MEHRDAD JON JAHANSHAHI, SHAHROKH NAGHDI and HAPPY VALLY ROASTERS, INC., Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA JURY TRIAL DEMANDED
vs.	:	NO. 99-00,899
CENTURA DEVELOPMENT CO., INC. and KEITH L. ECK, Individually and as President of Centura Development Co., Inc., Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: March 23, 2001

OPINION and ORDER

BEFORE THE COURT is Defendants' Motion for Summary Judgment.[1] Defendants' contentions are: 1) because a lease was never signed, no enforceable agreement existed; 2) because Plaintiffs were sophisticated businessmen, they could have not reasonably relied on any assertions made by Defendants in the absence of a written agreement; 3) there is no evidence to justify piercing the corporate veil nor to make Defendant Keith Eck personally liable. Because Pennsylvania law recognizes that there are situations where a contract exists despite the lack of a writing, this Court will deny that count of the Summary Judgment Motion. This Court further holds that based on the record, there are material facts in dispute as to whether or not Plaintiffs' reliance on Defendant was reasonable. Consequently that count of the Motion for Summary Judgment will also be denied. The Court will grant the

[1] Defendants filed their Motion for Summary Judgment on November 2, 2000. Defendants filed their Brief in Support of Motion for Summary Judgment on November 29, 2000. Plaintiffs filed their Brief in Opposition to Defendants' Motion for Summary Judgment on December 18, 2000. On December 12, 2000, the Court listened to arguments on the Motion.

Defendants' Motion for Summary Judgment with respect to the count addressing piercing the corporate veil as the uncontested material facts do not warrant such action. The Court, however, will deny the Motion with respect to dismissing the personal liability against Defendant Keith Eck as it is for a jury to determine if he undertook personal participation in this transaction.

Facts and Procedural History[2]

In September 1996, Plaintiff Mehrdad Jon Jahanshahi entered into negotiations with Defendant Keith L. Eck, (hereafter "Eck") owner of Defendant Centura Development Co., Inc. (hereafter "Centura") to lease Centura and Plaintiffs sought Centura's property located at 1915 East Third Street, Loyalsock Township, Lycoming County, Pennsylvania, which was then a Hardees Restaurant. Plaintiffs intended to remodel the Hardees into a Kenny Rogers Roaster restaurant and then operate it. To this end, Plaintiff Jahanshanhi and Plaintiff Naghdi joined as business partners in January 1997. In February 1997, Plaintiffs Jahanshanhi and Naghdi incorporated as Happy Valley Roasters, a Pennsylvania corporation. Between September 1996 and July 1997, Eck orally assured Plaintiffs the property would be leased to them so that Plaintiffs could operate the Kenny Rogers Roaster restaurant. Also during this period, September 1996 to March 1997, Plaintiffs and members of the Kenny Rogers Roasters main office performed several site inspections, site analysis, and demographic studies. In early June 1997, Plaintiffs hired an architect to draft building drawings necessary for the

[2] The uncontested facts are mostly gleaned from Plaintiffs' Complaint and Amended Complaint that have not been denied or otherwise are uncontested by Defendant at this time. Others come from the contested discovery documents submitted to the Court.

renovations.[3] Between September 1996 and July 1997, the parties exchanged drafts of leases to confirm the final details. A version of the lease was stored on the computer in Defendants' office. By July 9, 1997 all the major terms of the lease had been agreed to and incorporated into a writing[4] ready for the party's signatures. On that date, Plaintiffs and Eck met in Defendants' office. At that time, Plaintiffs signed the lease. After Plaintiff Naghdi signed, he pushed the lease toward Eck for him to sign. Eck did not sign but indicated he would mail Plaintiffs a signed copy. (Jahanshahi Deposition, p. 39.)

Prior to the July 9, 1997 meeting at which Plaintiffs had signed the lease, Plaintiffs had purchased some equipment to be used in the restaurant. On or around July 12, 1997, Plaintiffs used Defendants' office to make ten sets of copies of the building drawings and

[3] Though both parties agree that an architect was hired there is disagreement concerning exactly when it occurred. Defendants maintain that the architect was hired at a "much earlier time."

[4] The written agreement is entitled "Lease Between Centura Development Co., Inc. [address omitted] and Happy Valley Roasters, Inc. [address omitted] for Loyal Plaza 1915 East Third Street, Williamsport, Pa 17701" is an extensive document. In its 43 pages, it not only lays out the terms of the rent, which it in of itself is a detailed scheme, but also covers taxes, additional rent, use of premises, insurance, construction of new building, restoration of fire damage, repairs and maintenance by tenant, landlord's right of entry, non-abatement of rent, net lease, utility charges, governmental regulations, mechanic's liens, etc., indemnification of landlord, quiet enjoyment, condemnation, assignment and subletting, tenant's certificate, subornation and attornment, curing tenant's defaults, notices, adverse possession, surrender, bankruptcy, events of default, brokers, access by landlord, miscellaneous, rules and regulations, no merger, captions, entire agreement; interpretation, definition of landlord, and definition of tenant. Plaintiffs initialed every page and both plaintiffs signed and dated (July 9, 1997) the signature blocks on page 43. On page 2, there are two changes. The first change is that the 1 in the 1st day of July was crossed out and the 9th was handwritten in above it. The second change is on line 44 where 90 days was scratched out and the number 120 were handwritten above it. Plaintiff testified at his deposition that this change gave Plaintiffs an additional 30 days to complete renovations before opening for business. On page 12 line 719, there is a similar change wherein 90 were scratched out and again substituted by 120. This clause also pertained to the time period when the Plaintiffs were scheduled to open the restaurant. There is a change on pages 41-42 lines 2797 to 2801 where a clause was completely scratched out. The remaining portion of the clause reads, "tenant shall have the absolute right to assign, sublet or otherwise transfer its interest in the Lease to a Kenny Rogers Roasters licensee, franchisee, or to Roasters Corporation or any subsidiary of Roasters Corp. without Landlord's approval[,]." Plaintiff testified at his deposition the reason for the change was "because it was out of the norm for Kenny Rogers Roasters, they had requested us to delete it from the lease because it wasn't within the terms of Kenny Rogers Roasters."

mailed out five sets to contractors. Defendants charged the Plaintiffs $195 for the use of the copier and $22 postage. On July 18, 1997, Plaintiffs, believing they had a valid lease, traveled to New York to attend a Kenny Rogers Roasters restaurant auction, where they purchased equipment and made a commitment to purchase more the following week.

On July 22, 1997, Eck orally informed Plaintiffs that he had changed his mind and was not going to lease the premises to them. Instead Eck stated he had received an offer to purchase the building from an undisclosed buyer for $750,000. Defendants subsequently sold the building.

On June 11, 1999, Plaintiffs filed a complaint. Plaintiffs averred liability on the part of Centura as a corporate entity under three specific causes of action: 1) a breach of the promise to enter into a lease agreement, asserting an oral contract existed between the parties; 2) in the alternative Centura was liable on a theory of promissory estoppel; and 3) breach of contract. The Complaint averred that Eck was both personally liable for Plaintiff's losses as well as liable in his capacity as President and/or Chief Executive Officer of Centura based on assurances he had given to Plaintiffs to pay their losses and out-of-pocket expenses "if Plaintiffs would hold on, not complain about the change in plans, and be ready to sign the lease agreement if the $750,000 [offer] did not germinate." In their Complaint, Plaintiffs maintain they agreed to this request. Plaintiffs' Complaint seeks $120, 717 in damages; $70,000 is anticipated profit for the first year of operation, derived from site analysis and demographic

studies; the remainder is the amount expended in preparation to convert the building from a Hardee's restaurant into a Kenny Rogers Roasters.[5]

On June 30, 1999, Defendants filed Preliminary Objections, which significantly to this summary judgment motion, demurred, to the claims against Eck.[6] In overruling the demurrer, the Court found Plaintiffs had not pleaded sufficient facts to justify piercing the corporate veil, but citing ***Village at Camelback v. Carr***, 538 A.2d 528, 533 (Pa.Super. 1988), found Plaintiff had made a minimal case for finding Eck personally liable.

The prior Opinion focused on Defendant's argument that because there was no lease signed by all the parties, there was no contract. The Court noted that when arguing that there was no contract, "Defendants mean to argue there is no *written* contract in existence." The Court observed that Pennsylvania law holds, "if the parties orally agree to all the terms of a contract between them and mutually expect the imminent drafting of a written contract reflecting their previous understanding, the oral contract may be enforceable." ***Kazanjian v. New England Petroleum Corp.*** 480 A.2d 1153, (Pa.Super. 1984). The Court found that there

[5] The breakdown is as follows: $18,000 to the architect to design the conversion; $28,000 for the purchased equipment for the conversion; $2,500 for attorney's fees to incorporate into Happy Valley Roasters, Inc.; $2,000 minimum travel costs meeting with the upper management of Kenny Rogers Roasters, Inc.; and $217 for the costs of copies and postage Defendant charged Plaintiffs on or about July 12, 1997.

[6] The gravaman of Preliminary Objections was that because a lease signed by both parties never came into existence, there was no contract and therefore Plaintiffs are not entitled to relief. Defendants' also demurred as to the out-of-pocket expenses, asserting that a new business is too speculative a venture upon which to based recover for lost profits. Defendants also objected that Plaintiffs had failed to specify precisely which plaintiffs would be entitled to what relief. On November 5, 1999, this Court issued an Opinion and Order that overruled the demurrers but did sustain the Preliminary Objections regarding more specific pleading concerning precise identification of the Plaintiffs in the suit and also ordered Plaintiffs to attach a copy of the lease agreement to their Amended Complaint. The Court also denied Defendants' objection to the damage claim. Plaintiff did aver the specific methodology about how the damages were calculated, the Court was satisfied that this claim was satisfactorily pleaded.

were two agreements that Defendants allegedly breached. The first was the agreement to lease the premises and the second was Defendants' agreement to pay Plaintiffs' out-of-pocket expenses. The Court found that Plaintiffs had pleaded the minimal aspects of enforceable contracts and that "Defendant's argument that there is no written contract avails them nothing at this point in the proceedings."[7]

On December 17, 1999, Plaintiffs filed their "First Amended Complaint." In the complaint, Plaintiffs listed Mehrdad Jon Jahanshahi, Shahrokh Naghdi, and Happy Valley Roaster, Inc. as the plaintiffs. Plaintiffs also added a count of misfeasance to their original complaint. In accordance with the Court Order, Plaintiffs attached a copy of the lease agreement to the amended complaint.

On February 15, 2000, Defendant filed an Answer and New Matter. In their Answer, Defendant characterized the various meetings, including the one on July 7, 1997, as negotiations. Defendant maintained there could be no contract because Defendant never signed the lease. In their New Matter, Defendant pleads the Statute of Frauds bars Plaintiffs' claims;

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[7] The Court commented, "Further we note for the benefit of the parties that in a recent franchise agreement case before this Court, we were asked to grant summary judgment, in part, as Plaintiffs had not made out a cause of action for breach of contract, but rather only for "a breach of good faith." ***Louis A. Cupiccia and L.P.L., Inc. v. West Coast Entertainment Corporation, et al.***, Lyc. Co. No. 97-01,817 (1999). We declined to grant summary judgement on this ground, relying upon the case of ***Creeger Brick v. Mid-State Bank***, 560 A.2d 151 (Pa.Super. 1989), wherein the appellate court stated:

> Section 205 of the Restatement (Second) of Contracts suggests that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." A similar requirement has been imposed upon contracts within the Uniform Commercial Code by 13 Pa. C.S. §1203. The duty of "good faith" has been defined as "honesty in fact in the contract or transaction concerned." See: 13 Pa.C.S. §1201; Restatement of Contracts §705, comment a. Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts.

Creeger Brick at 153-154 (citations omitted). We point this out only because this claim is the essence of Plaintiff's Complaint, read as a whole."

that Plaintiffs' Complaint fails to allege the necessary elements of a contract; and the defense of a lack of consideration. On February 25, 2000, Plaintiffs filed an answer to the New Matter

On May 26, 2000, Plaintiffs filed a Motion to Compel Answers to Interrogatories and Request for Production of Documents. It was Plaintiffs' position that they needed documents[8] to demonstrate that Keith Eck should be held individually liable along with Centura Development Co., Inc. Defendants objected to the requests as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. On June 20, 2000, the Court issued an Opinion and Order granting Plaintiffs' motion.

On November 2, 2000, Defendants filed the Motion for Summary Judgment now before the Court.[9] Defendants argue they should be granted a judgment as a matter of law because the Statute of Frauds requires a lease agreement such as the one in the instant case to be in writing. Defendants further argue the changes to the lease indicate that there was never a meeting of the minds between the parties and as a result, no clear and definite terms emerged which could lead to the creation of a lease agreement. On the issue of personal liability of Eck, Defendants argue that Plaintiffs have not come forward with any evidence to support this claim and therefore liability cannot be imposed as a matter of law. Defendants attack Plaintiffs'

[8] Specifically, Plaintiffs sought the names and addresses of employees for Centura Development Co., Inc. from July 1996 until December 31, 1999; contracts between officers of Centura and said officer which would list duties and responsibilities of said officers to the company; tax returns for Centura from 1995 to the present; tax returns for Keith Eck for the same years; bank accounts for Centura from 1995 to 1998; and bank accounts for Keith Eck for the same period.

[9] On June 28, 2000, Plaintiffs' counsel filed a Petition for Leave to Withdraw as Counsel. The reasons listed were that Plaintiffs had failed to pay their counsel and that disagreement had arisen as to how to resolve the matter. On July 10, 2000, the Court issued an order granting the petition for leave

claim of detrimental reliance on two fronts. First, Plaintiffs were experienced businessmen making their reliance on Eck's statements unreasonable. Secondly, when purchasing equipment, Plaintiffs could not have relied on the lease because some of the purchases were made before the signing and the other purchases were made with the knowledge that Defendants had not signed the lease. Defendants further argue the claim to reimburse Plaintiffs' out-of-pocket expenses should be dismissed because Plaintiffs have failed to provide sufficient proof of the damages alleged in their complaint. Finally, Defendants argue that Plaintiffs never provided any documentation concerning the equipment that was purchased meaning they could not prove damages even if a contract was found to exist between the parties. Defendants did not ask for summary judgment on the misfeasance count of the amended complaint.

Discussion

There is little dispute about the standard for summary judgment. Summary judgment can only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Troxel v. A.I. DuPont Institute***, 675 A.2d 314 (Pa. Super 1996). All evidence is viewed in the light most favorable to the non-moving party. ***Philco Insurance Co. v. Presbyterian Medical Services Corp.***, 663 A.2d 753 (Pa. Super 1995). The moving party has the burden of demonstrating that there are no genuine issues of material fact. ***Solcar Equipment Leasing Corp. v. PA Manufacturing Association Ins. Co.***, 606 A.2d 522 (Pa. Super 1992).

Since the beginning of this suit, Defendants have contended that because they did not sign the lease, no contract existed between the parties. While this argument has the attraction of offering a bright line test to contract formation, it is not supported by the case law.

That Defendants did not sign the lease avail them of little because, "[o]ur supreme court has recently reiterated that 'where the parties have agreed orally to all the terms of their contract, and a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, such oral contract may be enforced, though one of the parties thereafter refuses to execute the written contract." ***GMH Associate, Inc. v. Prudential Realty Group***, 739 A.2d 889, 900 (Pa. Super 2000) citing ***Shovel Transfer & Storage, Inc. v. PLCB***, 739 A.2d 133, 138 (1999). In ***GMH***, the Superior Court stated that the essentials terms that must be identified for the sale of real estate, are "the naming of the specific parties, property and consideration or purchase price." ***Id***. at 900. While that case involved the sale of real property, it is doubtful that the fact this case involves a lease has any significant effect on the outcome. Ultimately the ***GMH*** Court found that no contract existed between the parties since at closing there was still a one and one-half million-dollar gap between the parties on the purchase price that apparently was never resolved. Secondly, in ***GMH***, a September 11 "acceptance" letter was incorporated the terms of the May 13th LOI that specifically mandated that the parties would continue negotiations. "Because recognized issues remained unresolved, no mutual assent existed sufficient to bind the parties." ***Id.*** at 901. Finally, in ***GMH***, there was an express condition precedent for prior corporate approval that was never satisfied.

This case presents a different posture. This Court believes that a jury could conclude that the facts in this case satisfy the requirements for a real estate contract as enunciated in ***GMH***. In this case, there was no doubt concerning the parties involved or the property in question. The written agreement proffered to Plaintiffs on July 9, 1997 makes these terms abundantly clear. The complexity of the rent clauses of the contract also suggests that

there was no disagreement about the consideration or "purchase price" term. It is not disputed that there were some alterations to the written lease agreement. Evidence at trial will establish what and who prompted these changes and the extent to which they were agreed upon. It is undisputed (at this point) Plaintiffs signed the corrected document intending to be bound thereby and handed it to Eck expecting him to sign it on behalf of Centura. Trial testimony may also reveal why Defendant did not sign the document. This Court believes that a jury could conclude that these alterations do not affect any of the essential terms and also that Defendant had become obligated to execute the lease and was bound by its terms as of July 9, 1997.

To establish a cause of action based on promissory estoppel, the parties must show that: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can only be avoided by enforcing the promise. ***Id.*** at 904 (citing ***Shoemaker v. Commonwealth Bank***, 700 A.2d 1003, 1007 (Pa. Super 1997)). Though the ***GMH*** Court found that the doctrine did not apply to its case, this Court believes that a jury could conclude that Plaintiffs relied on Defendant's representations to their detriment. In his Motion for Summary Judgment, Defendant makes much of the fact that Plaintiffs were "sophisticated" businessmen who could not have reasonably relied on Defendant's actions. Whether or not Plaintiffs were indeed sophisticated is for the trier of fact to decide. Regardless, even sophisticated businessmen may have a right to rely on the representation of similarly sophisticated businessmen.

There is some dispute as to whether or not Plaintiffs engaged in purchasing equipment for their venture based on Defendant's actions. Once again this dispute is for the trier of fact to decide. Defendant argues that because Plaintiff admitted in his deposition that he was able to use the purchased equipment for alternate purposes, he suffered no injustice. Contract law encourages an aggrieved party to mitigate their loses. It is possible that it Plaintiff did indeed recover some of his expenses, his damages are not as great as put forth in the original complaint. Mitigation, however, does not mean that Plaintiffs have incurred no damages. The damage award is for the trier of fact to determine and Defendant has the opportunity to introduce evidence of mitigation during the case.

In their Motion for Summary Judgment, Defendants argue that Plaintiffs have not demonstrated a necessity to pierce the corporate veil. Plaintiffs respond that Eck and Centura operate from the same office and there are perhaps 20 other businesses run from there as well by Defendant. The secretary employed by Centura performs many tasks for these other business ventures. Centura is required to have three directors but functions with only two, Defendant and his wife. Plaintiffs attached copies of Centura minutes dated 1994 and a resolution passed by the Board of Directors dated 1999 both of which indicate that Keith Eck was the sole director of Centura. Despite this suggestive evidence, Plaintiffs have not justified the necessity of piercing the corporate veil nor that they can produce evidence justifying the submission of the issue to the jury. "Piercing the corporate veil is imposed cautiously in Pennsylvania; in fact, there is a presumption against applying it." ***Brindley v. Woodland Village Restaurant***, 652 A. 2d 865, 870 (Pa. Super 1995). Factors, which may justify piercing the corporate veil, include undercapitalization, failure to adhere to corporate formalities,

substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud. ***Lycoming County Nursing Home Ass'n, Inc. v. Com., Dept. of Labor and Industry, Prevailing Wage Appeal Bd.***, 627 A.2d 238 (Pa. Cmwth 1993) (quoting ***Longenecker v. Com.***, 596 A.2d 1261 (1991)). In ***Village of Camelback v. Carr***, 538 A.2d 528, 532-33 (1988) aff'd 572 A.2d 1 (1990) (quoting ***Ashley v. Ashley***, 393 A.2d 637, 641 (1978)), the court set forth the standard for piercing the corporate veil as follows:

> The legal fiction that a corporation is a legal entity separate and distinct from its shareholders was designed to serve convenience and justice, ... and will be disregarded whenever justice or public policy require and where rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless.... We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate identity may properly be disregarded. A court will pierce the corporate veil on an alter ego theory when there is a showing of injustice after the establishment "that the dominant shareholder or the controlling corporation wholly ignored the separate status of a corporation and so dominated and controlled its affairs that its separate existence was a mere sham." ***Wheeling-Pittsburgh Steel Corp. v. Intersteel***, 758 F.Supp. 1054, 1057 (W.D.Pa.1990).

Plaintiffs offer no evidence of under-capitalization or co-mingling of funds. The only evidence that corporate procedures may not have been followed is that relating to the number of directors. However, the Pennsylvania Business Corporation Law permits corporations to function with one director. *See* 15 Pa. C.S. §1723. Corporate records do exist which state the identity of the director. There is no proof offered that the resolution appointing one director was in contravention of the bylaws, which typically can be amended by action of either the shareholders or directors. *See* 15 Pa. C.S. §1504. While the fact, if proven, that Defendant

operates numerous businesses out of the same office and shares assets to do so is of significance to this query, it alone does not demonstrate that Centura is a sham or exists to perpetrate a fraud. Nor does intermingling of business assets equate with an intermingling of personal and corporate affairs.

In short, Plaintiffs make an inference that Centura is a sham corporation, but fall short of demonstrating the factors necessary to pierce the veil. However, this being said, it does not mean that Defendant cannot still be held personally liable. In its November 5, 1999 Order and Opinion, this Court observed that while Plaintiffs may not have sufficiently pled the facts necessary for piercing the corporate veil, because Plaintiffs were averring that Defendant promised to reimburse them, he could be personally liable on a theory of participation. In ***Village at Camelback***, *supra* p.13, the Pennsylvania Supreme Court contrasted "piercing the corporate veil" from "participation theory".

> There is a distinction between liability for individual participation in a wrongful act and an individual's responsibility for any liability-creating act performed behind the veil of a sham corporation. Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.

If a jury finds that Eck personally promised to reimburse Plaintiffs for out-of-pocket expenses, then he can be found liable without extending that liability to Centura. Because the existence of this promise is disputed, by definition, the Court cannot grant a summary judgment motion.

O R D E R

For the reasons discussed in the preceding opinion, the Court enters the following order. The count of Defendants' Motion for Summary Judgment based on the lack of a written agreement is DENIED. The count of Defendants' Motion for Summary Judgment asserting a lack of detrimental reliance is DENIED. Defendants' Motion for Summary Judgment asserting that Plaintiffs' damages are too speculative is DENIED. The count of Defendant's Motion for Summary Judgment asserting that the corporate veil should not be pierced is GRANTED.

BY THE COURT,

William S. Kieser, Judge

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