

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA
CIVIL DIVISION

EMERY SMITH,

CASE NO. 15-CA-001620

Petitioner/Counter-Respondent,

-v-

EMCYTE CORP.,

Respondent/Counter-Petitioner

And

PATRICK PENNIE,

Respondent/Counter-Petitioner.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT
(filed December 31, 2016)

Respondent/Counter-Petitioner, EMCYTE CORP. (“EmCyte”), filed a Motion for Partial Summary Judgment on the Enforceability of the Shareholders’ Agreement (December 31, 2016), a Supplement thereto (August 29, 2016) and a Notice of Filing of Case Law in Support (September 16, 2016). Respondent/Counter-Petitioner, Patrick Pennie, joined in EmCyte’s Motion. Petitioner/Counter-Respondent, Emery Smith, filed a Memorandum in Opposition to the Motion and an Affidavit in support on September 14, 2016. On September 19, 2016, this Court conducted a hearing on these matters and after review of the pleadings, evidence, argument of counsel and supplemental filings, this Court finds as follows:

FINDINGS OF FACT

A. Public Record Filings for EmCyte

1. EmCyte Corp. is a Florida corporation that was formed on or around February 19, 2008.

2. The EmCyte Corp. Articles of Incorporation filed with the Florida Secretary of State, as reflected on www.sunbiz.org, reflect the initial directors to be Patrick Pennie and David Buzenius.

3. Patrick Pennie has been identified as an officer and a director of EmCyte since its inception as shown on www.sunbiz.org. Mr. Pennie was the only person referred to as the Chairman of EmCyte in the public records of EmCyte.

4. Mr. Smith was not identified as a participant in EmCyte until the March of 2011 corporate filings according to www.sunbiz.org.

5. Mr. Smith had knowledge of, but did not dispute the EmCyte Corp. public records disclosures shown on www.sunbiz.org.

B. EmCyte Benefits Accepted by Emery Smith

6. Mr. Smith claimed to be an owner, officer and director of EmCyte as of the filing date of his Petition initiating this litigation.

7. Mr. Smith contributed no capital to obtain his ownership interest in EmCyte.

8. Mr. Smith has guaranteed none of the debt obligations of EmCyte.

9. Mr. Smith received and retained the following distributions from EmCyte:

	<u>Year</u>	<u>Amount</u>
1.	2011	\$290,435.00
2.	2012	\$526,823.00
3.	2013	\$709,724.00
4.	2014	\$562,145.00
5.	Total	\$2,089,127.00

C. Reliance Upon the Executed Shareholders' Agreement

10. It is undisputed that Mr. Smith had knowledge of the executed Shareholders' Agreement and took no action to disavow or refute it prior to initiating this litigation. See Exhibit "A" attached to EmCyte's Supplement for the executed Shareholders' Agreement.

11. It is undisputed that Mr. Pennie believed that the executed Shareholders' Agreement was enforceable between the parties at all times prior to Mr. Smith filing his Answer and Affirmative Defenses to EmCyte's Counter-Claims on August 26, 2015.

12. Mr. Smith's knowledge of the contract and Mr. Pennie's reliance thereon is shown in the communication of November 4, 2014, wherein counsel for EmCyte transmitted the executed copy of the Shareholders' Agreement to Mr. Smith. It was pointed out to Mr. Smith that the relevant provisions of the agreement addressing his removal from the EmCyte checking account for his exorbitant spending were Sections 2.3, 2.4, 2.5, 5.1 and 5.2. It was communicated that "[T]hese provisions appoint Patrick as the Chairman and Treasurer and **Patrick also controls the voting by virtue of the 51% to 49% ownership allocation. As Chairman and Treasurer, Patrick has complete authority and control over all cash receipts and disbursements of the company (Section 2.5), as well as management and business operations (Sections 5.1 and 5.2).**" (Emphasis Added) See Exhibit "I" to EmCyte's Supplement.

13. Following receipt of a copy of the executed Shareholders' Agreement, Mr. Smith took no action to disavow or refute the terms and conditions of the executed Shareholders' Agreement.

14. The November 4, 2014 communication concerning the executed Shareholders' Agreement followed negotiations between the parties over a new shareholders agreement that was never consummated. See Exhibits "B," "C" and "D." It was also in furtherance of communications whereby Mr. Smith was repeatedly advised that he was violating the parties' agreement. See EmCyte's Exhibits "H" and "I."

15. Another example of Mr. Smith's knowledge of the executed Shareholders Agreement and Mr. Pennie's reliance thereon occurred during the new shareholder agreement negotiations in early 2014. In an e-mail exchange in February of 2014, Mr. Pennie reminded Mr. Smith of their respective roles, duties and responsibilities, as reflected in the executed shareholders' agreement, in part as follows:

I am thankful that **I mandated that you sign our original agreement giving me the operational control to secure my \$250,000 investment (My total life savings). I wouldn't have put that money in without my maintaining the full responsibility to keep the business solvent.** I also had to provide that same security to the bank in order to get the loan. I've put in \$200,000 with Dave and then \$250,000 with you. I didn't get my money back from Dave and I damn sure wasn't going to go through that again with you. **You never had to put a dime into this business at any time. The current \$500,000 of loans and line of credit is secured with my money only!** You didn't have any money saved up to take any risk with me, so I'm still exposed today! **I frankly don't care for another agreement, the one we have in place is the best for now.** Because it protects my interest and investment. I don't trust you. You are irresponsible, a loose cannon and mentally unstable...

I never expected this type of behavior from you in a million years. I don't know who you are. But obviously you've been a sleeper only waiting for the opportunity to exert your true personality. In my personal view what I see in you is pretty bad and very surprising. **I have given you equal ownership in equity but not in operations.** You're just not living up to that.... I don't mind working hard to get only half of my efforts in earnings. I believe I deserve more but I can't have that cause I made an obligation to you. But **I will maintain operational control to preserve my security...**

Lastly, if you continue to threaten and intimidate our employees then you're putting EmCyte at liability risk for a harassment lawsuit....

(Emphasis Added).

See Exhibit "E" to EmCyte's Supplement.

16. Mr. Pennie's February 28, 2014 e-mail was in response to Mr. Smith's e-mail of February 27, 2014 wherein Mr. Smith demanded, in part, that Mr. Pennie inform the EmCyte employees that he was an equal owner. See Exhibit "E" to EmCyte's Supplement. Mr. Pennie's

reliance upon the terms and conditions of the executed Shareholders' Agreement was unequivocally communicated to Mr. Smith in this correspondence. Mr. Smith elected to abide by these terms and conditions by failing to disavow or refute these terms at any time prior to his filing of this litigation.

17. Following Mr. Pennie's reminder to Mr. Smith of the important terms and conditions of the executed Shareholders' Agreement, the parties' negotiations over the drafting of a new shareholders' agreement were terminated on April 10, 2014. On that date, Mr. Pennie directed an e-mail to Mr. Smith, **and Mr. Smith's legal counsel**, stating:

“...this correspondence is to confirm and memorialize the understanding and agreement by and between Patrick Pennie and Emery Smith whereby **we both agree to continue to abide by the existing Shareholder Agreement between us and EmCyte without modification, amendment or supplement.**” (Emphasis Added).

Six minutes later, Mr. Smith e-mailed his acceptance of this written agreement and resolution by responding to Mr. Pennie's e-mail and saying “Patrick and I have agreed.” See Exhibit “F” of EmCyte's Supplement. Mr. Smith's acquiescence was **also** copied to his legal counsel. See Exhibit “F” of EmCyte's Supplement

18. Mr. Smith's communication of his election to abide by the executed Shareholders' Agreement was done with knowledge of the terms and conditions thereof AND Mr. Pennie's reliance thereon, as stated in Mr. Pennie's February 28, 2016 e-mail. Thereafter, Mr. Smith took no action to disavow or refute these terms at any time prior to his filing of his Answer and Affirmative Defenses to EmCyte's Counter-Claims.

19. In the communications of February 28, 2014, April 10, 2014 and November 4, 2014, Mr. Smith engaged in discussing the terms and conditions of the executed Shareholders' Agreement, the benefits conferred upon Mr. Smith as a result of these terms and conditions and

Mr. Pennie's reliance upon the enforceability thereof. These communications presented mutually exclusive options to Mr. Smith. He could either adhere to the terms and conditions of the executed Shareholders' Agreement or reject and disavow it. Mr. Smith elected to retain the benefits that he had received, and was continuing to receive, and to cause Mr. Pennie to believe that the terms and conditions of the executed Shareholders' Agreement were enforceable between Mr. Smith, Mr. Pennie and EmCyte.

20. Mr. Smith elected to accept the accrued and accruing benefits of the executed Shareholders' Agreement at all times. His elections include, but are not limited to, his written agreement to "...continue to abide by the existing shareholder agreement...without modification, amendment or supplement" in April of 2014, as well as his acquiesce and silence following his receipt of the executed Shareholders' Agreement in November of 2014.

21. With knowledge of the existence of the executed Shareholders' Agreement, and the key terms of voting ownership being in favor of Mr. Pennie (51%) over Mr. Smith (49%) and Mr. Pennie having full control over EmCyte as the Chairman, Mr. Smith intended to and did cause Mr. Pennie to believe that the executed Shareholders' Agreement was binding upon and governed the relationships of the parties.

22. By causing Mr. Pennie to believe that the executed Shareholders' Agreement was binding on the parties, Mr. Smith received and accepted the benefits of:

- a. Receiving distributions in 2011 (\$290,435); 2012 (\$526,823); 2013 (\$709,724); and 2014 (\$562,145);
- b. Receiving his ownership interest in EmCyte without making a capital contribution;
- c. Receiving his ownership interest in EmCyte without incurring any personal liability or obligation to EmCyte's creditors; and

- d. Receiving his ownership interest in EmCyte and his distributions without making any financial investment of any kind into EmCyte.

23. Mr. Smith does not dispute that he accepted the benefits he received from EmCyte.

24. Mr. Smith does not dispute that he caused Mr. Pennie to believe the parties were bound by the executed Shareholders' Agreement.

25. Mr. Smith does not dispute that he acted with knowledge of the existence of the executed Shareholders' Agreement.

26. Mr. Smith admits that when he was presented with opportunities to elect to reject the terms and conditions of the executed Shareholders' Agreement, he elected to accept it. Mr. Smith elected to accept the terms and conditions of the executed Shareholders' Agreement in writing and by his actions.

27. Mr. Smith's current claim that he did not sign the executed Shareholders' Agreement is irrelevant based upon his acceptance of benefits, his intent to cause Mr. Pennie to believe that the executed Shareholders' Agreement was binding upon the parties; and because he elected to adhere to the executed Shareholders' Agreement both in writing and by his actions, rather than to disavow it.

28. Mr. Smith's claim in his Affidavit that he does not currently possess various corporate records is irrelevant to the enforceability of the executed Shareholders' Agreement. See Affidavit of Emery Smith, ¶15. Whether he currently possesses various corporate records or not doesn't negate his acceptance of benefits from EmCyte and Mr. Pennie, his causing Mr. Pennie to believe that the contract between the parties was binding, or relieve him from his election, when confronted with a choice, to adhere to the executed Shareholders' Agreement rather than to disavow it.

29. Mr. Smith's current claim that he did not sign the executed Shareholders' Agreement or that he does not currently possess certain corporate records are not material issues of fact. EmCyte is relying upon Mr. Smith's:

- a. acceptance of benefits, including his ownership in and distributions from EmCyte;
- b. intentional acts taken to cause Mr. Pennie to believe in the enforceability of the Shareholders' Agreement; and
- c. election to adhere to the terms and conditions of the Shareholders' Agreement rather than to disavow it.

CONCLUSIONS OF LAW

I. Mr. Smith's is estopped, or has waived his ability to challenge the enforceability of the executed Shareholders' Agreement by his acceptance of the benefits received from EmCyte and Mr. Pennie

EmCyte and Mr. Pennie seek a partial summary judgment against Mr. Smith determining the terms and conditions of the executed Shareholders' Agreement to be binding and enforceable upon the parties as of the time that Mr. Smith initiated this litigation. Further, that upon determining that Mr. Smith is bound by these terms and conditions, that any claims, defenses or affirmative defenses that conflict with this determination be stricken.

The purpose of obtaining a signature on a contract is simply to show mutuality or assent, but a late in the day recanting of a signature on a contract is hardly a determinative factor. It is the actions and conduct of the parties that controls as to the existence of a binding contract. See, Sosa v. Shearform Mfg., 784 So.2d 609 (Fla. 5th DCA 2001). As stated in Integrated Health Services of Green Briar v. Lopez-Silvero, 827 So.2d 338 (Fla. 3rd DCA 2002), "A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract. See, Gateway Cable T.V., Inc. v. Vikoa Construction Corp., 753 So.2d 461 (Fla. 1st DCA 1971).

The enforceability of the executed Shareholders' Agreement results from Mr. Smith's acceptance of benefits, as well as the actions and conduct of both parties, and the application of the legal principles of estoppel, waiver, ratification and election. Mr. Smith failed to refute or disavow the executed Shareholders' Agreement prior to commencing this litigation. Mr. Smith's assertion that he didn't sign the Shareholders' Agreement, is irrelevant under the application of the law of contracts to these facts.

A contract is binding upon a party, regardless of the absence of a signature, when the acts or conduct of the parties show an agreement between them. See, Gateway Cable at 463. The Court in Gateway Cable, in citing to N.L.R.B. v. Local 825, International Union of Operating Eng., 315 F.2d 695, 698, 699 (3rd Cir. 1963), referenced Justice Holmes' statement that "conduct which imports acceptance is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party."

Accordingly, it is the acts and conduct of EmCyte, Mr. Pennie and Mr. Smith, that control the enforceability of the Shareholders' Agreement. Specifically, Mr. Smith's full acceptance of all of the benefits conferred on him, along with his causing Mr. Pennie to believe the executed Shareholders' Agreement to be enforceable, results in the application of the legal principles of estoppel, waiver, ratification and election to be applicable.

It is uncontroverted that Mr. Smith accepted the benefits of ownership in EmCyte and over \$2 million in distributions therefrom. As stated in the case of Hendricks v. Stark, 126 So.2d 2934, 297 (Fla. 1930):

One of the most familiar applications of the rule relating to the acceptance of benefits arises in the case of contracts. It has been repeatedly held that a person by the acceptance of benefits may be estopped from questioning the validity and effect of a contract; and where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he

cannot do both, and having adopted one course with knowledge of the facts, he cannot afterwards pursue the other. (Emphasis Added).

A person's silence results in an estoppel when there is a specific opportunity and a real apparent duty to speak and such person remains silent. See, Hendricks at 297. As stated another way in Hendricks: "If a man is silent when he ought to speak, equity will debar him from speaking when conscience requires him to keep silent." See, Hendricks at 297.

In addition to estoppel, the legal principle of waiver is applicable to Mr. Smith with regard to these facts. In the case of Scocozzo v. General Dev. Corp., 191 So.2d 572 (Fla. 4th DCA 1966), the Court adopted the ruling of Hendricks and found in that case that the plaintiff's acceptance of benefits under a contract, with knowledge of the facts "have waived their right, if any they ever had, to rescind the contract and deed and are now estopped from seeking such relief. See, Scocozzo at 579.

Mr. Smith's knowledge of the existence and enforceability of the executed Shareholders' Agreement is established by his April 10, 2014 written acceptance of Mr. Pennie's e-mail terms, which followed Mr. Pennie's reiteration to him of the key terms and provisions in February of 2014, and the November of 2014 communications to him. From and after April of 2014, Mr. Smith was silent as to any intent to challenge the enforceability of the executed Shareholder's Agreement and made no effort to disavow it. Additionally, he does not refute that he had knowledge of both the existence of the executed Shareholders' Agreement and Mr. Pennie's reliance thereon. He now didn't sign it, or he had some secret, undisclosed, intent to not be bound by it.

Based upon these underlying facts, what Mr. Smith is arguing is that the executed Shareholders' Agreement should be rescinded or cancelled or that he otherwise be relieved from his responsibilities thereunder. However, as discussed in the case of Rood Co. v. Board of

Public Instruction, 102 So.2d 139 (Fla. 1958), where a party seeking rescission or cancellation due to a mistake of material fact is involved, that party must show that upon discovery he “...with reasonable promptness, denied the contract as binding upon him and that thereafter he was consistent in his course of disavowal of it.” Further, if after acquiring knowledge, the party “...either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind. See, Rood at 141.

Upon multiple occasions, Mr. Smith was informed of, and he acknowledged the existence of the executed Shareholders’ Agreement. Pretending to ignore its existence and disregarding Mr. Pennie’s reliance thereon, is not a valid defense. Based upon the facts and circumstances herein, Mr. Smith had a duty to deny the existence of the contract, and to continuously disavow the contract, once it was brought to his attention. But, he failed to do so and, conclusively, he thereafter continued to accept the benefits of the contract he now seeks to avoid. Mr. Smith’s acceptance of the benefits of the executed Shareholders’ Agreement, waived any right he might have had to rescind or cancel the contract and must be estopped from seeking to do so.

II. Emery Smith Ratified the Executed Shareholders Agreement

Although this Court deems Mr. Smith’s self-serving claim that he didn’t sign the executed Shareholders’ Agreement to be irrelevant under these circumstances, his actions operated as a ratification of the agreement in any event.

Similar to the consequences from Mr. Smith’s acceptance of the benefits of the executed Shareholders’ Agreement, ratification of a contract occurs when a person, “...expressly or impliedly adopts an act or contract entered into in his or her behalf by another without authority.” See, Deutsche Credit Corp. v. Peninger, 603 So.2d 57 (Fla. 5th DCA 1992). A

ratification occurs through a knowing assent, such as an express statement or retaining benefits. A party is precluded from denial by estopped, or by negligence in permitting or failing to disavow it. See, European American Bank & Trust Co. v. Starcrete International Ind., Inc., 613 F.2d 564 (5th Cir. 1980).

The burden was on Mr. Smith to dispute and disavow the executed Shareholders' Agreement if he intended to not be bound by the terms and conditions of the executed Shareholders Agreement, but the evidence indicates he did otherwise. The executed Shareholders' Agreement is therefore binding upon him and his current claim that he didn't sign the agreement is immaterial and does not create a question of material fact on this issue.

III. Mr. Smith's current claim that he did not sign the executed Shareholders' Agreement is immaterial to determining that the terms and conditions are binding and enforceable as to the parties

It is undisputed that Mr. Smith was aware of the executed Shareholders' Agreement, that Mr. Pennie was relying upon the enforceability of the contract when conferring benefits upon Mr. Smith and that Mr. Smith did nothing to disavow the agreement prior to claiming, post-litigation, that he didn't sign it.

Mutuality and assent, for purposes of the executed Shareholders' Agreement, was established by the acts and conduct of the parties. See, Gateway Cable at 463. Mr. Pennie signed the executed Shareholders' Agreement with its terms and conditions. It is binding upon Mr. Smith regardless of signature. See, Gateway Cable at 464; see also, Integrated Health at 339; and Sosa v. Shearform Mfg. at 610.

The inequity of rendering the executed Shareholders' Agreement unenforceable based solely upon Mr. Smith's current claim that he didn't sign the contract is exemplified by the following:

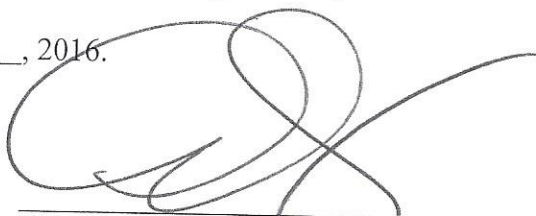
- a. Mr. Smith would have obtained his ownership interest in EmCyte without making any capital contribution;
- b. Mr. Smith would have received over \$2 million in distributions without having made any capital contribution or having any financial risk;
- c. Mr. Pennie's reliance upon the executed Shareholders' Agreement based upon the existence of the contract, Mr. Smith's knowledge of the contract and absence of Mr. Smith's refuting or disavowal of the agreement, would be completely undone by Mr. Smith claiming to have not signed it.

IT IS THEREFORE ORDERED that EmCyte's Motion for Partial Summary Judgment against Emery Smith is granted and it is determined that the terms and conditions of the executed Shareholders' Agreement are binding and enforceable by and between EmCyte Corp., Patrick Pennie and Emery Smith; further, all of Emery Smith's claims, defenses and affirmative defenses that are contrary to the legal determination that the Shareholders' Agreement is enforceable between the parties are stricken.

DONE AND ORDERED in Chambers in Lee County, Florida, on

Oct 10

, 2016.



Honorable Alane C. Laboda, Circuit Judge

Copies Furnished to:

- ✓ Kenneth G. M. Mather, Esq.
- ✓ Michael B. Green, Esq.
- ✓ Richard Alvarez, Esq.
- ✓ Andrew Lennox, Esq.
- ✓ Casey Lennox, Esq.