IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RRR MANAGEMENT COMPANY, INC., Plaintiff	**:** JANUARY TERM, 2001
v.	**:** No. 4039
RICHARD BASCIANO and LOIS M. PALMER, Individually and as Executors of the Estate of Samuel Rappaport, Deceased, Defendants	**:**
v.	**:**
WIL WES RAPPAPORT Third-Party Defendant	**:** Control Nos. 100784 and 120576

O R D E R

AND NOW, this 4th day of March 2002, upon consideration of: (a) defendants' Motion for Partial Judgment on the Pleadings and plaintiff's response in opposition, and (b) plaintiff's and defendants' Cross-Motions for Partial Summary Judgment, the respective answers and memoranda, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that:

1. Defendants' Motion for Partial Judgment on the Pleadings is **Granted**;

2. Plaintiff's Cross-Motion and defendants' Cross-Motion for Partial Summary Judgment are **Denied**;

3. Plaintiff's Motion for Partial Summary Judgment as to Count V of defendants' Counterclaim is **Denied as Moot**.

BY THE COURT,

ALBERT W. SHEPPARD JR., J.

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.....

O P I N I O N

Albert W. Sheppard, J. ..... March 4, 2002

This dispute arises over the attempted termination of a management agreement and the failure to pay management fees under that agreement. The parties consist of the management company which is owned and operated by members of the decedent's family, the coexecutors of the decedent's estate and the decedent's son. The latter is also the owner, president and a director of the management company.

Presently before this court are: (1) the Motion for Partial Judgment on the Pleadings of defendant-executors, Richard Basciano and Lois M. Palmer, on the issue of the termination of the management agreement pursuant to the terms of that agreement and the defendant-executors' notice of termination, (2) the Cross-Motion for Partial Summary Judgment of plaintiff, RRR Management Co., Inc., on the fees allegedly owed by the estate, and (3) the Cross-Motion for Partial Summary Judgment of defendant-

executors, asserting overpayment of management fees.[1] For the reasons set forth, defendants' Motion for Partial Judgment on the Pleadings is granted, and the Cross-Motions for Partial Summary Judgment are denied.

BACKGROUND

Plaintiff, RRR Management Co., Inc. ("RRR"), is a Pennsylvania corporation with an office located at 117 S. 17th Street, Philadelphia, PA. Compl. & Answer, ¶ 1. RRR provides management services for various commercial real estate properties owned by the Estate of Samuel Rappaport, deceased. Compl. & Answer, ¶ 2. Defendant, Richard Basciano ("Basciano"), and defendant, Lois M. Palmer ("Palmer"), are coexecutors of the Estate. Compl. & Answer, ¶¶ 8-9. Basciano was the Chairman of the Board of

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[1]For purposes of judicial economy, this court will address all pending filings, including the Motion for Partial Judgment on the Pleadings along with the Cross-Motions for Partial Summary Judgment. However, a discussion of the filings and docket entries is needed.

First, in its response to the Motion for Judgment on the Pleadings, plaintiff included a Cross-Motion for Partial Summary Judgment on the issue of outstanding management fees allegedly due and owing. No control number was initially assigned to this cross-motion, nor is such a cross-motion proper in a procedural sense because it does not automatically trigger an answer by the opposing party and the Motion for Partial Summary Judgment would otherwise go uncontested.

However, on December 10, 2001, defendants did respond to plaintiff's cross-motion and, in turn, filed a cross-motion on the issue of management fees. Defendant's response and cross-motion, together with plaintiff's subsequent reply were designated at control no. 120576, which actually related to a different motion for summary judgment. That motion was filed by plaintiff on December 7, 2001, as to Count V of defendants' Counterclaim, relating to the alleged violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §§ 201-1 et seq. On January 2, 2002, defendants filed a praecipe to voluntarily discontinue count V of their Counterclaim. Therefore, the plaintiff's Motion for Summary Judgment as to Count V of the Counterclaim is now moot.

For present purposes, this court will treat the Cross-Motions for Partial Summary Judgment, regarding asset management fees, as designated at control no. 120576.

Directors of RRR from its inception in January 1995, until his purportedly "improper" removal as of January 11, 2001. Answer, ¶¶, 3, 8. Third-party defendant, Wil Wes Rappaport ("Wil Rappaport"), the son of Samuel Rappaport, is the owner, President and a director of RRR. Compl. & Answer, ¶ 4. Rita Rappaport, the widow of Samuel Rappaport, is a director of RRR. Compl. & Answer, ¶ 5. Tracy Rappaport Scott, the daughter of Samuel Rappaport, is an officer and director of RRR. Compl. & Answer, ¶ 6.

Prior to the death of Samuel Rappaport, the properties he owned were managed by a company called SR Management Co., whose employees are now employees of RRR. Compl. & Answer, ¶ 12. On January 1, 1995, the Estate entered into a Management Agreement with RRR, which provided *inter alia* that RRR, under the supervision of the executors, would manage the day-to-day operations of certain of the real estate owned by the Estate, would maintain the appropriate books and records, would manage other assets of the Estate, and would prepare reports for the executors as they may require. Compl., Exhibit A at 1. In exchange, the Estate would pay fees to RRR as set forth in the "compensation" provision of the Management Agreement, which states that:

> The Estate shall pay fees to RRR Management Company for the above referenced services as follows:
>
> An asset management fee shall be paid each year in the amount of one percent of the total gross assets of the Estate as determined by the Estate's audited financial statement.
>
> A real estate management fee of four percent of all amounts actually received from tenants shall be paid by the Estate.
>
> No fees or commissions shall be due to RRR Management Company as a result of the sale or purchase of real estate or other assets of the Estate.

> The amounts due to RRR Management Company may be paid on a weekly, monthly, or any other reasonable basis as may be agreed by the operating management of the Estate and RRR Management Company.

Id. at 2. The Management Agreement also included a "term" provision, which is at the heart of the dispute in the Motion for Judgment on the Pleadings. See Id.

The financial statement of the Estate, as managed by RRR, has been audited each year by KPMG Peat Marwick. Compl. & Answer, ¶ 19. Improvements have been made and the value of Estate-owned properties have increased, though RRR and the executors dispute who is responsible for these improvements. Compl. & Answer, ¶ 22. In addition, virtually all of the city code violations on the Estate's properties have been eliminated, but the parties also dispute who is responsible for this effort. Compl. & Answer, ¶ 23.

In 1998, the relationship between the executors, Basciano in particular, and the Rappaport family began to deteriorate. Compl. & Answer, ¶ 24. Again, the parties dispute what was the cause of this strain in the relationship. Id. In June-July 2000, Basciano and Palmer considered resigning as executors of the Estate. Compl. & Answer, ¶26. RRR alleges that part of the strain in the relationship stems from Basciano's demand for millions of dollars for himself and Palmer for their services as executors. Compl., ¶¶ 27-29. Defendants assert that their efforts have been thwarted through the allegedly improper and illegal activities of one of RRR's employees, Carl Cordek ("Cordek"), whose activities have been supported and ratified by Wil Rappaport. Answer, ¶¶ 24, 26, 29.

In October 2000, Basciano hired Frank A. Cresci, Jr. ("Cresci"), C.P.A. to conduct a review of the books and records of RRR. Compl. & Answer, ¶ 30. On October 31, 2000, Cresci issued a letter report on RRR, which made various findings and conclusions, claiming incompetent management on the

part of RRR and questioning RRR's financial books. Compl. & Answer, ¶ 33. See also, Compl., Exhibit B. Plaintiff disputes the veracity of this report. Compl., ¶ 34.

Thereafter, on November 30, 2000, Basciano and Palmer sent a letter to Wil Rappaport which stated that it was "necessary to terminate the services of RRR Management Company as of December 31, 2000," for reasons in the Cresci report and other suspicions of mismanagement. Compl., Exhibit C. The letter also provided that it served "as formal notification of said termination." Id. On December 4, 2000, counsel for the Rappaport family sent a letter to Basciano and Palmer rejecting the termination of RRR and disputing the alleged mismanagement. Compl., Exhibit D. That letter also stated that "the Estate owes RRR the sum of $1,250,000. under the terms of the Management Agreement." Id. On December 20, 2000, counsel for Basciano and Palmer issued a letter to RRR's counsel, indicating that it would extend, without prejudice, the Management Agreement beyond December 31, 2000 on a day-to-day basis, provided that Mr. Cordek's employment relationship would be terminated under certain conditions and a separate agreement. Compl., Exhibit D. Defendants allege that Cordek remains an RRR employee. Answer, ¶ 37. Plaintiff, in turn, avers that the attempted termination of the Management Agreement is not effective until December 31, 2003. Compl., ¶ 38.

Then, in January 2001, Basciano allegedly began taking over the activities of RRR, including giving orders to RRR's employees, interfering with RRR's rights and removing RRR as a signatory on Estate accounts. Compl., ¶ 39. On January 25, 2001, Basciano refused to pay management fees to RRR and disputed that any management fee was due on that date. Compl. & Answer, ¶ 40. Since January 31, 2000, the Estate has allegedly been in arrears of the payment of management fees to RRR in the amount in excess of $1,150,000. Compl., ¶ 41.

Within this context, plaintiff filed its Complaint, along with a Motion for Temporary Restraining Order and/or Preliminary Injunction.[2] In its Complaint, plaintiff asserts a single count for breach and anticipatory repudiation of contract, seeking to enjoin the termination of the Management Agreement. In its Answer, defendant raises new matter, alleging that RRR had not advised the Estate or KPMG Peat Marwick that the Estate owed additional management fees for the years 1995 through 2000 prior to December 2000. Answer with New Matter, ¶¶ 53-65. Defendants also set forth a counterclaim for (1) declaratory relief that the Management Agreement had been properly terminated; (2) for injunctive relief to turn over all monies, books, records and other documents of the Estate which have been withheld by RRR and/or Wil Rappaport; (3) unjust enrichment; (4) conversion and (5) violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 et seq. Counterclaim, Counts I-V.

At issue now are defendants' Motion for Judgment on the Pleadings and the parties' cross-motions for partial summary judgment. This court will address these motions *seriatim*.

DISCUSSION

I. DEFENDANT-EXECUTORS EFFECTIVELY TERMINATED THE MANAGEMENT AGREEMENT WITH PLAINTIFF-RRR ON DECEMBER 31, 2000 PURSUANT TO THE NOTICE OF TERMINATION AND THE UNAMBIGUOUS TERMS OF THE MANAGEMENT AGREEMENT.

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings,

[2]The Motion for Temporary Restraining Order has been on suspended status by agreement of the parties.

which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmoving party may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 2001 WL 79985, at *2 (Pa.Super.Ct. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." Id. See also, Flamer v. New Jersey Transit Corp., 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992)("While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently.")(citations omitted).

In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. Kelly v. Nationwide Ins. Co., 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotovosky v. Ski Liberty Operating Corp., 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n.5 (Pa.Commw.Ct. 1997)(citations omitted).

In their Motion for Judgment on the Pleadings, Defendant-executors assert that, as a matter of law, the Management Agreement was effectively terminated on December 31, 2000 pursuant to the Notice of Termination, dated November 30, 2000, and the clear and unambiguous terms of the Management Agreement. In turn, plaintiff RRR contends that the termination provision in the Management Agreement is known as an "evergreen" provision, meaning that it contains a rolling three-year term and that any attempted termination would not be effective until December 31, 2003.

This court disagrees with plaintiff's argument, and finds that the Notice of Termination, together with the clear and unambiguous terms of the Management Agreement, effectively terminated that agreement on December 31, 2000.

Here, it is undisputed that the Management Agreement contained the following term provision:

> This agreement shall be for a three year period beginning on January 1, 1995 and expiring on December 31, 1998. The term of this agreement shall automatically be extended for an additional year on each December 31, without additional action by either party.
>
> If either party wishes to terminate this agreement, it must give written notice to the other party of its intention before December 31 in order to prevent the term of the agreement from automatically extending. Upon receipt of written notice of termination, this agreement shall no longer automatically extend each year, but will terminate on the last day of its effective term as of the date notice is given.

Compl., Exhibit A at 2. It is also undisputed that on November 30, 2000, defendant-executors sent a letter to Wil Rappaport which stated that it was "necessary to terminate the services of RRR Management Company as of December 31, 2000" and that the letter served "as formal notification of said termination." Compl., Exhibit C. However, plaintiff disputes the meaning of the term provision and how it should be interpreted in light of defendant's notice of termination.

In analyzing this issue, certain principles must be noted. The interpretation of a contract is a question of law. Seven Springs Farm, Inc. v. Croker, 748 A.2d 740, 744 (Pa.Super.Ct. 2000)(citations omitted). When a contract's language is unambiguous, the court must interpret its meaning solely from the contents within its four corners. Id. The court may not consider extrinsic or parol evidence unless the terms are ambiguous. Id. A contract is not ambiguous merely because the parties do not agree on the construction. Id. Additionally, "[t]he parol evidence rule forbids the introduction of parol evidence of antecedent or contemporaneous agreements, negotiations and understandings of the contracting parties for

the purposes of varying or contradicting the terms of a contract which both parties intended to represent the definite and complete statement of their agreement." Kripp v. Kripp, 784 A.2d 158, 162 (Pa.Super.Ct. 2001)(citations and quotation marks omitted).

Plaintiff relies on two out-of-state cases, AXA Assurance, Inc. v. The Chase Manhattan Bank, 339 N.J.Super. 22, 25, 770 A.2d 1211, 1213-14 (2001) and Washington Wine & Beverage Co. v. Outlook Vineyards Joint Venture, 1999 WL 1124614 (Wash.App.Div. 3 Dec. 7, 1999), for the proposition that an "evergreen" provision allows the duration of the agreement to extend automatically *ad infinitum*. First, the Washington Wine decision is an unpublished opinion and may not be relied upon for precedential value. See Commonwealth v. Swinson, 426 Pa.Super. 167, 172 n. 7, 626 A2d 627, 629 n. 7 (1993)(noting that unpublished memorandum opinions may not be relied upon for precedent); State v. Fitzpatrick, 5 Wash.App. 661, 668, 491 P.2d 262, 267 (1971)(noting same rule for the State of Washington). Therefore, this court need not consider that case.[3]

Further, the decision in AXA Assurance does not support plaintiff's position. In that case, an "evergreen clause" is defined "as a term in a letter of credit providing for automatic renewal of the credit." 339 N.J. at 25, 770 A.2d at 1213 (citation omitted). Such a clause "reflects the parties' intent to make credit available for an indefinite period of time." Id. at 25, 770 A.2d at 1214. However, the agreement

[3]Moreover, the Washington Wine decision does not support plaintiff's position though it involved a rolling three-year term in a purchase agreement of grape harvests, which initially covered the 1995, 1996 and 1997 harvests. 1999 WL 1124614 at *1. If neither party terminated that agreement by December 31, 1995, it would automatically be extended for one year. Id. Since there was no termination on December 31, 1995, the agreement was deemed to have renewed to cover the 1998 harvest. Id. Like in the present case, a failure to terminate merely extended the agreement for an additional year, not an additional three-year term.

in that case also included an expiry provision which provides that "plaintiff may draw upon the credit line 'on or before June 02, 1993 [*sic*] but not beyond June 2, 1994'." Id. at 26-27, 770 A.2d at 1214. The court determined that the expiration provision controlled and that the specific expiration date demonstrated the parties' intent that credit would not be extended beyond that date, notwithstanding the evergreen clause. Id. at 28, 770 A.2d at 1215.

Here, notwithstanding the plaintiff's position, the Management Agreement appears to be complete on its face despite the absence of a formal integration clause. The agreement covers the services to be provided, the duration of the agreement, the compensation to be paid, as well as other requisite matters. Its terms are clear and unambiguous. Under the clear language of the term provision, after December 31, 1998, absent additional action from one of the parties, the agreement would automatically be extended for one year, not three years under plaintiff's interpretation. Compl., Exhibit A at 2. The term provision also indicates that the agreement would terminate upon written notice of one party to the other "on the last day of its effective term as of the date notice is given." Compl. Exhibit A at 2. Since defendants sent written notice of termination on November 20, 2000, the last day of the effective term was December 31, 2000. It is not plausible that notice sent in one year means that the agreement does not expire for an additional three years. Such a reading would negate the language in the first paragraph of the term provision. Had the parties wanted a rolling three-year term to extend automatically every year after the initial term, they could have drafted the agreement to reflect such a desire instead of providing an automatic extension for merely an additional year.

For these reasons, the court grants defendants' Motion for Partial Judgment on the Pleadings.

II. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT FOR EITHER PARTY, INCLUDING THE APPLICABILITY OF DEFENDANTS' AFFIRMATIVE DEFENSES, THE AMOUNT OF ANY ALLEGED FEES WHICH MAY BE DUE RRR, WHETHER THE EXECUTORS OVERPAID THOSE FEES AND HOW THOSE FEES WERE CALCULATED UNDER THE AGREEMENT'S TERMS.

Under the Pennsylvania Rules of Civil Procedure, the court should grant summary judgment if (1) there is no genuine issue of any a material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report, or (2) after the completion of discovery, a party bearing the burden of proof on an issue has failed to produce evidence of facts essential to the cause of action or defense such that a jury could return a verdict in his favor. Pa.R.C.P. 1035.2. The moving party has the burden to prove that there is no genuine issue of material fact. Hagans v. Constitution State Serv. Co., 455 Pa.Super. 231, 687 A.2d 1145, 1156 (1997). Once the moving party meets this burden, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Id. The trial court's function is to determine whether there are controverted issues of fact, not whether there is sufficient evidence to prove the particular facts. Id. at 1157. A motion for summary judgment must be viewed in the light most favorable to the non-moving party, and all doubts as the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. Skipworth v. Lead Industries Ass'n., Inc., 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

Plaintiff, in its Cross-Motion for Partial Summary Judgment, asserts that it is entitled to outstanding management fees in the amount of $1,170,964, arising from fees due and outstanding from 1995 through December 31, 2000. Pl. Cross-Mot. for Partial Summ. J., ¶¶ 30-32. In support of this motion, plaintiff

attaches a chart of computations from Cordek, which incorporates the asset calculations of KPMG Peat Marwick for the years 1995 through 2000 and adds additional figures for certain ventures of the Estate. Pl. Cross-Mot. for Partial Summ. J., Exhibit G.

Defendants, in turn, assert that plaintiff and its principal, Wil Rappaport, made no claim for additional management fees for and during the years 1995 through 2000; that RRR's claims for fees for the years 1995 and 1996 are barred by the applicable statute of limitations or the doctrines of waiver and/or estoppel; and that the Estate, through the executors, have overpaid RRR. Defs. Resp. to Pl. Cross-Mot. for Partial Summ. J., together with Defs. Cross-Mot. for Partial Summ. J., ¶¶ 28-36, 43-44. Specifically, defendants aver that:

> 35. The Estate has paid RRR management fees in the amount of $4,533,507 through December 31, 2001.
>
> 36. The amount of management fees to which RRR is entitled to receive for this time period is $4,014,946.70.
>
> 37. The Estate has overpaid RRR in the amount of $518,560.30.

Id. at ¶¶ 35-37. In response, plaintiff admits that the Estate has paid it management fees in the amount of $4,533,507, but denies defendants' assertion of overpayment and maintains that the amount of management fees that have accrued but have not been paid to RRR is $897,048.[4] Pl. Resp. to Defs. Cross-Mot. for Partial Summ. J., ¶¶ 35-37. Plaintiff also disputes that the amounts taken from the KPMG financial reports accurately reflect the gross assets in order to determine the correct value for the outstanding management

[4]In its reply memorandum, in opposition to the defendants' cross-motion, plaintiff asserts that the number has been adjusted from the original motion because the figures for the year 2001 are not available. Pl. Reply Mem., at 12 n.2.

fees. Id. at ¶¶ 148-153, 156-57, 159. Further, plaintiff argues that the statute of limitations had not run because the Management Agreement is a continuous contract which does not fix a definite time for payment and the statute of limitations does not run until there is a breach or the contract is terminated. Pl. Reply Mem., at 6-8. In addition, plaintiff argues that the doctrines of waiver and/or estoppel do not apply because there is no evidence that plaintiff concealed that the Estate owed it management fees, that defendants misconstrue the terms of the Management Agreement, and that defendants seek to alter those terms so that the management fees only cover the costs of plaintiff's operation rather than one percent (1%) of the gross assets as provided by the agreement. Id. at 9.

In light of these and other contradictory allegations, this court finds that genuine issues of material fact exist which preclude the granting of summary judgment for either party. These disputed issues of fact also relate to the applicability of defendants' affirmative defenses of the statute of limitations and the doctrine of waiver or estoppel.

A. The Statute of Limitations

Summary judgment based on a statute of limitations defense is proper where the plaintiff fails to plead facts sufficient to toll the statute, or admits facts sufficient to concede this defense, or where the plaintiff fails to show that a genuine issue of material fact exists, or, finally, where plaintiff's evidence is inherently unreliable. Holmes v. Lado, 412 Pa.Super. 218, 224, 602 A.2d 1389, 1391 (1992) (citations omitted).

"The statute of limitations begins to run on a claim from the time the cause of action accrues." S.T. Hudson Eng'rs, Inc. v. Camden Hotel Dev. Assocs., 747 A.2d 931, 934 (Pa.Super.Ct. 2000)(citing Packer Society Hill Travel Agency, Inc. v. Presbyterian Univ. of Pennsylvania Med. Ctr., 430

Pa.Super. 625, 630, 635 A.2d 649, 652 (1993)). Whether a complaint is timely filed within the statute of limitations period is normally a question of law for the court. Crouse v. Cyclops Industries, 560 Pa. 394, 403-04, 745 A.2d 606, 611 (2000)(citing Hayward v. Med. Ctr. of Beaver Cty., 530 Pa. 320, 325, 608 A.2d 1040, 1043 (1992)).

The applicable statute of limitations for a breach of contract action is four years. 42 Pa.C.S.A. §5525(8). Generally, a contract action accrues at the time of breach. S.T. Hudson Eng'rs., 747 A.2d at 934. However, when the contract is continuing, the statute of limitations runs from the time when the breach occurs or when the contract is in some way terminated. Id. (citing Thorpe v. Schoenbrun, 202 Pa.Super. 375, 378, 195 A.2d 870, 872 (1963)). As stated in Thorpe:

> The test of continuity, so as to take the cause out of the operation of the statute of limitations, is to be determined by the answer to the question whether the services were performed under one continuous contract, whether express or implied, with no **definite** time fixed for payment, or were rendered under several separate contracts.
>
> If services are rendered under an agreement which does not fix any **certain** time for payment or for the termination of the services, the contract will be treated as continuous, and the statute of limitation does not being to run until the termination of the contractual relationship between the parties.

Id. at 378, 195 A.2d at 872 (emphasis added)(quotation marks and citations omitted).

In contrast to this principle, "where installment or periodic payments are owed, a separate and distinct cause of action accrues for each payment as it becomes due." American Motorists Ins. Co. v. Farmers Bank and Trust Co., 435 Pa.Super. 54, 61, 644 A.2d 1232, 1235 (1994); Ritter v. Theodore Pendergrass Teddy Bear Prods., Inc., 356 Pa.Super. 422, 430, 514 A.2d 930, 935 (1986); Pennsylvania Turnpike Comm'n v. Atlantic Richfield Co., 31 Pa.Commw. 212, 216-17, 375 A.2d 890, 892 (1977), aff'd, 482 Pa. 615, 394 A.2d 491 (1978).

The issue whether the statute of limitations bars plaintiff's claim for asset management fees for the years 1995 and 1996 depends upon whether the Management Agreement can be deemed a continuous agreement. It is true that the "compensation" provision specifically states that "[a]n asset management fee shall be paid each year in the amount of one percent of the total gross assets of the Estate as determined by the Estate's audited financial statement." Compl., Exhibit A at 2. However, this same provision also states that "[t]he amounts due to RRR Management Company may be paid on a weekly, monthly, or any other reasonable basis as may be agreed by the operating management of the Estate and RRR Management Company." Id. This language, when read together, along with the implicit understanding that RRR was to provide services over the term of the Management Agreement, indicates that the Agreement lacks a definite or fixed time for payment and that it may be deemed a continuous contract.

Moreover, in 1998 and 1999, defendants paid plaintiff more than it was owed for those years, purportedly to satisfy fees which had accrued during the period between 1995 to 1997.[5] See Pl. Mem.

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[5]Though neither party raises the issue, these payments in 1998 and 1999 could give rise to the "acknowledgement doctrine" which may toll the statute of limitations or remove its bar by a promise to pay the debt. S.T Hudson Eng'rs., 747 A.2d at 934. As noted in S.T. Hudson Eng'rs.:

> "[t]here must be no uncertainty either in the acknowlegement or in the identification of the debt; and the acknowlegement must be plainly referable to the very debt upon which the action is based; and also must be consistent with a promise to pay on demand and not accompanied by other expressions indicating a mere willingness to pay at a future time. A simple declaration of an intention to discharge an obligation is not the equivalent of a promise to pay, but is more in the nature of a desire to do so, from which there is no implication of a promise ..... A clear distinct and unequivocal acknowlegement of a debt as an existing obligation, such as is consistent with a promise to pay, is sufficient to toll the statute."

747 A.2d at 934 n. 5 (citations omitted). See also, Cole v. Lawrence, 701 A.2d 987, 990 (Pa.Super.Ct. 1997)("there can be no more clear and unequivocal acknowledgement of a debt than

of Law in Support of its Cross-Mot. for Summ. J., at 24-25; and Pl. Cross-Mot., Exhibit G. Defendants maintain that they had fully satisfied any balance due from the years 1995 through 1997 when they made payments in 1998 and 1999. See Defs. Cross-Mot. for Summ. J., ¶¶ 152, 156. Regardless of the reason for paying more money in 1998 and 1999 and irrespective of whether this satisfied any balance owed to RRR or amounted to an over-payment, these circumstances further indicate that the Management Agreement may constitute a continuous contract. As such, the statute of limitations did not begin to run until the breach or termination of the contract. S.T. Hudson Eng'rs., 747 A.2d at 934. As discussed in the above analysis, the contract terminated on December 31, 2000, following the defendant-executors' Notice of Termination of November 20, 2000. Therefore, the statute of limitations for plaintiff's claim to asset management fees could have started to run at that time. Alternatively, and more likely, plaintiff's claim started to accrue in 1998 when defendants began to pay additional monies for fees from 1995 through 1997, but allegedly failed to satisfy the balance owed to RRR which could be deemed a breach of the Management Agreement. In either case, plaintiff's claim would fall within the four-year statute of limitations. In any event, there are genuine issues of material fact as to the applicability of the statute of limitations defense which include whether the parties had agreed to an alternative arrangement in the

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Footnote 5 (continued)
payment . . . [i]n order for a partial payment to toll the statute of limitations, the payment must constitute constructive acknowledgement of the debt from which a promise to pay the balance is inferred.").

Here, the record is not clear that defendants' payments to plaintiff in1998 and 1999 could be deemed constructive acknowledgement of the debt. It is also not clear whether these payments were accompanied by other equivocal expressions regarding paying the alleged debt owed to plaintiff at some point in the future. As such, it appears that genuine issues of material fact exist whether the statute of limitations was tolled.

payment of asset management fees.

B. Doctrine of Waiver or Equitable Estoppel

Defendants argue, in the alternative, that plaintiff is barred from recovering for additional fees for the years 1995, 1996, and 1997 under the doctrines of waiver and/or equitable estoppel because it knew of its claim for fees but affirmatively misrepresented and concealed its claim until January 2001. Defs. Mem. of Law in Support of Cross-Mot. for Summ. J., at 16-18. Plaintiff, in turn, argues that there is no evidence that plaintiff concealed its entitled to management fees, rather plaintiff notified the defendant-executors that fees were lower than as provided under the Management Agreement's terms and that plaintiff "was satisfied with taking only a portion of its fees in the early years when the Estate was cash poor." Pl. Reply Mem., at 9.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right and may be established by a party's express declaration or by acts that warrant an inference of the relinquishment of such right." Hess v. Gebhard & Co., Inc., 769 A.2d 1186, 1194 (Pa.Super.Ct. 2001)(citing Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assocs. Ltd. Partnership, 416 Pa.Super. 45, 49, 610 A.2d 499, 501 (1992)).

Equitable estoppel prevents a party from asserting a right based upon his own action of misrepresentation to the other party and the other party having relied upon the misrepresentation. Id. at 1194. The doctrine recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own detriment may be enforced in equity. Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432,435, 457 A.2d 502, 503 (1983). The elements for equitable estoppel consists of (1) an inducement, by act, representation or silence when one ought to speak, that

causes one to believe the existence of a certain set of facts; (2) justifiable reliance on that inducement; and (3) prejudice to the one induced. Id. at 436, 457 A.2d at 503. See also, Zivari v. Willis, 416 Pa. Super. 432, 436, 611 A.2d 293, 295 (1992).

Here, it is not clear that plaintiff waived its claim to additional fees for the years 1995 through 1997, nor is it clear that plaintiff concealed or misrepresented any entitlement to these fees during those years. Similarly, it is not evident that plaintiff should be equitably estopped from asserting any claim to these fees. Rather, there are genuine issues of material fact as to what took place when certain fees were paid in 1998 and 1999.

C. The Calculation of Total Gross Assets

Plaintiff's position as to the calculation of asset management fees is clearly different from defendants' position. Plaintiff, according to Cordek's chart, maintains that it is owed fees which include the calculation of total assets per the KPMG Peat Marwick Statement, as well as the liabilities of the proprietorships and assets of R W Ventures and the negative amounts on the summary page. Pl. Cross-Motion, Exhibit G. In contrast, defendant contends that plaintiff was paid the total asset management fees in accordance with the Management Agreement's terms and Generally Accepted Accounting principles ("GAAP"). Defs. Reply Mem., at 10.

The Management Agreement provided that asset management fees shall be in "the amount of one percent of the total gross assets of the Estate as determined by the Estate's audited financial statement." Compl., Exhibit A at 2. However, the agreement does not further define the term "total gross assets." Defendants argue that the term "total gross assets" is indistinguishable from the term "total assets" as calculated in the KPMG reports. Defs. Reply Mem., at 13. In support of this argument, defendants rely

on the totals reached in the reports, as well as the definition of "gross". The dictionary defines "gross" as "an overall total exclusive of deductions" or "to earn or bring in (an overall total) exclusive of deductions (as for taxes or expenses). Webster's Ninth New Collegiate Dictionary 538 (1987). It is also true that the KPMG reports set forth annual values for the "total assets" of the Estate before certain liabilities are subtracted. See Defs. Cross-Motion, Exhibits E at 2; F at 2; G at 2; H at 2; I at 2 and J at 2. Further, while certain of Cordek's computations seemed to be redundant of the KPMG's summaries, certain figures do not appear to have been included in the totals reached in the KPMG reports. Specifically, the alleged liabilities of the proprietorships and the assets of R W Ventures appears to be absent from the reports in contrast to Cordek's computations. See Pl. Cross-Motion, Exhibit G. Thus, it is not clear on the present record that the total value of all of the assets of the Estate were included, exclusive of all of the liabilities, as reflected in the KPMG reports. It is also not clear that the court should find that the methodology employed in Cordek's computations was invalid.

Moreover, defendants now claim in their Cross-Motion for Partial Summary Judgment that they have overpaid asset management fees to plaintiff. Defs. Cross-Motion, ¶¶ 156, 159. Plaintiff, in turn, correctly asserts that this claim has never been asserted any counterclaim or other pleading filed of record with this court. Pl. Reply Mem., at 11. The first time defendants assert their claim for overpayment was in their cross-motion, which is not a "pleading" as defined under the Pennsylvania Rules of Civil Procedure. See Pa.R.C.P. 1017 ("pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to the counterclaim contains new matter, a preliminary objection and an answer thereto."). This court cannot *sua sponte* deem defendants' pleadings to be amended to include their claim of overpayment of asset management fees. However,

defendants may file a motion to amend their pleading *nunc pro tunc*.[6]

In sum then, the record demonstrates that genuine issues of material fact exist as to whether plaintiff was underpaid its asset management fees, whether defendants overpaid those fees, and how those fees were in fact calculated. For these reasons, the cross-motions for summary judgment are denied.

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[6]Rule 1033 of the Pennsylvania Rules of Civil Procedure permits a party to amend his complaint either by filed consent of the adverse party or by leave of court. Pa.R.C.P. 1033. The rule also provides that "[t]he amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense" and also allows amendment "to conform the pleading to the evidence offered or admitted." Pa.R.C.P. 1033. The trial court has broad discretion in determining whether to allow amendment. Capobianchi v. BIC Corp., 446 Pa.Super. 130, 134, 666 A.2d 344, 346 (1995). "Amendments are to be liberally permitted except where surprise or prejudice to the other party will result, or where the amendment is against a positive rule of law." Burger v. Borough of Ingram, 697 A.2d 1037, 1041 (Pa.Commw.Ct. 1997)(citation omitted). See also, Roach v. Port Authority of Allegheny County, 380 Pa.Super. 28, 30, 550 A.2d 1346, 1347 (1988)("the right to amend the pleadings should not be withheld where some reasonable possibility exists that the amendment can be accomplished successfully.")(citations omitted).

A reasonable possibility that defendants overpaid plaintiff may in fact exist. Therefore, a motion to amend their answer and/or counterclaim should be granted.

CONCLUSION

For the reasons set forth, the Motion for Partial Judgment on the Pleadings, as to the termination of the Management Agreement, is granted. The Cross-Motions for Partial Summary Judgment, as to asset management fees, are denied. Further, the Motion for Partial Summary Judgment as to Count V of the defendants' Counterclaim is denied as moot, in light of defendants' Praecipe to voluntary discontinue that count.

A contemporaneous Order will be issued in accord with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.