BRIAN V. SWISHER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 04-01,600
		:
ERIC S. BROWN and RAQUEL BROWN, his wife, each individually and each t/d/b/a One Stop Pools, and ONE STOP POOLS, INC.,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: March 8, 2005

OPINION and ORDER

Before the court for determination is the Motion for Summary Judgment of Plaintiff Brian V. Swisher (hereafter "Swisher") filed December 13, 2004. The court will deny the motion.

Background

Swisher instituted this case by filing a complaint on September 27, 2004. In the complaint, Swisher has alleged the following counts: Count I against One Stop Pools, Incorporated – Unjust Enrichment; Count II against Eric S. Brown and Raquel Brown – Unjust Enrichment; Count III against Eric S. Brown – Injunctive Relief/Specific Performance. Underlying Swisher's claims is a written agreement between him and Eric Brown whereby Brown agreed to release Swisher from any and all liabilities and debts of One Stop Pools, Incorporated and agreed to defend and hold Swisher harmless for any past, present, or future debts and liabilities of One Stop Pools, Incorporated. Defendants, representing themselves, filed an answer to the complaint on November 3, 2004.

The present motion for summary judgment was filed on December 13, 2004. In the motion, Swisher contends that Defendants have admitted in their answer material facts that would entitle him, as a matter of law, to summary judgment on his claims. A scheduling order filed December 16, 2004 directed that an argument be held on the motion and the parties to file briefs in support of their positions. Swisher filed a brief on January 19, 2005. Defendants had not filed a brief nor had they filed a response to the motion for summary judgment by the February 9, 2005 argument. It is upon this failure to file a response that Swisher based an additional argument as to why he is entitled to summary judgment.

By an order filed February 16, 2005, this court deferred deciding the motion for summary judgment. The order permitted each party until February 22, 2005 to submit cases or legal memorandum addressing the issue of whether the responses in Defendants' answer constitute admissions. The court stated that it would defer making a decision on the motion until after February 22, 2005. On February 22, 2005, Swisher filed Proposed Findings of Fact and Memorandum of Law on Plaintiff's Motion for Summary Judgment. Defendants submitted a Memorandum of Law in opposition to the motion for summary judgment, which was received by the court on February 24, 2005. Defendants have yet to file a response to the motion for summary judgment.

Therefore, the issue before the court is whether Swisher is entitled to summary judgment on the unjust enrichment and specific performance claims when Defendants have admitted certain allegations in the answer and have failed to file a response to the motion for summary judgment.

It is appropriate to initially set forth the standard of review for a summary judgment motion. A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "… when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " '… in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences ….'" ***Godlewski***, 597 A.2d at 107 (quoting ***Banker v. Valley Forge Ins. Co.***, 585 A.2d 504, 507 (Pa. Super. 1991)). Summary judgment will only be entered in cases that are free and clear from doubt and any doubt must be resolved against the moving party. ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Pennsylvania Rule of Civil Procedure 1035.3 sets forth the responsibilities of the non-moving party. It provides that:

> Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying
>
> (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

> (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa.R.C.P. 1035.3(a)(1), (2). If the non-moving party fails to meet his responsibilities, then the court has discretion to enter summary judgment against him. Pa.R.C.P. 1035.3(d). However, the mere fact that the non-moving party failed to file a response does not automatically make summary judgment appropriate; "… it is preliminarily imperative that the moving party's evidence clearly dispel the existence of any genuine factual issue." ***Atkinson v. Haug***, 622 A.2d 983, 986 (Pa. Super. 1993). When reviewing a motion for summary judgment to which no response has been filed, "[t]he court must ignore controverted facts contained in the pleadings and restrict its review to material filed in support of and in opposition to a motion for summary judgment and to those allegations in pleadings that are uncontroverted." ***Id***. at 985.

The motion for summary judgment had attached the affidavit of Swisher in support thereof. This oral testimony is insufficient to establish the absence of a genuine issue of material fact that would permit granting summary judgment. *See*, ***Penn Center Housing, Inc. v. Hoffman*** 553A.2d 900 (Pa. 1989); ***Nonty-Glo v. American Surety Co.,*** 163 A.523 (Pa. 1932). Therefore, the court will restrict its examination to the complaint and the answer. Based upon that examination, the court has determined the following to be the undisputed and uncontroverted facts. Swisher and Eric Brown had a business relationship whereby they did business as an entity known as One Stop Pools. On February 22, 2002, Swisher and Brown incorporated One Stop Pools. However, One Stop Pools, Incorporated never drafted or adopted by-laws or a shareholders agreement; never conducted annual meetings of

stockholders; never elected directors; never ratified corporate transaction; and never issued shares of stock.

During its operation, One Stop Pools, Incorporated incurred debts. One Stop Pools, Incorporated incurred tax liability to the Internal Revenue Service. It also incurred a debt owed to Fox Pool Corporation. Between May 14, 2002 and July 2, 2002, One Stop Pools, Incorporated ordered supplies, equipment, parts, materials, and other products necessary to support its business operations from Fox Pool Corporation. The total debt One Stop Pools, Incorporated owed Fox Pool Corporation was $19,309.51.

On June 25, 2002, Swisher and Eric Brown entered into a written agreement. The agreement states as follows:

> And now this 25th day of June, 2002, it is agreed by the parties below that Brian V. Swisher relinquishes any and all interests in One Stop Pools, Inc. in exchange for cash payment by Eric S. Brown in the amount of $9,283.03 and for the release by Eric S. Brown of Brian V. Swisher from any and all liabilities and debts of One Stop Pools, Inc. Cash payment to be made on or before July 8, 2002. The parties hereto further agree that any and all personal property of One Stop Pools, Inc., which presently is in their respective possession shall become their sole and exclusive property as of today's date. Eric Brown agrees to defend and hold harmless Brian V. Swisher from any and all past, present and future debts and liabilities of One Stop Pools, Inc.

Both Swisher and Eric Brown signed the written agreement.

The remaining factual contentions of Swisher are disputed by the pleadings Swisher contends he paid $6,838 to Fox Pool Corporation. The motion for summary judgment in paragraph 7, acknowledges that the answer sufficiently denies that claim. Similarly, as to the tax liability, which is allegedly the subject of an IRS inquiry, and the $2,325 debt owed to Nextel Communications, the summary judgment motion in paragraphs 9 and 11 acknowledges

that defendants have sufficiently denied that the I.R.S. has made an inquiry into One Stop Pools, Incorporated's tax debt and that Nextel Communications has commenced collection proceedings against Swisher for the debt incurred by One Stop Pools Incorporated. Swisher has sought payment of the $6,838 he paid to Fox Pool Corporation from Eric Brown and indemnification from him regarding the tax liability and the Nextel Communications debt. Eric Brown has refused to repay Swisher the $6,838 and indemnify him for the tax liability and Nextel Communications debt. As to the tax liability, Brown asserts that it has been paid. As to the Nextel Communications debt, he contends that it is not a debt incurred by One Stop Pools, Incorporated and thereby not covered by the agreement.

The court will apply these facts to the applicable law for each claim asserted by Swisher. The first claim is the unjust enrichment count asserted against One Stop Pools, Incorporated. As a preliminary matter the court notes that the record demonstrates One Stop Pools, Incorporated is in fact a corporation. Swisher alleged that on February 22, 2002 he and Eric brown incorporated One Stop Pools. Complaint, ¶ 5, ***Swisher v. Brown***, no. 04-01,600 (Lycoming Cty 2004). Defendants admitted that Swisher and Eric Brown incorporated One Stop Pools. Answer, ¶ 5. In order to incorporate a business, the business must file articles of incorporation with the Pennsylvania Department of State. *See*, 15 Pa.C.S.A. §1309(a). Based upon the allegation in the complaint and response in the answer, it must be inferred that this was done otherwise One Stop Pools, Incorporated could not have been incorporated. Upon the filing of the filing of the articles of incorporation or the effective date specified in the articles of incorporation, the corporate existence begins. Ibid. Therefore, the Court must conclude that One Stop Pools, Incorporated is a duly incorporated corporation.

The allegations regarding One Stop Pools, Incorporated's failure to draft or adopt by-laws or a shareholders agreement; to conduct annual meetings of stockholders; to elect directors; to ratify corporate transaction; and to issue shares of stock do not alter this conclusion. Nor does the allegation in paragraph 11 of the complaint, which alleges that Swisher and Eric Brown operated One Stop Pools, Incorporated as an equal partnership. The corporate entity comes in to existence once the articles of incorporation are filed or upon the date specified in the articles. In light of this, these allegations do not alter the earlier allegation that One Stop Pools, Incorporated had been incorporated. Legally, it remained a corporate entity until it was determined to be otherwise.

It is true that the corporate entity may be disregarded. ***Brindley v. Woodland Village Restaurant***, 652 A.2d 865, 867 (Pa. Super. 1995); ***First Realvest Inc. v. Avery Builders, Inc.***, 600 A.2d 601, 604 (Pa. Super. 1991); ***Village at Camelback Property Owners Ass'n v. Carr***, 538 A.2d 528, 533 (Pa. Super. 1988), *aff'd*, 572 A.2d 1 (Pa. 1990). It is also true that many of these factual allegations may be considered when determining if the corporate entity should be disregarded. *See*, ***Advanced Tel. Sys. v. Com-Net Prof'l Mobile Radio, LLC***, 846 A.2d 1264, 1278 (Pa. Super. 2004) (The factors to be considered when deciding if the corporate form should be disregarded are: undercapitalization; failure to adhere to corporate formalities; substantial intermingling of corporate and personal affairs; and the use of the corporate form to perpetuate a fraud.). However, the court does not conclude that Swisher was attempting to have the court disregard One Stop Pools, Incorporated's corporate form by alleging these facts. The court views these allegations to be merely factual background.

The Court will now address the unjust enrichment claim asserted against One Stop Pools, Incorporated. Unjust enrichment is an equitable doctrine. ***Mitchell v. Moore***, 729 A.2d 1200, 1203 (Pa. Super. 1999), *app. denied*, 751 A.2d 192 (Pa. 2000). Under the doctrine, the law implies a contract, which requires the defendant to pay the plaintiff the value of the benefit conferred. ***Ibid***. In order to establish a claim for unjust enrichment, one must prove: (1) benefits conferred on the defendant by plaintiff; (2) appreciation of such benefits by defendant; (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of the value. ***Ibid***. The application of the doctrine is specific to the facts and circumstances of the case. ***Id***. at 1203-04. "In determining if the doctrine applies, [the court's] focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched." ***Id***. at 1204.

Swisher asserts that he has established a claim for unjust enrichment against One Stop Pools, Incorporated. It is undisputed that One Stop Pools, Incorporated had incurred a debt to Fox Pool Corporation in the amount of $19,309.51. It *is* disputed that Swisher conferred a benefit upon One Stop Pools, Incorporated, since it is disputed that Swisher paid Fox Pool Corporation $6,838 thereby satisfying the debt. Swisher's assertion in paragraph 28 of the complaint that One Stop, Incorporated was unjustly enriched by the payment of $6,838 to Fox Pool Corporation is a legal conclusion. The denial of that paragraph in the answer is sufficient to deny Swisher's unjust enrichment claim asserted against One Stop Pools, Incorporated.

The second unjust enrichment claim is asserted against Eric Brown and Raquel Brown in Count II of the complaint. Although Count II is titled as an unjust enrichment cause of action, the claim is in reality a breach of contract claim regarding the June 25, 2002

indemnification agreement.[1] Count II seeks payment of the $6,838 expended by Swisher. He basis his right to the payment upon the indemnification agreement, and contends that Brown has refused to render payment per the agreement. As such, a breach of contract claim is the true species of Count II.

Before reaching the merits of the claim, it must first be determined whether Eric Brown and Raquel Brown can be held personally liable for a breach of the indemnification agreement. The court must determine whether the indemnification agreement was a contract between Swisher and One Stop Pools, Incorporated or was a contract between Swisher and Eric and Raquel Brown. In a breach of contract claim, the burden is on the plaintiff to prove by a preponderance of the evidence the existence of a contract and that the defendant is a party to that contract. ***Viso v. Werner***, 369 A.2d 1185, 1187 (Pa. 1977). In general, " …'[w]henever a corporation makes a contract, it is the contract of the legal entity of the artificial being created by the charter, and not the contract of the individual members.'" ***Wicks v. Milzoco Builders, Inc.***, 470 A.2d 86, 89 (Pa. 1983) (quoting ***Bala Corp. v. McGlinn***, 144 A. 823, 824 (Pa. 1929)) (change in original). Pennsylvania law is clear that "… where a party enters in to a contract with a corporation, no action will lie against the shareholders of that corporation individually for a breach of that contract." ***First Realvest, Inc.***, 600 A.2d at 603; ***Loeffler v. McShane***, 539 A.2d 876, 879 (Pa. Super. 1988). " '[T]he breach of the contract is the breach of the promise made by the corporation, and not the breach of any promise extended by the corporate officer.'" ***First Realvest, Inc.***, 600 A.2d at 603 (quoting ***Loeffler***, 539 A.2d at 879).

[1] A court may not find unjust enrichment where there exists a written or express contract between the parties. ***Mitchell***, 729 A.2d at 1203. Therefore, it would be impossible to find unjust enrichment against Eric Brown because of the June 25, 2002 indemnification agreement between him and Swisher.

However, a corporate officer may still be held liable for a breach of contract. "A corporate officer is of course liable for the breach of any promises or representations which he extends not in his capacity as an officer but personally in his individual capacity." ***Loeffler***, 539 A.2d at 879, n.3. In this regard, recovery cannot be had against one who is not a party to a contract, but only signed it on behalf of his disclosed principal. ***Viso***, 369 A.2d at 1187. " 'An authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party.'" ***Ibid***. (quoting ***Geyer v. Huntington County Agricultural Assoc.***, 66 A.2d 249, 250 (Pa. 1949)). "If the alleged contract is in the name of the agent, but the name of the principal is disclosed, there exists a strong presumption that it is the intention of the contracting parties that the principal and not the agent should be a party to the contract." ***Ibid***. However, an agent will not be found to be acting in his representative capacity if the contract shows an intent to bind the agent individually. *See*, ***Id***. at 1188.

Eric Brown may be held personally liable for a breach of the indemnification agreement. The indemnification agreement was not a contract between Swisher and One Stop Pools, Incorporated; instead, it was a contract between Swisher and Eric Brown in his individually capacity. The indemnification agreement does address matters related to One Stop Pools, Incorporated – Swisher's interest in the corporation, the debts and liabilities of the corporation, and the property of the corporation. However, the promises made in the agreement are made on behalf on Eric Brown. The agreement states that Swisher will relinquish his interest in the corporation upon a cash payment *by Eric Brown*. The agreement states that this relinquishment was also premised on a release *by Eric Brown* of Swisher form

any and all debts and liabilities of One Stop Pools, Incorporated. The agreement final states, "*Eric S. Brown agrees* to defend and hold harmless Brian V. Swisher from any and all past, present and future debts and liabilities of One Stop Pools, Inc." (emphasis added). The clear language of the agreement demonstrates that Eric Brown was extending promises in his individual capacity and was personally binding himself to those promises. Therefore, the indemnification agreement was a personal agreement between Eric Brown and Swisher.

As to Raquel Brown, the court finds that a breach of contract claim cannot be asserted against her. Raquel Brown was not a party to the indemnification agreement. She did not sign it and she is not mentioned anywhere in the document. As such, she was not bound by the indemnification agreement and a claim for breach thereof cannot be asserted against her.

In order to establish a claim for indemnification, the party must establish: (1) the scope of the indemnification agreement; (2) the nature of the underlying claim; (3) whether the claim is covered by the indemnification agreement; (4) the reasonableness of the expenses or the settlement. *See*, ***McClure v. Deerland, Corp.***, 585 A.2d 19 (Pa. Super. 1991). However, the right to indemnification does not arise until payment is made. ***Id***. at 23. Any action for indemnification brought before payment is premature. ***Ibid***.

If Swisher has paid the $6,838 to Fox Pool Corporation, as he asserts, then he would be entitled to summary judgment on his indemnification claim. Per the June 25, 2002 agreement, Swisher relinquished all of his interest in One Stop Pools, Incorporated for $9,283.03 in cash and his release from any and all debts and liabilities of One Stop Pools, Incorporated. According to the indemnification provision of the agreement, Eric Brown agreed to "… defend and hold harmless Brain V. Swisher from any and all past, present and future debts and

liabilities of One Stop Pools, Inc." According to the plain language of the agreement, the scope of the indemnification agreement included any and all debts and liabilities that One Stop Pools Incorporated had or was to incur.[2]

The nature of Swisher's claim is that he made a $6,838 payment to Fox Pool Corporation to satisfy a debt. Eric Brown has admitted in the answer that One Stop Pools, Incorporated incurred a $19,309.51 debt to Fox Pool Corporation. The June 25, 2002 agreement states that Brown will indemnify Swisher for any and all debts of One Stop Pools, Incorporated. As to the reasonableness of the alleged payment to Fox Pool Corporation, there is no evidence to suggest that a $6,838 payment to Fox Pool Corporation would be unreasonable; especially considering such an amount would only constitute thirty-five percent of the original debt.

However, Eric Brown has not admitted that Swisher paid $6,838 to Fox Pool Corporation to satisfy a debt of One Stop Pools, Incorporated. Until it is established that Swisher did in fact pay $6,838 to Fox Pool Corporation he has no right to indemnification and may not bring an action for indemnification. Therefore, Swisher is not entitled to summary judgment on his indemnification claim for the $6,838 payment to Fox Pool Corporation.

The third claim asserted by Swisher is one for specific performance of the June 25, 2002 indemnification agreement. Swisher wants Eric Brown to specifically perform the

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[2] Parties are free to write their own contracts, and it is the function of the courts to interpret and enforce those contracts. ***Ambridge Water Auth. v. Columbia***, 328 A.2d 498, 500 (Pa. 1974). " A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties." ***Mace v. Atl. Ref. & Mktg Corp***., 785 A.2d 491, 496 (Pa. 2001). " 'It is firmly settled that the intent of the parties to a written contract is contained in the writing itself.'" ***Ibid***. (quoting ***Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd***., 739 A.2d 133, 138 (Pa. 1999)). " When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the content alone." ***Ibid***.

agreement and defend and hold harmless him with respect to the Fox Pool Corporation debt, the tax liability, and the Nextel Communications debt incurred by One Stop Pools, Incorporated. To this effect, Swisher has requested that Brown be:

> 1. Ordered to provide a letter of indemnification and defense of Brian V. Swisher to the Internal Revenue Service relative to all and every past, present, and future tax liability of One Stop Pools, and One Stop Pools, Inc;
>
> 2. Ordered to pay the Nextel Communications debt;
>
> 3. Ordered to request Nextel Communications to remove the information from Swisher's personal credit profile;
>
> 4. Ordered to provide a letter of indemnification and defense of Brian V. Swisher to all major credit reporting agencies relative to the Nextel Communications debt;
>
> 5. Ordered to provide defense and indemnification to Brian V. Swisher for any and all other past, present, and future debts and liabilities of One Stop Pools, Inc. and One Stop Pools as such debts and liabilities may from time to time be pursued against Brain V. Swisher;
>
> 6. Ordered to pay for any reasonable attorney fees and costs necessary to enforce such defense and indemnification; and
>
> 7. Any such other relief as this Court deems just and proper.

Complaint, 6-7. The court finds that it cannot grant Swisher the relief he seeks.

"It is well settled that specific performance is an appropriate remedy where the subject matter of an agreement is an asset that is unique or one that its equivalent cannot be purchased on the open market." ***Tomb v. Lavalle***, 444 A.2d 666, 668 (Pa. Super. 1991). "A decree of specific performance involves the exercise of the equity powers and discretion of the court." ***Wagner v. Estate of Rummel***, 571 A.2d 1055, 1058 (Pa. Super. 1990), *app. denied*, 588 A.2d 510 (Pa. 1991). There is no right to a decree of specific performance. ***Ibid***. Specific

performance should only be granted if the party seeking it is clearly entitled to it, an adequate remedy at law does not exist, and justice requires it. ***Cinima v. Bronich***, 537 A.2d 1355, 1357 (Pa. 1988). Furthermore, specific performance should not be ordered when it appears that such an order would result in a hardship or injustice to either of the parties. ***Wagner***, 571 A.2d at 1058.

The court cannot require Eric Brown to specifically perform the indemnification agreement because the subject matter is not unique and Swisher has an adequate remedy at law. The subject matter which is at the heart of the indemnification agreement is the debts and liabilities of One Stop Pools, Incorporated. Under the agreement, Eric Brown is liable for the debts and liabilities of One Stop Pools, Incorporated and must repay Swisher the amount he expends toward payment of those debts. In essence, the subject matter of the indemnification agreement is money, and money is not unique.

Swisher also has an adequate remedy at law. "Under Pennsylvania law, a claim for recovery under an indemnification agreement is an action for breach of contract over which equity lacks jurisdiction." ***McClure***, 585 A.2d at 23. Swisher's claim for indemnification does not arise until he pays a debt covered by the agreement. Once this occurs and Eric Brown breaches the indemnification agreement by refusing to repay him, a standard breach of contract action is born and Swisher is provided with a remedy. Therefore, Swisher is not entitled to specific performance of the June 25, 2002 indemnification agreement.

Accordingly, the motion for summary judgment will be denied.

ORDER

It is hereby ORDERED that the Motion for Summary Judgment of Plaintiff Brian V. Swisher filed December 13, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: W. Jeffrey Yates, Esquire
Michael E. Groulx, Esquire
Eric S. Brown
413 Stephens Street, Williamsport, PA 17701
Raquel Brown
413 Stephens Street, Williamsport, PA 17701
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)