STATE OF MAINE
SAGADAHOC, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: West Bath
DOCKET NO. BCD-WB-CV-08-33

MILO ENTERPRISES, INC.,

Plaintiff

v.

DECISION AND ORDER

TD BANKNORTH, N.A.,
d/b/a TD BANK, N.A.,

Defendant

This matter was tried before the court without jury on the claims of Plaintiff Milo Enterprises, Inc. ("Milo") against Defendant TD Banknorth, N.A. ("TD Banknorth") for Breach of Contract (Count I), Unjust Enrichment (Count II), and Quantum Meruit (Count III). The facts, below, are based on evidence that this court finds credible.

FINDINGS OF FACT

Milo was established in 1998 by Randall Male. Among other things, the company provided financial advisory services to distressed companies. For example, it might act as an interim Chief Financial Officer for a client; provide financial analysis; investment banking services; corporate restructuring services; and/or solicit and work with prospective buyers of its clients' business and/or assets.

U.S. Felt Manufacturing Co. ("USF–Debtor") was a manufacturer of non-woven fabrics, felt, and composite materials with a facility located in Sanford, Maine. In early 2006, USF-Debtor began experiencing significant financial difficulties. TD Banknorth was its primary secured creditor. By the Spring of 2006, USF–Debtor had three secured loans with the bank: a

$700,000 line of credit; Equipment Loan #1, so-called, in the amount of $250,000; and Equipment Loan #2 in the approximate amount of $1,000,000. By March or April of that year, TD Banknorth had identified USF–Debtor's loans as problems and placed them with the bank's workout department. The loans were assigned to Alice Paxson, a commercial loan workout officer at TD Banknorth.

On April 5, 2006, USF–Debtor entered into a Master Lease Financing Agreement with Gorham Savings Leasing Group LLC ("Gorham Savings") for a Shoou Shyng needle loom system ("Shoou Shyng Loom"). (Def's Ex. O.) The rent under the lease was $4,591 per month, and the lease term was 120 months, during which title to the loom remained at all times in the name of the lessee, Gorham Savings. The lease agreement provided that title to the loom would be transferred to USF–Debtor at the expiration of the lease term provided that the company was not in default. Among other things, USF–Debtor's failure to pay the monthly rent and other sums required by the lease constituted an event of default.

As a result, TD Banknorth held a first security interest in all of USF–Debtor's assets except the Shoou Shyng Loom. Gorham Savings had a first security interest in the loom and TD Banknorth had a second position.

USF–Debtor's financial problems did not abate and on May 21, 2007, it entered into a Retention Agreement with Milo. (*See* Pl.'s Ex. 1.) Under that agreement, Milo was to provide consultation services to USF–Debtor in connection with corporate restructuring efforts, including: financial advice and investment banking services; negotiations to secure new debt financing; and, if requested, assistance with efforts to sell of some or all of the company's assets. USF–Debtor agreed to pay Milo a consulting fee for these services at the rate of $270 per hour.

In addition, Milo would earn an accomplishment fee if it successfully assisted USF–Debtor in obtaining new debt or equity financing or in selling some or all of its assets.

In early June 2007, Mr. Male, on behalf of Milo, met with Ms. Paxson of TD Banknorth. Mr. Male was concerned about USF–Debtor's problems with its loans to TD Banknorth and the impact of the bank's secured position on Milo's compensation expectations under the Retention Agreement. Mr. Male wanted the bank to be aware of Milo's work to find a potential buyer for USF–Debtor's assets. Those efforts included soliciting proposals from prospective buyers. Among the proposals received was one from a company called Metapoint. The Metapoint proposal included an offer of approximately $150,000 for the Shoou Shyng Loom, which was less than the balance owed by USF–Debtor to Gorham Savings under the lease. Ms. Paxson expressed concerned that Milo appeared to be working on deals that included the loom without involving Gorham Savings, which held the first security and controlled the disposition of the equipment.[1]

On June 21, 2007 Mr. Male sent a copy of the Retention Agreement to Ms. Paxson, together with an email message that he would like to discuss the Retention Agreement with Ms. Paxson and "seek TD Banknorth's consent to the terms of my retention — in particular as it related to the sale of the company or its assets." (Pl.'s Ex. 2.)

On August 6, 2007, Mr. Male and Ms. Paxson spoke by phone. Mr. Male said Milo was still providing services under the Retention Agreement and he wanted the bank to step into the shoes of USF–Debtor under the agreement. Following further discussions in that phone conversation, Mr. Male sent another email to Ms. Paxson purporting to summarize the parties' understanding regarding Milo's agreement with TD Banknorth. (*See* Pl.'s Ex. 4.)

[1] Metapoint eventually backed out of the deal.

> TD Banknorth agrees that I will received my accomplishment fee as set forth in my agreement with [USF–Debtor]. My accomplishment fee is 4% of the value of the assets sold. Based on the offers we currently have, we expect to sell inventory, equipment and intangibles. Therefore, these assets would be included in the accomplishment fee calculation. *I agree to cap my total compensation (hourly billings plus accomplishment fee) at 12% of the value of the assets sold*.

(Pl.'s Ex. 4 (emphasis added).) Mr. Male also sought to clarify that Milo's fee would be paid by TD Banknorth. (Pl.'s Ex. 4.) Ten minutes later, Ms. Paxson sent a reply email to Mr. Male articulating her contrary understanding that

> I believe what we originally discussed is that your total compensation would not exceed 10–12% of the gross sales of the companies assets. I said 10–12% and than [sic] you added inventory, so I said 10%.
>
> . . . .
>
> You would get 4% of asset sale [] and than [sic] your hourly compensation. But the combined amount can not exceed 10% of the outstanding business sale. I believe this is more than fair. Subject to FAME and [USF–Debtor's] approval. Is this acceptable?

(Pl.'s Ex. 4.) Seven minutes later, Mr. Male replied: "I agree to the 10% cap. Thank you Alice." (Pl.'s Ex. 4.)

On August 13, 2007, while Milo was still working on the Metapoint proposal, Aron O'Grady of USF–Debtor received an inquiry from Vincent Boragine of Shape Global Technology, another company located in Sanford, Maine, expressing interest in purchasing "[USF–Debtor] as a complete entity including a lease of the existing building." (Def.'s Ex. L.) Mr. O'Grady referred Mr. Boragine to Mr. Male, who described to Mr. Boragine USF–Debtor's ongoing negotiations with Metapoint, but encouraged Mr. Boragine to "work towards preparing an offer in the event Metapoint is unable to close." (Def.'s Ex. L.) Mr. Male also noted that TD Banknorth was preparing to foreclose on USF–Debtor's assets and that Boragine should expedite the submission of any proposal. (Def.'s Ex. L.)

On August 29, 2007, Mr. Male informed Ms. Paxson that Metapoint was ready to proceed with a closing and that Mr. Boragine was also about two weeks away from submitting a separate proposal. (Pl.'s Ex. 5; Def.'s Ex. N.) Mr. Male recommended that USF–Debtor and the bank proceed with the Metapoint deal, "but at a measured pace in the hopes that Vin [Boragine] is able to put forth a superior offer." (Pl.'s Ex. 5; Def.'s Ex. N.)

Matters involving USF–Debtor were heating up. On September 5, 2007, to Gorham Savings sent a notice of default to USF–Debtor regarding the Shoou Shyng Loom lease. (Def.'s Ex. H.) On September 14, 2007, Mr. Boragine submitted the anticipated proposal to purchase the assets of USF–Debtor. (Def.'s Ex. M.) And, on September 20, 2007, in a Notification of Disposition of Collateral sent to Gorham Savings, TD Banknorth gave notice of its intention to sell all of USF–Debtor's assts "sometime after October 1, 2007." (Def.'s Ex. G.)

The conversation between Milo and TD Banknorth regarding the terms, if any, of an agreement between them to compensate Milo for its services to USF–Debtor resurfaced, and, on September 20, 2007, Ms. Paxson sent an email to Mr. Male: "Randy, [w]as not your total compensation package not to exceed 10%; through both hourly compensation and sales commission??? Alice" (Pl.'s Ex. 6.) To which Mr. Male replied: "That was for purposes of determining whether I would be eligible for the accomplishment fee and if so, whether it would be capped. I was not intending to cap my hourly billings. Were that the case, I would have stopped working on this assignment weeks ago." (Pl.'s Ex. 6.)[2]

Around this time, the Metapoint proposal fell through, and USF–Debtor, TD Banknorth, and Gorham Savings proceeded with the proposal submitted by Mr. Boragine. Although Mr. Boragine was affiliated with Shape Global Technologies when he initially contacted USF-Debtor

[2] According to Milo's billing summary, the last time it asserts that it did work in connection with USF–Debtor was on October 5, 2007. (Def.'s Ex. E.)

and Milo, the actual "purchaser" in his proposed transaction was a newly formed company called U.S. Felt Company, Inc. ("USF–Purchaser").

On October 2, 2007, TD Banknorth, USF–Purchaser, USF–Debtor, and Gorham Savings entered into an agreement to sell the business assets of USF–Debtor for $650,000. (Pl.'s Ex. 7.) The sales agreement did not reference the Shoou Shyng Loom. Pursuant to the agreement, USF-Purchaser would immediately take over the business operations of USF–Debtor with a contemplated closing on November 30, 2007. (Pl.'s Ex. 7.) At the same time, TD Banknorth and Gorham Savings entered into a separate agreement to deal with the Shoou Shyng Loom. (Def.'s Ex. C.) Gorham Savings agreed to cooperate with TD Banknorth, include the loom in the sale to USF–Purchaser in exchange for $180,000,[3] and, upon receipt of those funds, provide a quitclaim bill of sale of the loom to USF–Purchaser, "as directed by [TD Banknorth]". (Def.'s Ex. C at ¶ 3.)

The last entry on Milo's billing records reflect that Mr. Male participated in a meeting on October 5, 2007, with Mr. Boragine of USF–Purchaser and Ms. Paxson to "discuss closing mechanics, funding requirements, [and] potential time revisions." (Def.'s Ex. E.) Milo did not provide any further services after this meeting.

On January 25, 2008, the parties amended the sales agreement. Among other things, the amendment: (1) extended the closing to March 31, 2008, (2) increased the total purchase price to $675,000, and (3) decreased the amount paid to Gorham Savings for the Shoou Shyng Loom to $175,000. (Pl.'s Ex. 8.) Both the initial sales agreement and the amended sales agreement contemplated payments by USF–Purchaser to TD Banknorth and to Gorham Savings. However, on March 26, 2008, as a result of further discussions between USF–Purchaser and TD

[3] This agreement between the banks specified that to Gorham Savings would receive $5,000 upon the signing of the agreement and the remaining $175,000 at closing. (Def.'s Ex. C at ¶ 2.)

Banknorth, TD Banknorth agreed to finance that portion of the purchase of USF–Debtor's assets in which TD Banknorth had a first security interest in the amount of $500,000.[4] Def's Ex. K.

The closing transaction finally occurred in June 2008. On June 20, 2008, TD Banknorth gave a quitclaim bill of sale of all of the assets, except the Shoou Shyng Loom, to USF-Purchaser. USF–Purchaser, however, was unable to buy the Shoou Shyng Loom outright and separately negotiated an equipment lease of the loom with Gorham Savings. (Def.'s Exs. P, Q.) Neither Milo nor TD Banknorth was aware of or involved in these negotiations. USF-Purchaser and Gorham Savings executed the lease on June 25, 2008. (Def.'s Exs. P, Q.) The lease recited that the cost of the loom and the amount financed was $180,000. The lease fixed a rental rate of $3,723 per month and a term of 60 months, during which title to the loom remained at all times in the name of the lessee Gorham Savings. (Def.'s Exs. P, Q.) The lease agreement provided that title to the loom would be transferred to USF–Purchaser for $1 at the expiration of the lease term as long as USF-Purchaser was not in default. (Def.'s Exs. P, Q.) Among other things, USF–Purchaser's failure to pay the monthly rent and other sums required by the lease constituted an event of default. (Def.'s Exs. P, Q.)

On July 7, 2008, Mr. Male sent an email to Ms. Paxson noting his understanding that the sale to USF–Purchaser had finally closed and that Milo was owed money under its agreement with TD Banknorth. (Pl.'s Ex. 10.) Mr. Male thought that the total sale price for all of USF-Debtor's assets, including the Shoou Shyng Loom, was $710,000. Based on this understanding, he stated that "[w]hile my accomplishment fee is 4% of the asset sale value, we agreed my total compensation would be capped at 10% of the asset sale value. This cap amount is $71,000. My total hourly billings were $52,110. Leaving an accomplishment fee of $18,890."

[4] The parties have stipulated that this amount is $515,000.

(Pl.'s Ex. 10.) On July 22, 2008, Ms. Paxson replied by email that TD Banknorth would not pay the claimed accomplishment fee because "[t]he original deal that you were involved in did not close." (Pl.'s Ex. 10.) Rather, she asserted that the bank had to negotiate a new deal with USF-Purchaser, in which the bank had to finance the USF-Purchaser's acquisition of the assets in order for the sale to close. Twenty–two minutes later, Ms. Paxson sent another email to Mr. Male:

> Just as a clarification, you have already been compensated your 10% on the TD Banknorth piece. Our asset sale was for $500,000.[5] 10% of that would be $50,000. You have been compensated $52,110. TD Banknorth is not paying you for the Gorham Savings Bank piece that they ended up refinancing for the new company because they could not pay them off either. You can discuss the issue with them.

(Pl.'s Ex. 13.)

At the beginning of the trial in this case, Milo and TD Banknorth stipulated that the portion of the sales price paid by USF–Purchaser for the assets of USF–Debtor in which TD Banknorth had a first security interest was $515,000 and that the value of the Shoou Shyng Loom was $180,000. They also stipulated that the amount in controversy and, thus, the damages amount claimed by Milo is $17,390, not $18,890, as recited in Mr. Male's email of July 7, 2008.

DISCUSSION

I. Breach of Contract (Count I)

Based on these facts, the court finds that: there was an oral agreement between Milo and TD Banknorth pursuant to which Milo would continue its efforts to find and secure a purchaser for the assets of USF–Debtor; consistent with the compensation terms of the Retention Agreement, Milo would be compensated for those efforts based on an hourly rate of $270, plus a 4% accomplishment fee in the event of a successful sale of US Felt-Debtor's assets; and Milo's

[5] Again, the parties have stipulated that this number is actually $515,000.

total compensation, including both hourly fees and an accomplishment fee, would be capped at 10% of the total sales price of those assets. *See VanVoorheese v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996) (explaining that the "existence of a parol contract, its extent and limitations" are questions of fact for the factfinder).

The parties agree that Milo has already been paid $52,110. Their dispute in this case centers on the amount of additional compensation, if any, due Milo as a result of the sale to USF–Purchaser. This dispute presents two issues. First, did the parties' agreement to cap Milo's fees at 10% of the sales price of USF–Debtor's assets apply only to his accomplishment fee or did it apply to the total combined amount of his hourly fees and his accomplishment fee? Second, did the parties cap agreement, which was based upon the sales price of all of USF-Debtor's assets, include the lease value of the Shoou Shyng Loom?

A. Does the Cap Apply to All Fees or Only the Accomplishment Fee?

Although the bank understood, and does not seem to challenge, that Milo's compensable services included both an hourly fee at the rate of $270 per hour[6] and a 4% accomplishment fee, the court finds that both parties understood and agreed that Milo's total combined compensation, both the hourly fee and the accomplishment fee, would be capped at 10% of the sales price of the USF–Debtor's assets.

In the parties' August 6, 2007, email exchanges, Mr. Male agreed to "cap my total compensation (hourly billings plus accomplishment fee) at 12% of the value of the assets sold." (Pl.'s Ex. 4.) When Ms. Paxson clarified that she said 10%, Mr. Male replied, "I agree to the 10% cap." (Pl.'s Ex. 4.) There can be no serious doubt that Mr. Male unequivocally agreed that the cap applied to his total compensation, including hourly billings plus accomplishment fee.

[6] There is some evidence that Ms. Paxson thought that was an unreasonable rate.

Later, when Ms. Paxson detected a departure by Mr. Milo from the parties' cap agreement, she sent him an email on September 20, 2007, asking somewhat incredulously, "Randy, Was not your total compensation package not to exceed 10%; through both hourly compensation and sales commission???" (Pl.'s Ex. 6.) Mr. Male quickly replied that the cap applied only to the accomplishment fee, not the hourly rate. (Pl.'s Ex. 6.) However, Mr. Male's contention was belied by his later email to Ms. Paxson on July 7, 2008, after the sale to USF-Purchaser had been consummated: "While my accomplishment fee is 4% of the asset sale value, we agreed my total compensation would be capped at 10% of the asset sale value." (Pl's Ex. 10.)

B. Should the Lease Value of the Shoou Shyng Loom be Included in the Sales Price When Calculating the Cap?

In the creation of the parties' agreement, there was no express discussion between Milo and TD Banknorth as to whether the Shoou Shyng Loom would be included in the total sales price of USF–Debtor's assets for the purposes of calculation the 10% cap on Milo's fees. There is also no mention of the loom in Milo's earlier Retention Agreement, nor any evidence as to whether Milo and USF–Debtor ever intended to include the loom in any asset sales price when calculating the accomplishment fee, other than Mr. Male's post-closing demand, which was unequivocally challenged by Ms. Paxson. (*See* Pl.'s Ex. 10.) However, three factors inform the viability of Milo's argument that the loom was to be included in the sales price calculation.

First, the loom was leased, not owned by USF–Debtor; title remained in the lessee, Gorham Savings. Although the lease arrangement between USF–Debtor and Gorham Savings might more accurately be described as a lease–purchase agreement, USF-Debtor never owned the loom, and, in view of its extreme financial circumstances and the declaration of default by Gorham Savings, USF–Debtor had no equity or residual value in the loom at the time of the

closing. Further, Gorham Savings' separate agreement to enter into a new loom lease with a new obligor did not generate the payment of any funds or proceeds at the closing. That is precisely why only Gorham Savings and USF-Purchaser negotiated the lease of the loom and the terms had to be acceptable to and approved by Gorham Savings. (Def.'s Ex. A.) TD Banknorth was not aware of and did not participate in those negotiations.

Under the circumstances, TD Banknorth argues that it is not reasonable to presume or suppose that it intended or agreed to include the value of the leased equipment in the total sales price figure, thereby reducing the recovery of the debt owed to it by USF–Debtor. Such a situation would allow Milo to earn an accomplishment fee either for its unsuccessful efforts to sell the loom for Gorham Savings at a price arguably less than the amount of the debt owed to it by USF–Debtor or for Milo's non-involvement in the ultimate lease of that equipment to USF-Purchaser. TD Banknorth's argument is compelling.

Second, not all of Milo's efforts to sell USF–Debtor's assets, nor all of the purchase proposals it received or generated, included the Shoou Shyng Loom. Thus, it does not necessarily follow that the loom was always assumed to be part any sales transaction or to be included in any calculation of the cap or the accomplishment fee.

Third, and finally, it was TD Banknorth, not Milo or USF–Debtor, that entered into an agreement with Gorham Savings to secure the latter's cooperation regarding the ultimate sale of USF–Debtor's assets. Milo did no work in connection with that agreement. TD Banknorth was the major creditor of USF–Debtor and wanted the sale to proceed for obvious reasons; it did not, however, have control over the disposition of the loom and it would not share in any proceeds attributable to its sale. In any event, the loom was not sold and did not generate any sales proceeds. Thus, while it was in TD Banknorth's best interest to enter into a separate agreement

with Gorham Savings in order to facilitate resolution of Gorham Savings' interest in the loom so that the entire sale could proceed, those efforts did not include any expressed, implied, or *de facto* agreement by TD Banknorth to compensate Milo for any efforts it might expend in connection with any eventual transfer of the loom by Gorham Savings to USF–Purchaser.

To summarize, the court finds that the parties had an agreement that capped Milo's total combined compensation entitlement, including both its hourly fee and accomplishment fee, at 10% of that portion of the sales price attributable to the sales price of the assets of USF–Debtor in which TD Banknorth had a first security interest – meaning, all of USF–Debtor's assets, except for the Shoou Shyng Loom.

The parties have stipulated that the total sales price paid of those particular assets was $515,000.[7] Thus, the total compensation owed to Milo under the parties' agreed-upon 10% cap is no more than $51,500. Milo has already been paid $52,110. Milo is not entitled to any further compensation and TD Banknorth has not breached the parties' agreement.

II. Unjust Enrichment (Count II)

Milo also claims that it is entitled to recover damages under the theory of unjust enrichment. "Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship." *In re Wage Payment Litig.*, 2000 ME 162, ¶ 19, 759 A.2d 217, 224 (quotations marks and emphasis omitted); *see also Me. Eye Care Assocs. P.A. v. Gorman*, 2006 ME 15, ¶ 26, 890 A.2d 707, 712. Because the court has found that there was an express contract between the parties, Milo cannot prevail on it contemporaneous claim for unjust enrichment. *See Danforth v. Ruotolo*, 650 A.2d 1334, 1335 n.2 (Me. 1994) ("Unjust enrichment applies only in the absence of any quasi-contractual relationship.").

[7] As also noted earlier, the portion of the sales price attributable to the Shoou Shyng Loom was $180,000.

III. Quantum Meruit (Count III)

Finally, Milo claims that it is entitled to recover damages under the theory of quantum meruit. Quantum meruit is grounded in a theory of implied contract and is based on proof that services or materials were provided "under circumstances consistent with contract relations." *Danforth*, 650 A.2d at 1335; *see also Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 11, 760 A.2d 1041, 1045 (quantum meruit involves liability under an implied contract theory). In order to "sustain a claim in quantum meruit, a plaintiff must establish that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." *Forrest Assocs.*, 2000 ME 195, ¶ 11, 760 A.2d at 1045 (quotation marks omitted); *see also Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994) (explaining that a "contemporaneous understanding that compensation is anticipated for the services being rendered" is a necessary element of quantum meruit).

Based upon all of the foregoing, the only residual basis on which Milo might still advance a quantum meruit claim must relate to the loom. However, the court concludes that the credible evidence does not support this claim. Milo rendered no services to TD Banknorth in connection with the loom, but even if it had done so with TD Banknorth's knowledge and consent, there are no credible circumstances in this case which demonstrate that it was reasonable for Milo to have expected payment from TD Banknorth for any services rendered in connection with the lease of the loom to USF–Purchaser. Accordingly, Milo cannot prevail on its quantum meruit claim.

DECISION

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Decision and Order on the Civil Docket by a notation incorporating it by reference, and the entry is

> Judgment for Defendant on Counts I, II, and III of Plaintiff's Complaint, together with its costs of this action.

Dated: December 7, 2010

s/Thomas E. Humphrey
Chief Justice, Superior Court