**IT IS SO ORDERED.**

Burton Perlman
United States Bankruptcy Judge

**Dated: August 31, 2012**

---

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| In Re: | ) | |
| | ) | |
| SL Liquidating, Inc. et al. | ) | Case No. 09-12869 |
| | ) | |
| Debtor | ) | Chapter 11 |
| | ) | |
| - - - - - - - - - - - - - - - - - - - - - | ) | Judge Burton Perlman |
| Glenn P. Rudolph | ) | |
| | ) | |
| Claimant | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| Post-Consummation Trust Administrator | ) | |
| | ) | |
| Respondant | ) | |
| | ) | |

**DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

In this jointly administered Chapter 11 case Glenn P. Rudolph (hereafter "Rudolph") filed a claim for $486,959.00 to which the Post-Consummation Trust Administrator (hereafter "PCTA") filed an objection. Attached to Rudolph's proof of claim is Attachment

A, an Employment Agreement entered into between Senco Products Inc. and Rudolph, with an effective date of April 1, 2004. Also attached to the proof of claim is Attachment B, which Rudolph asserts is a purported First Amendment to the Employment Agreement. Also attached to the proof of claim is Attachment C, entitled Severance Benefits and Obligations, which informed Rudolph that his employment from DuraSpin Products, LLC was being terminated December 9, 2005.

As part of her Thirty-First Omnibus objection (doc. 918), PCTA objected to Rudolph's proof of claim. Rudolph filed a response (doc. 941). The parties have since filed cross motions for summary judgment on the objection (docs. 1198 and 1199), to which they have responded (docs. 1202 and 1204) and replied (docs. 1208 and 1209). It is these cross motions that are now before the Court.

In support of her Motion for Summary Judgment, PCTA presents as her Exhibit A Rudolph's proof of claim with attachments. In addition, as her Exhibit B, PCTA presents a check from Rudolph to SENCORP dated December 14, 2005 for $30,000.00 "for 2005 Audi A6." Also in support of her motion at Exhibit C, PCTA submitted the deposition of Mark Bailey who had been the official of debtors to whom Randolph reported. The deposition was taken by Rudolph's counsel as on cross examination.

Rudolph's Motion for Summary Judgment is supported by the three attachments to his proof of claim. In addition, as his Exhibit C, he attaches a copy of an email from Mark Bailey to himself dated September 9, 2005. As evidence in his Motion for Summary Judgment, Rudolph also presents his own affidavit.

**1. Jurisdiction**.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334

and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

**2. Summary Judgement**.

As set forth in Federal Rule of Civil Procedure 56(a), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." With regard to what is material, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248,106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The filing of cross motions for summary judgment does not change the analysis:

> "The filing of cross-motions does not alter the standards governing the determination of summary judgment motions." Drown v. Countrywide Home Loans, Inc. (In re Peed), 403 B.R. 525, 529-30 (Bankr. S.D. Ohio 2009). But "cross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." [Id.(quoting Greer v. United States, 207 F.3d 322, 326 (6th Cir. 2000))].

Menninger v. Mortgage Electronic Registration Systems, Inc., et al. (In re Earl), 09-1097(Bankr. S.D. Ohio July 2, 2010).

**3. Issue**.

Rudolph's Employment Agreement, effective April 1, 2004, was terminated on December 9, 2005, concluding his employment by a debtor entity. He was compensated upon termination pursuant to the terms of the Employment Agreement, amounting to a sum of $930,000.00. Rudolph contends that he is entitled to additional compensation pursuant to the First Amendment. PCTA contends that he is not.

**4. Positions of the Parties**.

PCTA argues first that the First Amendment was never executed and therefore is of no effect. PCTA then argues that the undertakings of the First Amendment cannot be effective as a verbal agreement because it is barred by the Statute of Frauds.

Rudolph contends that he is entitled to the rights provided in the First Amendment by application of the doctrine of promissory estoppel. Rudolph argues as well that the Statute of Frauds is inapplicable in the circumstances of this case.

**5. Discussion**.

Resolution of the question of the validity of Rudolph's claim turns on whether Rudolph's Employment Agreement of April 1, 2004 was amended under Ohio law. See ¶ 12B of the Employment Agreement. The Court holds that it was not.

Rudolph's Employment Agreement of April 1, 2004 expressly provides at ¶ 12H: "This Agreement may be amended only by an instrument in writing executed by the parties hereto." The purported First Amendment was not executed by the parties to the 2004 Employment Agreement. Thus, by the terms of that agreement, it was not validly amended. Rudolph's contention that the document entitled "First Amendment" represents an agreement between the parties is therefore invalid.

Rudolph contends that there was a verbal agreement to the effect of the First Amendment. Such contention is without merit, for the Statute of Frauds requires that an agreement such as that here in question, to be effective, must be in writing. The Statue of Frauds does not apply unless the agreement in question "is not to be performed within one year from the making thereof." O.R.C. § 1335.05. The Court holds that the Statute of Frauds bars the verbal agreement in this case, because the Employment Agreement

which it purports to amend, itself, contemplated "a firm Initial Term" of three years and a two-year covenant not to compete. See ¶¶ 4,9 of the Employment Agreement. The terms of the purported First Amendment did not affect these terms, and thus, even an amended Employment Agreement could not have been performed within one year.

Rudolph also argues that the purported agreement represented by the First Amendment is enforceable because of the doctrine of promissory estoppel. In Eugene Rhodes v. R&L Carriers, Inc., et al., No. 11-3054, slip op. at 10 (6th Cir. Aug. 6, 2012), the Court held:

> To establish a claim of promissory estoppel, "a plaintiff must show that (1) the employer made a clear, unambiguous promise;(2) the plaintiff relied on that promise;(3)the reliance was justifiable; (4) the reliance caused detriment to the plaintiff." O'Donnell v. Coulson 40 F.Supp. 2d 446, 455 (N.D. Ohio 1998).

The Court holds that promissory estoppel is not available to Rudolph. "To be successful on a claim of promissory estoppel, the party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse." Shampton v. Springboro, 98 Ohio St.3d 457, 461 (2003) (internal quotation omitted). Rudolph states that his reliance consisted of "continuing my employment with the Company...and upon the representation made by Bailey as to the effectiveness of the First Amendment." See Aff. of Rudolph, p. 4. This is not evidence that Rudolph changed his position "for the worse." See Springboro, 98 Ohio St.3d at 461. Rudolph also raises equitable estoppel as a basis for the relief sought. Because application of this doctrine, like promissory estoppel, requires reasonable reliance and resulting detriment, it is likewise of no avail to Rudolph. See Ford Motor Credit Co. v. Ryan, 189 Ohio App.3d 580, 598, 939

N.E.2d 891, 921 (Ohio App. 10 Dist. 2010) (internal quotation omitted).

We deal briefly with the remaining issues raised by Rudolph. Rudolph argues that the Employment Agreement, the email from Bailey to himself, and the First Amendment, taken together, satisfied the requirements of the Statute of Frauds. Under Ohio Law, separate signed and unsigned documents may only be integrated to satisfy the Statue of Frauds when the signed writing makes specific reference to the unsigned writing. Beggin v. Ft. Worth Mtge. Corp., 93 Ohio App.3d 333, 337, 638 N.E.2d 605, 607 (Ohio App.3 Dist. 1994) ("nothing in the record permits integration of the signed writings and the unsigned five-year lease agreement because none of the signed writings contains a specific reference to the unsigned five-year lease document."). The Employment Agreement, between Senco Products Inc. and Rudolph, does not make specific reference to the purported First Amendment, and therefore this argument of Rudolph is without merit.

Rudolph also argues that he completely performed under the Employment Agreement as amended by the First Amendment. He cites Gathagan v. Firestone Tire & Rubber Co., 23 Ohio App.3d 16, 490 N.E.2d 923 (Ohio App. 9th Dist. 1985). In support of his position, Rudolph concedes that he did not complete the full initial term of the First Amendment but he argues that this deficiency should be excused, because he was terminated unilaterally and without cause by his employer. That he was terminated unilaterally and without cause by his employer, cannot be dismissed as a "technical deficiency" because the right to terminate the Employment Agreement unilaterally and without cause was bargained for by the parties and constitutes a provision in the Employment Agreement. See ¶ 7.1 of the Employment Agreement. There is no such contract provision in the relationship in the Gathagan case and Gathagan is entirely

distinguishable from the case before the Court.

**6. Conclusion**.

The foregoing constitutes the findings of fact and conclusions of law of the Court. Finding no issue of material fact, and that the PCTA is entitled to judgment as a matter of law, the motion of PCTA for judgment will be granted, and that of Rudolph will be denied.

Copies to:

Suzanne S. Whisler
Victoria E. Powers
Tyson A. Crist
250 West Street
Columbus, OH 43215

Stephen C. Crowe, Esq.
Crowe and Welch
1019 Main Street
Milford, OH 45150