Choiniere v. Rowe-Button, No. 10-1-05 Wrcv (Eaton, J., Dec. 12, 2008)

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STATE OF VERMONT
WINDSOR COUNTY

PAUL CHOINIERE	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 10-1-05 Wrcv**
	)	
CHRISTINE ROWE-BUTTON,	)	
Individually and as Administrator of the	)	
Estate of Henry O. Button II	)	

DECISION
Cross-Motions for Summary Judgment

Plaintiff Paul Choiniere seeks enforcement of a personal guaranty allegedly executed by defendant Dr. Christine Rowe-Button and her late husband on September 19, 2003. The personal guaranty was allegedly given in order to induce Mr. Choiniere to loan one million dollars to a limited liability company managed by Andrew Button, who is the stepson of Dr. Rowe-Button. Dr. Rowe-Button denies signing the guaranty and claims that her "signature" must have been forged or made by someone pretending to act as her agent.

The second amended complaint seeks two forms of relief: (1) a declaration regarding the validity of Dr. Rowe-Button's signature on the September 19th personal guaranty; and (2) a money judgment against Dr. Rowe-Button and the Estate of Henry Button under the terms of the September 19th guaranty.[1]

The parties have filed cross-motions for summary judgment. Mr. Choiniere seeks rulings establishing the liability of the defendants on the personal guaranty. He does not contend that Dr. Rowe-Button's signature is genuine, but rather argues that Dr. Rowe-Button has become liable on the guaranty under theories of ratification, equitable estoppel, and waiver. These theories are based upon the legal consequences of a letter sent by Dr. Rowe-Button's attorney on April 28, 2004.

[1] The original complaint was filed by Andrew Button and Button Holdings, LLC, and sought declarations regarding the validity of several other guaranties allegedly executed by Dr. Rowe-Button. Those plaintiffs have since dismissed their claims voluntarily. Only Mr. Choiniere (who intervened in the lawsuit as a plaintiff under V.R.C.P. 24(a)) remains as a plaintiff, and he seeks declaratory relief and a money judgment only with respect to the September 19, 2003 guaranty.

Dr. Rowe-Button filed an opposition and a cross-motion for summary judgment. She disputes material facts, including whether her attorney was authorized to send the April 28, 2004 letter. She also seeks summary judgment on the theories advanced by Mr. Choiniere.

Mr. Choiniere is represented by Attorney E. William Leckerling. Dr. Rowe-Button and the Estate of Henry Button are represented by Attorney Michael J. Catalfimo, appearing *pro hac vice*, and Attorney John Canney.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party sometimes fails to meet its burden of demonstrating that no genuine issue of material fact exists. When that happens, it "does not automatically indicate that the opposing party has satisfied his burden and should be granted summary judgment on the other motion." 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2720. It usually means only that the motion for summary judgment should be denied. Rule 56(c) authorizes courts to consider whether judgment may be entered against the moving party based on the undisputed facts, but only when there are no genuine issues of fact. *Endres v. Endres*, 2008 VT 124, ¶ 10. "Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant." 10A Federal Practice and Procedure, *supra*, at § 2727.

In cases where the parties have filed cross-motions for summary judgment, the court must rule on each party's motion "on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Federal Practice and Procedure, *supra*, at § 2720. "Both motions must be denied if the court finds that there is a genuine issue of material fact." *Id*.

Facts

The following material facts are derived from the statements filed by the parties pursuant to V.R.C.P. 56(c)(2). Disputes are noted where appropriate.

Andrew Button is the son of the late Henry Button and the stepson of Dr. Rowe-Button. On September 19, 2003, Andrew borrowed one million dollars from Mr. Choiniere on behalf of a limited liability company known as Button Holdings Real Estate, LLC (BHRE). The terms of the loan are set forth in a promissory note.

A personal guaranty was executed in connection with the loan. The personal guaranty recites the terms of the million-dollar loan, and states that the guaranty was made in order to induce Mr. Choiniere to make the loan. The document names Henry Button, Dr. Rowe-Button, Andrew Button, and David Zullo as guarantors. There are signatures above the name of each guarantor.

Dr. Rowe-Button denies signing the guaranty. She also denies authorizing any person to sign the guaranty on her behalf. The parties have not presented the court with any evidence regarding the circumstances under which the document was signed. There is no testimony from Andrew Button or David Zullo, nor any testimony from the person who signed the document as a witness. The signature of the witness is indecipherable.

Mr. Button died on January 3, 2004. Dr. Rowe-Button claims that she first became aware of the personal guaranties (including the September 19th guaranty in favor of Mr. Choiniere) sometime after her late husband's death. She subsequently asked her attorney, Anthony Marshall, to prepare the following letter on her behalf. She reviewed and signed the letter before it was sent.

> April 8, 2004
>
> Re: **TERMINATION OF GUARANTY**
>
> Dear Mr. Choiniere:
>
> I am the surviving spouse of Henry O. Button II, who died on January 3, 2004. Henry O. Button II (during his life, and now the Estate of Henry O. Button II) (the "Estate") executed a Personal Guaranty in your favor. There may also be a Personal Guaranty purportedly executed by me in your favor, but which may not reflect my actual signature thereon . . . . By the Guaranty, the Estate agreed, and purportedly I agreed, to personally guarantee the payment and performance of all indebtedness owing to you (and specifically that certain loan in the original principal amount of $1,000,000.00 to Button Holdings Real Estate,

LLC), whether existing at the time of the execution of the Guaranty or thereafter arising.

PLEASE TAKE NOTICE THAT EFFECTIVE AS OF THE DATE OF THIS LETTER, THE ESTATE AND I HEREBY TERMINATE ALL AND ANY GUARANTIES EXECUTED OR PROVIDED, OR PURPORTEDLY EXECUTED AND PROVIDED, TO YOU OR YOUR ASSIGNS WITH RESPECT TO ALL AND ANY INDEBTEDNESS OWING TO YOU BY BUTTON HOLDINGS REAL ESTATE, LLC OR ANY AFFILIATE OR OTHER ENTITY, WHETHER EXISTING AT THE TIME OF THE EXECUTION OF THE GUARANTY OR THEREAFTER ARISING.

If you have any questions, please do not hesitate to contact me.

Very truly yours,
/s/
Christine Rowe-Button, M.D., individually and as Executrix of the Estate of Henry O. Button II

Mr. Choiniere received this letter on April 9th. On April 14th, Mr. Marshall sent another letter to Mr. Choiniere, along with another copy of the April 8th letter. The April 14th letter stated as follows:

April 14, 2004

Re: **Termination of Bank Guaranty**

Dear Mr. Choiniere:

Please be advised we represent Christine Rowe-Button, individually and as Executrix of the Estate of Henry O. Button II. Enclosed please find a Termination of Guaranty executed by Dr. Button in her individual and fiduciary capacities. While the Guarantors may have some irrevocable obligations pursuant to the terms of the September 2003 Guaranty Agreement, the purpose of this termination notice is to confirm that the Guaranty shall not extend to any advances or new indebtedness created after actual receipt by you of this Termination.

Please do not hesitate to contact me, should you have any questions.

Very truly yours,
/s/
Anthony P. Marshall, Esq.

At the time Mr. Choiniere received these letters, he was involved in active negotiations with Andrew Button regarding additional loans to one of Andrew's business entities. Upon receiving the letters, Mr. Choiniere "immediately contacted Andrew" and "notified him that our negotiations about any additional lending to him or his business entities were over unless Christine Rowe-Button and the Estate of Henry Button affirmed their obligations pursuant to the Guarantee."

Dr. Rowe-Button raises factual questions about whether this contact actually happened. She points to deposition testimony in which Mr. Choiniere admitted that loans were sometimes made by a corporation owned by himself and his wife, and that negotiations for those loans were normally handled either by his wife or by a person named Doug Riley. The loan discussed here was ultimately made by the corporation. In the deposition, Mr. Choiniere expressed unfamiliarity with the specifics of loan negotiations between the corporation and Andrew Button.

Andrew Button subsequently asked his stepmother to rescind her termination of the guaranties. He told her that the termination notices had been harmful to his "ongoing business relationships." The parties dispute whether Dr. Rowe-Button understood what Andrew meant by this. There is no evidence that Andrew specifically told her about the loan negotiations with Mr. Choiniere.

Mr. Marshall subsequently drafted and sent the following letter to Mr. Choiniere's attorney on April 28, 2004:

April 28, 2004

Re: **RESCISSION OF TERMINATION OF GUARANTEE**

Dear Mr. Webster:

We are attorneys for the Estate of Henry O. Button II and Christine Rowe-Button, the surviving spouse of Henry O. Button II and the executor of his estate. Your client received a letter from our client dated April 8, 2004 advising him that any guarantee as was provided by our clients respecting Button Holdings Real Estate, LLC debt to Paul H. Choiniere was terminated (the "Termination Notice"). We have been authorized by our clients to deliver this letter to you.

BE ADVISED THAT THE TERMINATION NOTICE IS HEREBY REVOKED AND RESCINDED.

If you have any questions, please do not hesitate to contact me.

Very truly yours,
HARRIS BEACH LLP
/s/
Anthony P. Marshall

Dr. Rowe-Button denies that she authorized Mr. Marshall to send the letter. Through deposition testimony and affidavit, she claims that she merely called her attorneys and asked them what should be done in response to Andrew's request, and that the attorneys "took it upon themselves to do what they did." She denies reviewing the letter before it was sent or authorizing her attorney to send the letter.

At another point in her deposition, Dr. Rowe-Button appeared to confirm that it was "accurate" for Mr. Marshall to state that he was authorized to send the April 28th letter.

In any event, Mr. Choiniere received the April 28th letter, and interpreted it as an affirmance of Dr. Rowe-Button's obligations under the personal guaranty. He considered this when evaluating Andrew's credit risk, and relied on the affirmance when he and his wife loaned an additional $1.3 million dollars to another business entity managed by Andrew Button (Button Automotive Group, Inc.) on June 11, 2004.

Dr. Rowe-Button disputes the accuracy of Mr. Choiniere's interpretation, and the reasonableness of his reliance. She furthermore disputes the extent to which Mr. Choiniere was involved in the loan negotiations with Button Automotive Group, and the extent to which he relied on the letter when making the June 11th loan. She observes that the June 11th loan was personally guaranteed by five other persons or entities.

BHRE stopped making payments on the note on December 31, 2005. The amount of the remaining principal is $862,675.20. Mr. Choiniere never sent a notice of default or notice of acceleration to BHRE. He also never sent a notice of default or notice of acceleration to the guarantors.

Mr. Choiniere's Motion for Summary Judgment

Mr. Choiniere does not argue that Dr. Rowe-Button actually signed the guaranty or that she authorized someone to sign the guaranty on her behalf. Instead, he argues that she became liable on the guaranty by affirming her obligations in the April 28th letter. He seeks to prove liability as a matter of law under theories of ratification, equitable estoppel, and waiver.

Ratification

Ratification occurs when a principal affirms "a prior action by an agent which did not bind the principal but was purportedly done on his or her account, with the ratification 'relating back' to the time of the actual act." *Estate of Sawyer v. Crowell*, 151 Vt. 287, 293 (1989). The principal usually does this either by indicating agreement, in some objective or observable way, that she intends to be bound by the prior unauthorized act, or by engaging in conduct that is justifiable only by assuming that she intended to be bound by the legal consequences of the prior unauthorized act. Restatement (Third) of Agency § 4.01, comment d. It is ordinarily a question of fact as to whether a principal's conduct is sufficient to constitute ratification. *Id*.

The facts material to the issue of ratification are disputed. The most pertinent dispute involves whether Dr. Rowe-Button authorized Mr. Marshall to send the April 28th letter. See Restatement (Third) of Agency § 4.01, comment e (explaining that ratification is only effective if it is performed by the principal or by an agent acting with actual authority on behalf of the principal). Mr. Choiniere argues that she authorized Mr. Marshall to send the letter, based on the representations in the letter itself and Dr. Rowe-Button's deposition testimony that it was "accurate" to say that the letter was authorized. Dr. Rowe-Button disputes this in deposition testimony and affidavits stating that she merely asked her attorneys what to do, and that the attorneys "took it upon themselves to do what they did." She also testified that she did not review or approve the letter before it was sent. These conflicting statements show a factual dispute as to whether the alleged ratification was performed by an agent acting with actual authority.

Even assuming *arguendo* that the letter was authorized, there is a second factual dispute surrounding Dr. Rowe-Button's intent in sending the April 28th letter. The letter does not expressly affirm or disavow the guaranty, and Dr. Rowe-Button's intent in sending the letter cannot be determined solely by looking within the four corners of the document. The evidence showing the circumstances under which the letter was sent, and the relationships between the relevant parties, is largely disputed. Summary judgment is therefore denied on the issue of ratification.

Equitable Estoppel and Waiver

Equitable estoppel promotes good faith and fair dealing by preventing parties from asserting legal claims or defenses against another party who has detrimentally relied upon previous, contrary representations. *O'Brien Bros. Partnership v. Plociennik*, 2007 VT 105, ¶ 25, 182 Vt. 409. The doctrine of equitable estoppel, and its elements, will be discussed in more detail below. For now, it is sufficient to explain that Mr. Choiniere's theory of estoppel involves the equitable consequences of the April 28th letter, and that his theory of waiver involves the legal consequences of the April 28th letter (namely, whether it voluntarily relinquished Dr. Rowe-Button's right to challenge the authenticity of her signature). There are disputed facts regarding whether Mr. Marshall was actually authorized to send the April 28th letter on Dr. Rowe-Button's behalf. Mr. Choiniere's

motion for summary judgment is therefore denied on the issues of equitable estoppel and waiver.

Estate of Henry Button

Mr. Choiniere seeks a ruling that the Estate of Henry Button is liable as a matter of law because Dr. Rowe-Button has not contested the authenticity of his signature on the personal guaranty. Dr. Rowe-Button denies personal knowledge as to whether Mr. Button actually signed the document, but admits that the signature on the document appears to resemble Mr. Button's known signature.

The court cannot grant summary judgment on the issue of whether Mr. Button's signature was genuine, because Mr. Choiniere did not request declaratory relief to that effect in his complaint. Cf. *Limoge v. People's Trust Co.*, 168 Vt. 265, 274 (1998) (refusing to address claim for breach of implied covenant of good faith and fair dealing where it was not stated in the complaint).

The court furthermore cannot grant summary judgment on the claim for breach of contract because the amount of damages is presently uncertain. The terms of the underlying promissory note state that in the event of default, "the holder *may*, after notice by certified mail, declare the remainder of the debt at once due and payable." Plaintiff's Exhibit 2 (emphasis added). The undisputed facts show that an acceleration notice has not been sent to the promisors by certified mail.

Failure to send an acceleration notice does not require the dismissal of the claim for breach of contract. The personal guaranty specifically provides that the obligations of the guarantors "shall . . . not be affected, modified or impaired . . . [by] the taking or the omission to take any action under the Note and/or under this Guaranty." Plaintiff's Exhibit 3, ¶ 2(b)(iv).

Nor does failure to send an acceleration notice necessarily mean that the guarantors are not required to pay the full amount of the note. The note itself states that failure to send a notice of acceleration at the time of default "shall not constitute a waiver of the right to exercise the same at any other time." Plaintiff's Exhibit 2. Furthermore, the undisputed facts show only that no notice of acceleration was sent by certified mail; the facts do not show whether effective notice has been provided by other means. It will be an issue for the finder of fact to determine whether or not the right of acceleration has been exercised.

This uncertainty affects the amount of damages recoverable. See *Smith v. Country Village Intern., Inc.*, 2007 VT 132, ¶¶ 9–10 (explaining that damages are an essential element of a claim for breach of contract). Because the court cannot determine that the amount of damages is undisputed, summary judgment is denied.

Dr. Rowe-Button's Cross-Motion for Summary Judgment

Dr. Rowe-Button seeks judgment on the theories of ratification, equitable estoppel, and waiver. She contends that they were not properly pleaded, and that they lack merit even if the facts are viewed in the light most favorable to Mr. Choiniere. She also argues that the claim for breach of contract should be dismissed.

Pleading Requirements

Dr. Rowe-Button contends that the theories of ratification, equitable estoppel, and waiver should be dismissed because they were not properly pleaded in the complaint.

Vermont follows the practice of notice pleading, and complaints are required to contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." V.R.C.P. 8(a). The statement of the claim does not need to be specific or detailed, but merely enough to provide "fair notice of what the claim is and the grounds upon which it rests." Reporter's Notes, V.R.C.P. 8 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Theories connecting the facts to their desired legal consequences do not need to be stated in the complaint; theories are instead developed and clarified by motion practices, pretrial conferences, and discovery. 5 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1219.

The second amended complaint alleges that Dr. Rowe-Button personally guaranteed a million-dollar loan, that the promisor defaulted on the note, and that the guarantors have breached their obligation to pay. The complaint also seeks a declaration regarding the validity of Dr. Rowe-Button's signature on the guaranty. This was sufficient to put the defendants on notice of the claim and the grounds upon which it rested. It was not necessary for the complaint to have contained descriptions of the legal theories (ratification, equitable estoppel, waiver) upon which the plaintiff came to believe that liability for the breach could be established. Cf. *Mellin v. Flood Bank Union Sch. Dist.*, 173 Vt. 202, 221 (2001) (explaining that equitable estoppel and waiver are not "causes of action" upon which relief can be granted).

Furthermore, plaintiffs are not required to anticipate particular defenses and affirmatively plead their responsive theory in the complaint. The obligation to plead affirmative defenses under V.R.C.P. 8(c) falls upon defendants. There are no counterclaims in this case, and there are no accordingly no rules requiring Mr. Choiniere to specifically plead those issues in the complaint.

Ratification

Dr. Rowe-Button contends that ratification requires proof that the person who allegedly signed the personal guaranty acted with apparent authority. She also contends that any ratification was ineffective because it was not supported by consideration, and that it is undisputed that the ratification was not authorized.

The essence of ratification is affirmance by the principal of a previously unauthorized act. Restatement (Third) of Agency § 4.01. Ratification would be an unnecessary theory of relief if the third party were able to show that it reasonably believed, based on beliefs traceable to the principal, that the agent was authorized to perform on the principal's behalf. See Restatement (Third) of Agency § 2.03 (defining apparent authority). Although there is no evidence in the case as to how Dr. Rowe-Button's signature came to be made on the personal guaranty, it would be reasonable for the fact-finder to infer that it was made by someone pretending to act on behalf of Dr. Rowe-Button. See *Price*, 149 Vt. at 521 (all reasonable inferences must be drawn in favor of non-moving party). The facts and their reasonable inferences are sufficient to show genuine, material issues of fact in this case.

Ratification does not require consideration as a general rule. "The sole requirement for ratification is a manifestation of assent or other conduct indicative of assent by the principal." Restatement (Third) of Agency § 4.01, cmt. b. Although old Vermont cases appear to indicate that consideration may be required when a principal attempts to ratify a fraudulent alteration that amounts to forgery, *Grapes v. Rocque*, 97 Vt. 531 (1924), it is unclear whether this rule survives modern developments in agency law. See Restatement (Third) of Agency § 4.03, cmt. c (forgeries may be ratified). In any event, it is impossible to know on the present record whether Dr. Rowe-Button's signature was made by someone pretending to be her (a forgery) as opposed to someone pretending to be her agent (an unauthorized act).

Finally, there are disputed facts with respect to whether the alleged ratification satisfied the statute of frauds. 12 V.S.A. § 181(2); see *Dunbar v. Farnum*, 109 Vt. 313, 319 (1937) (explaining that where written authorization is required, ratification must be in writing). This argument largely duplicates previous assertions that the April 28th letter was not authorized by Dr. Rowe-Button. As explained above, this fact is disputed. Summary judgment is accordingly denied on the issue of ratification.

Equitable Estoppel

Dr. Rowe-Button contends that the evidence, even if viewed in the light most favorable to Mr. Choiniere, does not establish the elements of equitable estoppel.

"The doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon." *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973). It requires the court to determine "whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Greenmoss Builders, Inc. v. King*, 155 Vt. 1, 6 (1990) (quoting *Neverett v. Towne*, 123 Vt. 45, 55 (1962)). The plaintiff seeking to prove equitable estoppel must show that (1) the defendant knew the facts, (2) the defendant intended that her conduct would be acted upon, (3) the plaintiff was ignorant of the true

facts, and (4) the plaintiff detrimentally relied upon the defendant's conduct. *Lodge at Bolton Valley Condo. Ass'n v. Hamilton*, 2006 VT 41, ¶ 8, 180 Vt. 497 (mem.).

The court has carefully considered whether the evidence is sufficient to show a genuine issue of material fact with respect to equitable estoppel. It is a close call.

Mr. Choiniere's theory of equitable estoppel is as follows. Dr. Rowe-Button learned about the personal guaranties after her late husband's death, and therefore knew that Mr. Choiniere had loaned one million dollars to Andrew. She thereafter attempted to terminate the personal guaranties in the April 8th letter. Andrew then asked her to rescind the termination notices because they were "very harmful" to his "ongoing business relationships." She did this in the April 28th letter, which was addressed to Mr. Choiniere. Mr. Choiniere then interpreted the April 28th letter as an affirmance, and relied to his detriment on the letter when evaluating Andrew's credit risk for purposes of a new loan, which was issued less than two months later.

The missing link is direct evidence that Dr. Rowe-Button knew that a subsequent loan was in the works, or that the April 28th letter would be relied upon by a creditor for purposes of evaluating subsequent loans. See *Fisher v. Poole*, 142 Vt. 162, 168 (1992) (explaining that the party seeking estoppel must show that the party being estopped knew the material facts, and intended that her conduct would be acted upon).

The circumstantial evidence is sufficient, however, to create a genuine issue of material fact as to whether Dr. Rowe-Button *should have known* these facts. She knew that Mr. Choiniere had loaned money to Andrew, and that her termination notices had been harmful to Andrew's ongoing business relationship with Mr. Choiniere. A reasonable fact-finder could determine that she should have known that Andrew's "ongoing business relationship" with Mr. Choiniere related to financing, given the prior loan and Mr. Choiniere's status as a lender.

The circumstantial evidence is also sufficient to permit the inference that Dr. Rowe-Button intended for Mr. Choiniere to rely on the April 28th letter in the course of his ongoing financial relationship with Andrew. It is reasonable to infer that she intended *something* by sending the letter. Whether Mr. Choiniere's subsequent reliance on the letter was reasonable and detrimental, and whether issuance of a new loan in reliance on the letter was a proximate and reasonably anticipated result of the letter, *My Sister's Place v. City of Burlington*, 139 Vt. 602, 609 (1981), are questions that are better answered after hearing and considering all the evidence, including the disputed evidence discussed above. They are not appropriate for resolution as a matter of law on this record. For these reasons, summary judgment is denied on the issue of equitable estoppel.

Waiver

Dr. Rowe-Button contends that the evidence is insufficient to show waiver. A waiver is the intentional relinquishment of a known right, and may be either express or implied. *Eastman v. Pelletier*, 114 Vt. 419, 423 (1946).

There is no evidence of an express waiver. Even assuming that Mr. Marshall was authorized to send the April 28th letter, it does not contain any language expressly waiving Dr. Rowe-Button's challenges regarding the authenticity of her signature on the personal guaranty.

There is also insufficient evidence of an implied waiver. "In assessing a claim of implied waiver, caution must be exercised both in proof and application. To succeed on an implied waiver theory, plaintiff must show some act or conduct on the part of the defendant that was unequivocal in character." *Anderson v. Cooperative Ins. Cos.*, 2006 VT 1, ¶ 11, 179 Vt. 288 (internal quotations omitted). Neither the April 28th letter nor the surrounding conduct demonstrate an *unequivocal* intent to relinquish Dr. Rowe-Button's claims regarding the authenticity of her signature.

The April 28th letter is unequivocal in the sense that it clearly "revokes" and "rescinds" the termination notices. But it is not obvious what this means *vis a vis* the claim allegedly waived: whether the signature on the personal guaranty is valid. The April 28th letter could have meant to forever relinquish Dr. Rowe-Button's rights to challenge the authenticity of her signature, but it is not clear that it did. The letter could have also meant simply to rescind the termination notices (and therefore return everyone to the position they occupied prior to April 8th, without saying anything about future challenges to the validity of the guaranty).

After considering all the evidence in the light most favorable to the non-moving party, the court concludes that the April 28th letter is susceptible to multiple interpretations, and that neither the letter nor any surrounding conduct show an *unequivocal* intent on the part of Dr. Rowe-Button to forever relinquish her claims regarding the validity of the September 19th guaranty. Cf. *West River Power Co. v. Bussino*, 111 Vt. 137, 139–40 (1940) (landowners' inconsistent actions did not show an unequivocal waiver). Summary judgment is therefore granted in favor of Dr. Rowe-Button on the theory of waiver.

Breach of Contract

Dr. Rowe-Button has also raised a number of arguments seeking to dismiss the claim for breach of contract.

First, she contends that the claim must be dismissed because Mr. Choiniere has not proven the authenticity of the note or the guaranty. Arguments involving the evidentiary foundation for the claim of breach of contract are moot, because Mr. Choiniere's motion for summary judgment has been denied. The court is not persuaded that the documents themselves are wholesale forgeries; the parties have submitted the documents to the court and the facts show that the parties have acknowledged the

documents and relied upon them as if they were authentic. The court will not dismiss the claim for breach of contract on this ground.

Second, she contends that forgeries are void *ab initio*. Summary judgment cannot be granted on this ground, because the question of whether Dr. Rowe-Button's signature was forged is one of the central factual mysteries in this case.

Third, she contends that the claim for breach of contract must be dismissed because the amount of damages is not proven. She relies on undisputed evidence showing that acceleration notices have not been provided to the promisors of the note, and that the guarantors have not been afforded an opportunity to cure. These defects do not affect the guarantors' liability, because the guaranty specifically provides that the guarantors' obligation does not depend upon the taking or omission of any action under the note. As noted above, it may or may not affect the amount of damages. The court therefore concludes that the amount of damages is an issue of fact for trial.

Finally, given the denial of Mr. Choiniere's motion for summary judgment, the court does not reach or decide the issue of whether the note is "void" under the Licensed Lender Law. See *Klein v. Wolf Run Resort, Inc.*, 163 Vt. 506, 511 (1995) (explaining that the Licensed Lender Law affords *the borrower* the remedy of voiding the contract if a violation is proven).

To the extent that Dr. Rowe-Button has sought summary judgment on issues not specifically discussed in this opinion (for example, under 12 V.S.A. § 1602), the court has considered those issues and determined that they do not warrant the entry of summary judgment.

ORDER

For the foregoing reasons:

(1) Plaintiff's Motion for Summary Judgment (MPR #17), filed June 3, 2008, is *denied*; and

(2) Defendant's Cross-Motion for Summary Judgment (MPR #18), filed July 2, 2008, is *granted* on the issue of waiver and is *denied* in all other respects.

Dated at Woodstock, Vermont this ____ day of December, 2008.

_____

Hon. Harold E. Eaton, Jr.
Superior Court Judge