IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KROLL, INC., as Receiver for IM PARTNERS Plaintiff, v. SALESORBIT CORPORATION d/b/a TRANSFERORBIT INC., Defendant.	)	C.A. No. 07C-07-300 JRJ NON-ARBITRATION CASE

Date Submitted: April 15, 2008
Date Decided: June 25, 2008

Upon Plaintiff's Motion for Summary Judgment: ***DENIED***

MEMORDANUM OPINION

Thomas P. Preston, Esquire and Alisa E. Moen, Esquire, Suite 800, 1201 N. Market Street, Wilmington, DE. 19801, Attorneys for Plaintiff.

William J. Cattie, III, Esquire, P.O. Box 588, 300 Delaware Avenue, Wilmington, DE. 19899, Attorney for Defendant.

I. **INTRODUCTION**

Before the Court is Plaintiff Kroll, Inc.'s ("Kroll") Motion for Summary Judgment. By its Motion, Kroll seeks repayment of a $200,000 loan made by IM Partners to Defendant SalesOrbit Corporation d/b/a TransferOrbit Inc. ("SalesOrbit").[1] Kroll claims that summary judgment is appropriate because there is no dispute concerning a loan agreement between IM Partners ("IM") and SalesOrbit memorialized by a Promissory Note.[2] Additionally, Kroll submits that SalesOrbit breached the Note by failing to repay the principle amount of the loan or the accrued interest.[3] In opposition, SalesOrbit argues that summary judgment is inappropriate because there are five genuine issues of material fact: (1) whether SalesOrbit defaulted on the Note; (2) whether IM provided consideration to support the Note; (3) whether SalesOrbit is entitled to keep to the $200,000 Transfer Amount pursuant to an oral agreement it had with Bayou Management LLC ("Bayou"); (4) whether SalesOrbit is entitled to keep the $200,000 Transfer Amount under the doctrine of quantum meruit; and (5) whether IM had unclean hands with respect to the Promissory Note transaction.[4]

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[1] On January 6, 2006, the United States District Court for the Southern District of New York appointed Kroll as Receiver and authorized it to collect, on behalf of the United States, loans and purported loans made by IM Partners. A detailed procedural history of this litigation is set forth in Pl. Mot. for Summ. J ("Kroll Opening Br.") at 3-4, Docket Item ("D.I.") 13.

[2] *See* Kroll Ex. E

[3] Kroll Opening. Br. at 9.

[4] *See* Def. Resp. in Opp'n to Pl. Mot. for Summ. J. ("SalesOrbit Resp. Br."), D.I. 18.

II. DISCUSSION

It is well settled under Delaware Law that summary judgment is proper and the moving party is entitled to judgment as a matter of law when the Court finds that there are no genuine issues of material fact.[5] The moving party always carries the burden of proof to show the absence of any genuine issue of material fact.[6] The facts must be viewed in the light most favorable to the non-moving party.[7] In this case, Kroll has not met its burden of proof. Although SalesOrbit has admitted to not repaying the $200,000 Transfer Amount and accrued interest owed under the Note, genuine issues of material fact exist concerning the reasons for the lack of payment.[8]

The key issue in this case concerns the transfer of funds between IM and SalesOrbit. There is a genuine issue of material fact as to whether these funds were transferred to SalesOrbit as a loan or as a payment for services rendered. Kroll claims that on May 2, 2005, IM and SalesOrbit made an agreement pursuant to which IM loaned $200,000 to SalesOrbit. Kroll further claims that Bayou transferred $200,000 to SalesOrbit on behalf of IM

[5] Delaware Civil Rule 56(c).
[6] *See* Rockwell Automation, Inc. v. Kall, 2004 WL 2965427 (Del. Ch.).
[7] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995) *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).
[8] SalesOrbit's Answer and Affirmative Defenses at paragraph 19.

that same day.[9] SalesOrbit denies that SalesOrbit and IM entered into any agreement and denies that Bayou transferred any money to SalesOrbit on behalf of IM.[10] The Wire Transfer Form makes no mention of IM. It states "Bridge Loan-SaleOrbit Corporation [from] Bayou Management LLC."[11] A Memorandum from Dan Marino, Bayou's Chief Financial Officer, to a Carolyn Sherry states,

> "Please wire $200,000 from Bayou_____Checking to SalesOrbit."[12]

The Memorandum nowhere refers to IM.

There is also a genuine issue of material fact as to whether SalesOrbit defaulted because The Promissory Note is ambiguous on its face. The Note states: "Maturity Date: The Closing Date of The First Institutional Equity Financing of Maker." This is contradictory to Section One, which contains a Maturity Date of December 31, 2005. The Promissory Note states "This Note shall mature as of the earlier of (a) the date of the closing of the Maker's next round of equity financing the gross proceeds of which are at least $300,000 (the "Financing"), (b) December 31, 2005 (the "Cash

[9] Kroll Opening Br. At 4.
[10] SalesOrbit Resp. Br. at 2.
[11] *See* SalesOrbit Ex. A.
[12] *See* SalesOrbit Ex. B.

Date")." [13] According to SalesOrbit, because the two parties never closed on institutional equity financing, there has been no default.

There is a genuine issue of material fact as to whether IM provided consideration to SalesOrbit to support the Note. The Wire Transfer Form indicates that Bayou transferred $200,000 to SalesOrbit.[14] There is no mention of IM in the Wire Transfer Form. The Note does not indicate that SalesOrbit received any money from IM, nor does the Note indicate a relationship between IM and Bayou.

Fourth, SalesOrbit asserts that the two parties entered into an enforceable oral agreement pursuant to which it is entitled to keep the Transfer Amount. In return for services provided to SalesOrbit, SalesOrbit claims that Bayou paid $200,000. Pursuant to this oral agreement, if Bayou decided to invest in SalesOrbit, then SalesOrbit would credit Bayou with stock equivalent to the amount paid. If Bayou decided not to invest in SalesOrbit, then SalesOrbit would keep the money as payment for services rendered. Not only does The Promissory Note make no mention of this oral agreement, it refers to and relies upon a "Stock and Note Subscription Agreement" that was never executed by the parties. SalesOrbit argues that

[13] *See* SalesOrbit Ex. C.
[14] *See* SalesOrbit Ex. A.

there is a genuine issue as to the terms of an oral agreement alleged by SalesOrbit and whether Bayou invested in SalesOrbit.

Finally, SalesOrbit claims that IM had unclean hands with regard to The Promissory Note. In August 2005, Daniel Marino and Sam Israel, Bayou's founder, admitted to defrauding investors in Bayou's Hedge Fund.[15] Consequently, Bayou became the focus of a state and federal investigations.[16] SalesOrbit alleges that Matt Marino, the brother of Daniel Marino and Bayou's attorney, contacted SalesOrbit and demanded payment of the Transfer Amount. During the entire month of August, SalesOrbit was unable to reach anyone at Bayou to talk about Matt Marino's demands. On September 12, 2005, Jorge H. Toro, Chief Executive Officer and Founder of SalesOrbit, signed The Promissory Note after repeated requests from Matt Marino. Mr. Toro states that he never believed the Note changed the oral agreement between SalesOrbit and Bayou.[17] The Note was executed seventeen days before the federal indictment of Daniel Marino and Sam Israel. SalesOrbit asserts that IM obtained Toro's signature with unclean hands as a result of the impending indictment.

Because there are genuine issues of material fact in dispute, the Plaintiff's Motion for Summary Judgment is **DENIED.**

[15] *See* Kroll Ex. A.
[16] *See* Kroll Ex. D.
[17] *See* Aff. of Jorge H. Toro in Opp'n to Pl. Mot. For Summ. J. ("Toro Aff.") D.I. 19.

IT IS SO ORDERED.

Jan R. Jurden, Judge