IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HERCULES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. CPU4-09-008911
	)	
TIMOTHY P. TOMASZEWSKI,	)	
	)	
Defendant.	)	
	)	

Date Submitted: November 21, 2011
Date Decided: December 29, 2011

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DECISION AFTER TRIAL

FRACZKOWSKI, J.

Plaintiff Hercules, Inc. ("Plaintiff" or "Hercules") filed a claim against Defendant Timothy P. Tomaszewski ("Defendant") for damages it claims are due under an alleged loan agreement between the parties. In the alternative, Plaintiff filed a claim for damages under the theory of *quantum meruit*, arguing that even if there was not an agreement between the parties, Plaintiff performed a service for Defendant by giving him money with the expectation that Defendant would repay, and Defendant should have known that Plaintiff expected to be repaid.

Trial was held on October 24, 2011. The Court reserved decision. The parties submitted memoranda in support of their respective positions. This is the Court's final decision and order.

FACTS AND PROCEDURAL HISTORY

The Court concludes that the record supports the following findings of fact:

Defendant was born in Canada in 1967. He attended college in Canada. He is certified in Canada as a "Certified Management Accountant" ("CMA"). CMA certification is similar to American Certified Public Accountant certification, but is more focused on business financial management and planning. While obtaining CMA certification requires substantial financial sophistication, it does not require a detailed understanding of American tax law.

In 1992, Defendant began working for Hercules Canada, Inc., a subsidiary of Hercules, Inc. Defendant testified that Canada has a public old age security and pension plan similar to United States Social Security and Medicare ("FICA"). Like the American system, Canadian employers withhold the tax from their employees' wages, and remit this money to the government on behalf of the employee. This tax withholding is reflected on the Canadian equivalent of a year-end W-2 form. Defendant testified that he reviewed these forms when he was employed by Hercules Canada, Inc.

In 1997, Defendant left Hercules Canada, Inc. and began working for Hercules, Inc. in the United States. Defendant testified that his Canadian old age security and pension plan withholdings continued to be withheld by Hercules, Inc., as required by a "totalization agreement." A totalization agreement is an agreement between a United States company employing Canadian citizens in the United States, the United States government, and the Canadian government that requires the United States company to withhold the Canadian citizen's old age security and pension plan taxes, and remit these funds to the Canadian government at the

end of each tax year. The effect of this agreement is that the Canadian citizen continues to be taxed as if he were still living and employed in Canada. Canadian citizens who pay taxes to Canada under such agreements are not required to pay United States FICA taxes.

In 1999, Defendant was transferred to Fibervision, a subsidiary of Hercules, Inc. located in the United States. Defendant's title at this time was controller. His primary job duty as controller was management of the accounts payable, cost accounting, and payroll departments. Defendant acknowledged that these departments were responsible for withholding FICA and social security taxes. Defendant testified that under United States law, Fibervision/Hercules was required to withhold these taxes on behalf of each United States employee and later remit the funds to the United States government. At this time, Hercules continued to withhold Defendant's Canadian citizen old age security and pension plan taxes as required by the totalization agreement.

On October 19, 2000, Defendant became a permanent resident of the United States.[1] Defendant admitted that he understood that as a permanent resident he would no longer be taxed by the Canadian government, but would be taxed as if he were a United States citizen, and that this would require Fibervision to withhold his FICA taxes and later remit these funds to the United States government. Fibervision properly withheld Defendant's FICA taxes in 2001 and remitted the funds to the United States government. Accordingly, Defendant testified that at the beginning of the 2001 tax year, he noticed a decrease in his take home pay in his pay stubs. Defendant testified that he personally prepared his own taxes in 2001 using Turbo Tax. Defendant testified that he noticed a decrease in his take home wages when he prepared his taxes in 2001.

[1] Plaintiff's Exhibit # 1.

In 2002, Defendant transferred to Aqualon Company, another Hercules, Inc. subsidiary located in the United States. From 2002 through 2006, Aqualon/Hercules failed to withhold Defendant's social security and Medicare taxes.[2] In whole, Aqualon/Hercules failed to withhold $26,193.85 in taxes from Defendant's wages.[3] Each year, Aqualon/Hercules issued Defendant a W-2 tax form. Each year, the boxes marked "[s]ocial security tax withheld" and "medicare tax withheld" on the W-2 form were blank. Gordon Slivinski ("Slivinski"), Hercules' payroll manager from 1996 through 2011, testified that it was Hercules' responsibility to withhold these taxes each year and that Hercules failed to do so because of either a clerical or accounting error. Ed Carrington ("Carrington"), Vice President of Human Resources for Hercules during the time period in question, and Thomas F. Wertz ("Wertz"), Director of Human Resources during the time period in question testified similarly.

Defendant testified that he personally prepared his taxes using Turbo Tax in tax years 2002-2006 just as he had in 2001. While preparing his taxes for these years, Defendant noticed various issues with his W-2 form, none concerning FICA withholding, and contacted the Hercules payroll department to resolve these problems.[4] Defendant testified that while he noticed a decrease in take home wages in 2001, he never noticed his gross wages were inflated during 2002-2006, and never noticed the FICA boxes on his W-2's were blank during those years.

In 2005, Defendant transferred back to Hercules, Inc. in the United States. On June 9, 2006, Hercules sent Defendant a letter informing him that Hercules failed to withhold social

[2] Plaintiff's Exhibit # 6.
[3] Plaintiff's Exhibit # 7. Defendant does not dispute the amount that Hercules failed to withhold. Rather, the gravamen of Defendant's argument is that because he did not make the clerical error that led to the non-payment of the taxes, he should not be responsible for their repayment.
[4] Plaintiff's Exhibit # 2.

security and Medicare taxes from May 1, 2002 through May 31, 2006.[5] In this letter, Hercules asked Defendant to either write Hercules a check for $26,193.85, or enter into an interest free loan agreement with Hercules for the same amount, with monthly repayment over three years.[6]

On June 29, 2006, Hercules sent Defendant another letter and attached proposed agreement for an interest free loan in the amount of $25,990.51, repayable in monthly installments over a ten year term.[7] Additionally, Hercules said that it would provide Defendant W-2C forms for tax years 2002-2005, and informed Defendant that he would need to file amended tax returns.[8] Hercules also offered to reimburse Defendant the cost of preparing the amended tax returns. Defendant refused to sign the attached loan agreement and file amended tax returns. Carrington and Wertz testified that Hercules decided to make this new offer because after internal meetings Hercules management recognized it was responsible for the non-withholding and wanted to make the repayment terms as palatable as possible for Defendant. Carrington, Slivinski, and Wertz all testified that at all times since the error in withholding was discovered, Hercules considered the tax to be Defendant's liability, and the company expected that Defendant would repay the money. Defendant left Hercules in June 2006.[9] On November 15, 2006, Carrington sent Defendant a letter indicating that Hercules had paid the Internal Revenue Service $25,990.51 on Defendant's behalf and demanding payment in accordance with the June 29, 2006 letter.[10]

Defendant testified that he has consistently refused to enter into an agreement to repay Hercules because he never felt that it was his obligation to repay the money. However,

[5] Plaintiff's Exhibit # 8.
[6] Plaintiff's Exhibit # 8.
[7] Defendant's Exhibit # 1-K.
[8] Defendant's Exhibit # 1-K.
[9] Defendant's Exhibit # 1-K.
[10] Plaintiff's Exhibit # 12.

Defendant admitted that based on the June 29, 2006 letter, Hercules expected repayment of the $25,990.51. Hercules sent Defendant yearly billing statements beginning on February 19, 2007 following the terms of the June 29, 2006 ten year interest free loan offer.[11] The February 19, 2007 billing statement demands payment within 120 days. Defendant acknowledged that he has received the billing statements. On cross-examination, Defendant admitted that by making payment to the IRS after discovering the error, Hercules performed a service for him. Defendant similarly admitted that he was overcompensated by Hercules during tax years 2002 through 2006.

On cross-examination, Defendant denied that he will receive an extra when he becomes eligible for social security and receives disbursements from the United States government. Defendant argued that the money deposited in his bank account via direct deposit was his money because he did not make the accounting error resulting in Hercules' failure to withhold FICA taxes. Additionally, Defendant testified that social security disbursements are calculated based on the last ten years of each particular worker's income and accompanying social security taxes paid, and not lifetime income and accompanying taxes. In other words, assuming Defendant works until 2016, his social security disbursements will not be affected by the fact that he was overpaid from 2002 to 2006.

On November 23, 2009, Hercules filed the Complaint in this action. On December 1, 2009, Hercules filed an Amended Complaint. On March 31, 2010, Defendant filed an Answer. In the Answer, Defendant asserted several affirmative defenses. Specifically, Defendant asserted that both Plaintiff's breach of contract and *quantum meruit* claims were barred by the applicable statutes of limitations.

[11] Defendant's Exhibit # 1-L.

DISCUSSION AND FINDINGS

a. Defendant's Statute of Limitations Defense

Actions for breach of contract and *quantum meruit* are governed by a three year statute of limitations barring actions to recover damages brought more than three years from the "accrual of the cause of such action."[12] In both breach of contract and *quantum meruit* actions, the cause of action accrues for purposes of the statute of limitations at the time of the alleged injury.[13]

The Complaint was filed on November 23, 2009 naming "Ashland, Inc." as the plaintiff. The Amended Complaint was filed on December 1, 2009, substituting Hercules as the plaintiff. Defendant argues that the claims are barred by the statute of limitations because the June 9, 2006, June 29, 2006, and November 15, 2006 letters each demanded that Defendant repay the money, and each of these dates precede the filing of the Complaint by more than three years. Hercules argues that the claims are not barred by the statute of limitations because neither cause of action accrued until June 19, 2007, the date payment was due under the February 19, 2007 bill, and less than three years before either the Complaint or Amended Complaint was filed.

Both the breach of contract and *quantum meruit* claims accrued for statute of limitations purposes on June 19, 2007. On November 15, 2006, Hercules sent Defendant a letter notifying Defendant that Hercules paid the taxes on Defendant's behalf, and indicating that it expected payment according to a yearly billing schedule pursuant to the terms of the June 29, 2006 letter. On February 19, 2007, Hercules mailed the first billing statement, which demanded payment within 120 days. Assuming a contract existed between the parties at this time, the alleged injury could not have occurred until Defendant failed to make payment by June 19, 2007, as required

[12] 10 *Del. C.* § 8106; *Rudginski v. Pullella*, 378 A.2d 646, 648 (Del. Super. 1977); *Alban Tractor Co. v. Land Preparation Specialists, Inc.*, 2001 WL 914008, *2 (Del. Super. July 30, 2001).
[13] *Rudginski*, 378 A.2d at 648; *Alban Tractor*, 2001 WL 914008 at *2.

by the alleged agreement between the parties. Similarly, the alleged injury could not have occurred for *quantum meruit* purposes until June 19, 2007, the date that Hercules expected the first payment for the alleged tax money lending service to be made. Assuming that there was no contract between the parties, as is required for *quantum meruit* claims, Hercules expected that payment would be made on June 19, 2007, because it sent Defendant an invoice memorializing this expectancy. Therefore, Hercules timely filed both claims within the applicable three year statute of limitations, because the statute did not expire until June 19, 2010, well after both the Complaint and Amended Complaint were filed.

b. Plaintiff's Breach of Contract Claim

In a civil action for breach of contract, the burden of proof is on the plaintiff to prove the claim by a preponderance of the evidence.[14] To prove a claim for breach of contract by a preponderance of the evidence, the plaintiff must establish the following: (1) the existence of a contract; (2) the defendant breached an obligation imposed by the contract; and (3) resulting damages to the plaintiff.[15] In order to establish that a contract exists between the parties, the plaintiff must establish that both parties agreed to all essential terms of the contract, and the existence of consideration.[16]

In this case, Plaintiff has failed to prove the claim for breach of contract by a preponderance of the evidence because Plaintiff has failed to present any evidence establishing that a contract existed between the parties. Rather, Defendant, Slivinski, Carrington, and Wertz all testified that Defendant never signed a contract or otherwise agreed to any of Hercules' proposed loan repayment options. Therefore, there is insufficient evidence to establish that the

[14] *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005).
[15] *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).
[16] *Thomas v. Thomas*, 2010 WL 1452872, *4 (Del. Com. Pl. Mar. 19, 2010) (citations omitted).

parties have agreed to any of the essential terms of the alleged contract, and Plaintiff's claim for breach of contract must fail.

c. Plaintiff's *Quantum Meruit* Claim

Quantum Meruit is a quasi-contractual remedy that allows the plaintiff, in the absence of an enforceable contract between the parties, to recover the reasonable value for services rendered to the defendant.[17] In order to state a claim upon which relief can be granted for *quantum meruit*, Plaintiff must establish that (1) Plaintiff performed the services with the expectation that the Defendant would pay for those services; (2) that the services were performed by Plaintiff, absent a promise to pay; and (3) the circumstances were such that Defendant should have known that Plaintiff expected to be paid.[18]

It is important to distinguish *quantum meruit* from the related but distinct claim of unjust enrichment. Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience"[19] The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of remedy provided by law.[20] Unjust enrichment is a wholly separate and distinct cause of action from *quantum meruit*.[21] The operative difference between a claim for *quantum meruit* and for unjust enrichment is unjust enrichment focuses on the retention

[17] *C & C Drywall Contractor, Inc. v. Milford Lodging, LLC,* Young, J., 2010 WL 1178233, at *3 (Del. Super.).
[18] *C & C Drywall Contractor, Inc.* 2010 WL 1178233 at *3; *Petrosky v. Peterson,* 859 A.2d 77, 79 (Del. 2004).
[19] *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2009 WL 2231716, *31 (Del. Super. May 29, 2009) (citations omitted).
[20] *Id.*
[21] *Hynansky v. 1492 Hospitality Group, Inc*., 2007 WL 2319191 (Del. Super. Aug. 15, 2007).

of a benefit or money.[22] In contrast, *quantum meruit* allows plaintiffs to recover the reasonable value of services rendered, not the value of a benefit received.[23]

The Internal Revenue Code (the "IRC") requires that employers deduct and withhold certain taxes from their employees' wages.[24] Social Security and Medicare taxes, otherwise known as "FICA" taxes, are included in this required deduction and withholding.[25] Specifically, employers are required to deduct and withhold 6.2% of each employee's wages for Social Security, and 1.4% of each employee's wages for Medicare.[26] Once the deductions and withholdings have been made, the employer is required to hold these funds in trust for the benefit of the United States government, until these funds are paid to the United States.[27] In other words, employers are required by the IRC to withhold FICA taxes on behalf of their employees, and remit these funds to the United States government when they became due. Despite the administrative methods the IRC employs to collect FICA taxes, it is important to note that this scheme taxes each employee's wages, rather than their respective employer's earnings. However, employers are liable to the United States government for FICA taxes regardless of whether they are withheld or remitted.[28]

Accordingly, the parties do not dispute that it was Hercules obligation to withhold Defendant's FICA taxes and remit these funds to the United States government. Further, the parties do not dispute that Defendant was overcompensated from 2002 through 2006 as the result of Hercules failure to withhold. When Defendant becomes eligible and subsequently receives

[22] *Id.*
[23] *Id.*
[24] 26 U.S.C. §§ 3402-3403.
[25] 26 U.S.C. § 3101.
[26] *Id.*
[27] 26 U.S.C. § 7501.
[28] *United States v. Crosland Const. Co.*, 217 F.2d 275 (4th Cir. 1954).

Social Security and/or Medicare disbursements, these disbursements will have in part been funded by the $25,990.51 in taxes paid out of pocket by Hercules that but for administrative error should have been paid out of Defendant's salary. Hercules took numerous steps to make their offer of repayment as palatable as possible to Defendant. Finally, the Court believes it is very possible, if not probable that Defendant noticed that withholdings were not being made well before Hercules discovered this error because Defendant was financially sophisticated and questioned other inconsistencies in his W-2 forms.

While the equities weigh strongly in Hercules' favor, there is a distinct difference between *quantum meruit* and unjust enrichment. While related, quantum meruit requires that the plaintiff prove that a *service was performed*, and unjust enrichment allows plaintiffs to recover when the defendant *unjustly retained money or some other benefit*. While these definitions are far from precise and it is possible to envision a situation where something could be both a service and "some other benefit," this case does not present such situation. The gravamen of Hercules' claim is the unjust retention of money. In other words, the claim alleges that Defendant refused to reimburse Hercules for the money it paid out of its own funds on Defendant's behalf, even though Defendant was overpaid by $25,990.51 as a result. It might be argued that Defendant unjustly retained Hercules' money by refusing to reimburse Hercules for the FICA taxes it paid. However, this is a claim for *quantum meruit*, not unjust enrichment. The Court is not convinced that the payment of money constitutes a service for *quantum meruit* purposes. Accordingly, Plaintiff has failed to prove its claim for *quantum meruit* by a preponderance of the evidence.

CONCLUSION

Based on these findings of fact and conclusions of law, the Court concludes that Hercules has failed to meet its burden of proving its claims for breach of contract and *quantum meruit* by a preponderance of the evidence.

Judgment is entered in favor of Defendant. Costs assessed to Plaintiff.

IT IS SO ORDERED

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Alfred Fraczkowski[29]
Associate Judge

[29] Sitting by appointment pursuant to Del. Const. Art. IV, § 38 and 29 *Del. C.* § 5610.