it both ways. At best, Pisano had to have suspected that Wong's relationship with DSWA was sketchy.

Another factor in deciding whether Pisano's beliefs were reasonable concerns his duty to act with "ordinary prudence and reasonable diligence" in ascertaining the scope of Wong's authority. As a matter of law, Pisano had to make a preliminary inquiry as to Wong's apparent authority, and if warranted, make further investigation.[19] Pisano could not reasonably rely on Wong's apparent agency if he ignored facts pointing to Wong's lack of authority.[20]

Pisano offers no evidence that he made any preliminary inquiry about Wong's supposed authority. Whatever the reason, Pisano gave Wong the check without contacting DSWA. In Pisano's August 22, 2001 letter to DSWA on Nasprosa letterhead, he implies that DSWA "forced" Wong on Nasprosa, but Pisano has not presented evidence showing that.

In at least one important way, Pisano cannot deny that he failed to investigate Wong's authority when he should have. As presented above, Pisano admits that when he finally met DSWA for the first time, which was at the December 9, 1999 meeting, DSWA's representative explained Contract 410's conditions. The

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[19] *Int'l Boiler Works,* 372 A.2d at 177.

[20] *Limestone Realty,* 256 A.2d at 679.

next day, DSWA copied Pisano on a letter to Wong, written on DSWA's letterhead, clearly recapitulating the conditions, including Nasprosa's financial obligations and the deadline for completion. Even after he heard what DSWA said, Pisano stated, "I didn't tell them anything at the meeting. I just listened."

After the meeting, Pisano did nothing to find out what was going on. He did not even ask DSWA to copy him on future correspondence with Wong. Regardless of what DSWA told him orally and in writing, Pisano remained content to rely on whatever Wong said.

Pisano attempts to dismiss DSWA's alarming letter and his failing to even attempt to meet DSWA's conditions, by claiming: "Stanley [Wong] told me. . .that you didn't have to worry about that stuff." That, coupled with the allegation that Pisano "didn't agree to those terms."

Pisano's position cannot add up in other ways. If Wong were DSWA's agent, as Pisano believed, why would DSWA send its December 10, 1999 letter to PSA and Wong demanding that "PSA provide a $1,000,000 performance bond in accordance with our contract"? If Pisano's views were accurate, DSWA's December letter was written by DSWA to its agent (Wong), demanding that its agent provide a performance bond to assure completion of a contract with itself. In reality, anyone reading DSWA's letter had to realize that DSWA and PSA were not the same, and

Wong was neither DSWA's employee nor its agent.

Again, Pisano had no contract or direct relationship with DSWA. He had nothing in writing from DSWA, Wong, PSA, or even Nasprosa. Pisano made a deal with Wong without checking out Wong's authority. From then on, Pisano doggedly relied on Wong's assurances. Thus, Pisano thought he had bought a massive industrial facility worth millions, including an incinerator, turbines, electrostatic precipitators, cooling towers, almost everything in the plant "even the light bulbs," according to Pisano, for $150,000. And, he had whatever time he needed to remove the equipment.

In summary, Pisano presents nothing that makes his initial belief in Wong's authority reasonable. Pisano failed to make a satisfactory initial inquiry into Wong's authority. And, after he had obvious reason to question what Wong was telling him, Pisano failed to investigate. Pisano, therefore, cannot meet his burden of proving that his beliefs about Wong's authority were traceable to DSWA's manifestations, nor that he had a reasonable basis to believe Wong was authorized by DSWA to act on its behalf.

C. DSWA Did Not Breach Any Contract

Since Pisano cannot prove that Wong had authority to excuse performance or that Pisano bought the EGF from DSWA, he cannot prove DSWA

breached any agreement. Giving the contract its plain meaning and viewing the facts in the light most favorable to Pisano, he had no contract with DSWA. That not only includes Contract 410, but also any agency-based agreement with DSWA to sell the equipment to Pisano. Therefore, there is no basis for a jury to find that DSWA breached any contract with Pisano.

To the contrary, the record shows that DSWA properly terminated Contract 410 after PSA and, indirectly, Pisano failed to meet the contract's financial preconditions. Although PSA told DSWA on March 4, 1999 that PSA had found Naprosa as a buyer for the equipment, the record shows that from the start, Pisano, Wong, PSA and Nasprosa were financially unable to qualify under Contract 410. Pisano always intended to resell the equipment, and until they found a buyer with actual resources, PSA and Nasprosa could not fulfill their respective bargains. As the record undeniably demonstrates, Pisano and Wong were unable to find a legitimate taker in the Dominican Republic, Zambia, or any other place. So, as Wong and Pisano searched in vain for an actual buyer, the years passed. And the original and extended deadlines came and went. As discussed further in the next section, DSWA formally terminated Contract 410 and went elsewhere.

As discussed above, Pisano also cannot establish that after December 1999, he reasonably believed that, through Wong, he had bought the EGF's contents

from DSWA. Based on the undisputed evidence, no juror could find in Pisano's favor on any breach of contract claim. Intending to broker the equipment's sale, Pisano paid for the rights to the EGF's equipment from PSA, but he could not find a buyer. Now, Pisano simply wants DSWA to cover his losses, even though no contract existed between him and DSWA.

V.

A. Pisano's Claim Comes Too Late

Pisano tacitly concedes that if he had a claim for breach of contract based on Contract 410, his March 11, 2005 Complaint was filed more than three years after DSWA terminated Contract 410 in February 2001. Instead, Pisano claims that his contract was for the sale of goods under Delaware's Uniform Commercial Code.[21] Therefore, Pisano argues the applicable statute of limitations is four years.[22]

For statute of limitations purposes, the court assumes that Pisano's contract claim has potential merit. As discussed above, that assumption is incorrect because Pisano bought the "goods" from PSA, not DSWA. And, as also discussed above, Contract 410 was primarily concerned with the goods' removal, not their sale. Thus, Contract 410 was not a contract for the sale of goods. Nevertheless, the court

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[21] 6 *Del. C.* § 2-106.

[22] 6 *Del. C.* § 2-725(1).

accepts here that: the contract Pisano is suing on was the check he gave to Wong, the "contract" was primarily for the sale of the EGF's equipment, and the massive equipment's removal was merely incidental.

But even if Pisano had a contract to buy the EGF equipment, he missed the UCC's four year statute of limitations too. Pisano's Complaint alleges that DSWA breached on February 6, 2002, when it notified Pisano that it would sell parts of the incinerator to others. Actually, on that date, DSWA sent Wong a letter, mentioned above, telling him about DSWA's efforts to find PSA's replacement. Pisano testified, however, that DSWA barred him from the EGF around the time it terminated Contract 410. That was in February 2001. Thus, Pisano's Complaint, having been filed in March 2005, came more than four years after Pisano knew DSWA would not let him have the goods.

B. DSWA Was Not Unjustly Enriched

Alternatively, claiming unjust enrichment,[23] Pisano wants DSWA to return the front money he gave to Wong. He alleges in the Complaint:

> On March 3, 1999, PSA attempted to broker a sale between the Authority and Pisano for the incinerator. Pisano gave the Authority $150,000.00 for the purchase of the incinerator should the Authority have decided to sell it to him.

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[23] *Schock v. Nash*, 732 A.2d 217, 232-233 (Del.1999).

As discussed above, the Complaint mischaracterizes PSA's role and Pisano's actions. PSA was not DSWA's broker, and Pisano gave his money to Wong. On the record presented, it may be that Wong misused Pisano's money, but that was between them.

Otherwise, Wong agreed in Amendment 1 that the money PSA gave to DSWA (regardless of where PSA got it) would serve as PSA's deposit. In return for Amendment 1, DSWA allowed PSA to continue as the Contractor under Contract 410.

C. DSWA Is Not Estopped By Any Promise It Made To Pisano

Pisano's Complaint finally alleges promissory estoppel[24] against DSWA. Specifically, Count 3 says, in part: "The Authority promised to sell the incinerator to Pisano." Actually, DSWA agreed that PSA could sell the incinerator to Nasprosa if Nasprosa met specific conditions. Neither Nasprosa nor Pisano ever met those conditions. To the extent Pisano spent "time, money, resources, great effort, and pains in an attempt to re-sell the incinerator. . .[,]" his attempt failed.

Although there is innuendo in the record, Pisano has not presented substantial evidence from which a jury could find that DSWA broke any promise it made to Pisano, much less that it pulled the rug out from under him. To the contrary, Contract 410 did not contemplate PSA's selling the equipment to an approved buyer

[24] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

who, in turn, would "re-sell" it. The heart of Pisano's problem was that he was not an appropriate buyer. He was merely a middleman. When he could not find a true taker for the EGF's equipment, neither he nor PSA could keep their ends of their bargains. Again, if Pisano has evidence showing that someone led him on, it was Wong, not DSWA. And Wong is not before the court.

VI.

For the foregoing reasons, Defendant's Motion for Summary Judgment is ***GRANTED.***

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

oc: Prothonotary (Civil Division)