

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

03 OCT -2 PM 3:09

JAMES A. KNAUER as the Court Appointed)
Receiver for HEARTLAND)
FINANCIAL SERVICES, INC., JMS)
INVESTMENT GROUP, LLC, ATLAS)
INCOME FUND, LLC, BMC INVESTMENT) CASE NO: 1:03-CV-0279JDT-TAB
GROUP, LLC, DOLPHIN INTERNATIONAL)
DEVELOPMENT, LTD., BELIZE ESCROW)
SERVICES, HEARTLAND MONEY)
MANAGEMENT OF FLORIDA, INC.,)
LINCOLN FIDELITY ESCROW SERVICES,)
MDS INVESTMENT, INC., and 21ST)
CENTURY INTERNATIONAL ADVISORS,)
INC.)
)
Plaintiff,)
)
v.)
)
LESLIE REED,)
)
Defendant.)

**RECEIVER'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I. Introduction

James A. Knauer, (the "Receiver"), the Receiver for Heartland Financial Services, Inc., JMS Investment Group, LLC, and their alter egos (collectively, "Heartland"), has filed a Complaint in two counts against the Defendant, Leslie Reed: Count I, Complaint for Money Had and Received (Implied Contract), and Count II, Complaint for Unjust Enrichment. The Defendant, Leslie Reed ("Reed"), has filed an answer in general denial.

Pursuant to S.D. Ind. L.R. 56.1, the Receiver respectfully submits his brief in support of his motion for summary judgment. The material facts are undisputed, and confirm that the Receiver is entitled to recover from Reed the sum of \$45,000.00, interest from the date of the filing of this action, and costs. Accordingly, summary judgment should be entered in favor of the Receiver and against Reed.

II. Statement of Undisputed Material Facts¹

According to Heartland's financial records, Reed received the sum of \$20,000.00 as a retainer fee. (Complaint, ¶ 3; Affidavit of James A. Knauer {"Knauer Affidavit"}, ¶ 4). Reed maintains that the \$20,000 payment was offered by Heartland and paid to him to become a "registered principal", qualified to manage other stock brokers. (Deposition of Leslie Reed {"Reed Deposition"}, p. 7). To become a registered principal, Reed was required to successfully complete the so-called "Series 24 exam", a prerequisite for licensing National Association of Securities Dealers (NASD) managers to supervise branch activities. (Reed Deposition, pp. 7, 8). Reed has testified that Heartland "paid me \$20,000 up front, for me to get the Series 24 test taken and passed". (Reed Deposition, p. 12).

Also according to Heartland's financial records, Reed received the sum of \$25,000.00 denominated as a loan, which loan has not been repaid in whole or in part. (Complaint, ¶ 5; Knauer Affidavit, ¶ 6). Reed described the payment of \$25,000.00 in the following terms:

[I]t's standard practice in brokerage that they would give what's called a forgivable loan, and then, if you make certain production requirements, the loan is forgiven over a number of years. . . .

Q. So the \$25,000.00 would have been a draw against future earnings?

A. Correct.

(Reed Deposition, p. 15).

In fact, Reed never commenced employment for Heartland, as a registered principal or otherwise. (Reed Deposition, pp. 18-19). He has continued his employment as a licensed stock broker through SunAmerica, which position he occupied at the time he was approached by Heartland to become a registered principal and thus qualified to manage its office. (Reed

¹ The following facts are supported by admissible evidence contained in the cited exhibits in the Receiver's Appendix. The facts are taken favorably to the non-movant as required by Fed.R.Civ.P. 56.

Deposition, pp. 5, 8). Because Reed never worked for Heartland, no part of the \$25,000.00 was ever repaid to Heartland. (Reed Deposition, pp. 18-19).

Reed holds money of Heartland in the aggregate sum of \$45,000.00 which, in equity and good conscience, he ought to repay. (Complaint, ¶ 6; Knauer Affidavit, ¶¶ 4, 5, 6). Demands have been made upon Reed to repay the sum of \$45,000.00, which demands have been refused. (Complaint, ¶ 7; Knauer Affidavit, ¶ 7).

III. Summary Judgment Standard

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F.Supp. 713, 726 (S.D. Ind. 1991). The party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The ultimate burden of demonstrating the existence of a genuine issue of material fact, however, lies with the non-moving party. Id. In Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court explained this shifting burden as follows:

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial."

Id. at 586-87 (Emphasis in original).

The mere existence of a factual dispute is not, by itself, sufficient to bar summary judgment. A factual dispute does not preclude summary judgment unless the disputed fact is outcome determinative. Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. Kaken Pharmaceutical Co. v. Eli Lilly and Co., 737 F.Supp. 510, 515 (S.D. Ind. 1989).

In the case at bar, there is no genuine issue of material fact relative to the Receiver's claims against Reed. The Receiver is entitled to judgment as a matter of law in its favor on his Complaint. Accordingly, summary judgment should properly be entered in favor of the Receiver.

IV. Discussion

A. The Receiver is entitled, as a matter of law, to judgment against Reed on the Receiver's claim for money had and received.

An action for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons:

- (1) which money belongs to the plaintiff, and
- (2) where the money has been received by mistake of facts, or without consideration, or upon a consideration that has failed.

See generally Lawson v. First Union Mortg. Co., 786 N.E.2d 279 (Ind.Ct.App. 2003). The action rests upon an implied promise, and it may be maintained against the person who received money from the plaintiff under circumstances which in equity and good conscience he should not retain. Shelby Eng'g Co., Inc. v. Action Steel Supply, Inc., 707 N.E.2d 1026, 1028 (Ind.Ct.App.1999) (quoting Chosnek v. Rolley, 688 N.E.2d 202, 211 (Ind.Ct.App.1997)) (emphasis omitted).

The undisputed facts in this case establish that Reed received money in the aggregate sum of \$45,000.00 from Heartland. A portion of that money represented a retainer, paid to Reed for him to become a registered principal under NASD regulations, and the balance constituted a draw against future earnings. Yet, Reed never commenced employment for Heartland as a registered principal or in any other capacity. Thus, "the money has been received by mistake of facts, or without consideration, or upon a consideration that has failed". See Lawson v. First Union Mortg.

Co., supra. As a matter of law, the Receiver is entitled to recover from Reed the sum of \$45,000.00, under the legal theory of money had and received.

B. The Receiver is entitled, as a matter of law, to judgment against Reed on the Receiver's alternative claim of unjust enrichment.

In Count II of his Complaint against Reed, the Receiver relies upon the alternative theory of unjust enrichment to recover the aggregate sum of \$45,000 paid to Reed by Heartland. To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under circumstances in which the defendant's retention of the benefit without payment would be unjust. See Encore Hotels of Columbus, LLC v. Preferred Fire Protection, 765 N.E.2d 658 (Ind.Ct.App. 2002). The effect is, quite simply, to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each party in the position in which it was before the defendant acquired the property. Id.

Under the theory of unjust enrichment, a person who pays another an excessive amount of money due to an erroneous belief induced by a mistake of fact that the amount paid was necessary to discharge a duty is entitled to restitution of the excess. Restatement of Restitution §§ 20 (1973). Money paid under a unilateral mistake of fact may be recovered when it would not have been otherwise paid, even though the party making the payment may have been careless. Monroe Financial Corp. v. DiSilvestro, 529 N.E.2d 379, 383 (Ind.Ct.App. 1988), reh. denied, trans. denied (Broker, which acted as customer's agent to sell stock and which mistakenly sold shares in company not held or intended to be sold by customer and delivered proceeds to her in exchange for commission, was entitled to recover proceeds erroneously paid to customer).

The facts in the present case, gleaned from Heartland's financial records and Reed's own deposition testimony, establish that Heartland paid to Reed the sum of \$20,000.00 to become a

registered principal, which services, ultimately, Reed never performed on Heartland's behalf. (Complaint, ¶ 3; Knauer Affidavit, ¶¶ 4, 5). Furthermore, Reed received the sum of \$25,000.00 from Heartland as a draw against future earnings, which earnings were never realized because Reed never commenced employment with Heartland. (Complaint, ¶ 5; Knauer Affidavit, ¶ 6). Thus, a measurable benefit (money in the aggregate sum of \$45,000.00) has been conferred on Reed, under circumstances in which his retention of that benefit without repayment would be unjust. See Encore Hotels of Columbus, LLC v. Preferred Fire Protection, supra. As a matter of law, judgment should be entered in favor of the Receiver and against Reed on the Receiver's claim of unjust enrichment.

V. Conclusion

The undisputed facts establish that Reed holds money of Heartland in the aggregate sum of \$45,000.00. Under alternative theories of money had and received, and unjust enrichment, Reed should be compelled to repay that sum. As a matter of law, the Receiver is entitled to judgment against Reed in the sum of \$45,000.00.

For the foregoing reasons, James A. Knauer, in his capacity as the Receiver for Heartland Financial Services, Inc., JMS Investment Group, LLC, and their alter egos, respectfully requests that the Court enter summary judgment for the Receiver on his Complaint against the Defendant, Leslie Reed, and for all other relief proper in the premises.

Respectfully submitted,

KROGER, GARDIS & REGAS, LLP

By: 

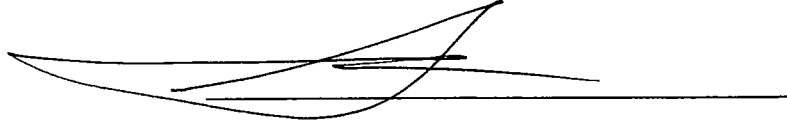
Samuel D. Hodson, #10842-41
Attorneys for Receiver

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served upon the following parties by placing a copy of the same in the United States Mail, first class postage pre-paid, on this

2 day of ^{Oct} ~~September~~, 2003:

Leslie Reed
9924 Tudor Court
Fishers, Indiana 46038

A handwritten signature in black ink, appearing to read 'Leslie Reed', is written over a horizontal line. The signature is stylized with a large, sweeping flourish that extends to the right and then loops back under the line.

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