

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

Glenwood Associates, L.L.C., a)
Delaware Limited Liability)
Corporation,)

Plaintiff,)

v.)

C.A. No. 10C-12-024 JRJ

Daybreak United Methodist)
Church, Inc., Daybreak United)
Methodist Church, an)
Unincorporated Association, Jody R.)
Gilliland, Reverend James R.)
Hawkins,)

Defendants.)

Date Submitted: April 18, 2011

Date Decided: July 5, 2011

Upon Plaintiffs' Motion Dismiss:
Converted to a Motion for Summary Judgment

Robert K. Beste, Jr., Esquire, Scott T. Earle, Esquire, Cohen, Seglias, Pallas, Greenhall & Furman, PC, Nemours Building, 1007 North Orange Street, Suite 1130, Wilmington, Delaware, 19801, Attorneys for Plaintiff.

John W. Paradee, Esquire, Stephen E. Smith, Esquire, Nicole M. Faries, Esquire, Prickett, Jones & Elliott, P.A., 11 North State Street, Dover, Delaware, 19901, Attorneys for Defendants Jody R. Gilliland and Rev. James R. Hawkins.

Jurden, J.

I. Introduction

Before the Court is a Motion to Dismiss filed by Jody R. Gilliland (“Gilliland”) and Reverend James R. Hawkins (“Hawkins”), who are named as individual defendants in this breach of contract case. Gilliland and Hawkins argue they are not proper defendants because they did not sign the Lease Agreement at issue in their personal or individual capacities, rather, they signed on behalf of, and in their capacity as officers of, Defendant Daybreak United Methodist Church (“Daybreak”). Plaintiff, Glenwood Associates, L.L.C., (“Glenwood”) argues that the Motion to Dismiss should be denied because, *inter alia*, Gilliland and Hawkins did sign in their individual capacities, or as members of an unincorporated association. For the reasons that follow, the Motion to Dismiss is converted to a Motion for Summary Judgment and the Court defers ruling until necessary discovery is completed.

II. Facts

Glenwood entered into a Lease Agreement (the “Lease”) with what it believed to be “Daybreak United Methodist Church, Inc.” on December 17, 2009.¹ According to Glenwood, Daybreak vacated the premises on approximately October 29, 2010 and failed to make rent payments due, thereby placing it in default of the

¹ Complaint at ¶ 6 (Trans. ID 34645678). The effective date of the Lease was January 1, 2010.

Lease.² Consequently, by letter dated November 5, 2010, Glenwood terminated the Lease and accelerated the Lease Agreement provisions.³ At the time it entered into the Lease, Glenwood believed it was contracting with a Delaware corporation. Glenwood later learned that there is no such Delaware corporate entity known as Daybreak, Inc. and that Daybreak is an unincorporated association.⁴ According to the Lease Summary, the “tenant” is “Daybreak United Methodist Church, Inc.” and the tenant’s trade name is “Daybreak United Methodist Church.” The tenant’s representative is Jody Gilliland.⁵ In the Lease itself, on the signature page the word “tenant” appears and two signatures, those of Gilliland and Hawkins, appear next to it. As noted previously, “tenant” is defined in the Lease Summary as “Daybreak United Methodist Church, Inc.”⁶ At the time of the execution of the Lease, Glenwood neither bargained for nor obtained any personal guarantee of the Lease by Gilliland or Hawkins or anyone else associated with Daybreak.⁷ In fact, during negotiations over the terms of the Lease, Glenwood agreed to omit from its initial draft of the Lease language which otherwise might have exposed Gilliland and Hawkins to personal liability.⁸ The initial version of Exhibit G to the Lease was revised by Glenwood to expressly provide that the Personal Guarantee

² *Id.* at ¶ 7.

³ *Id.* at ¶ 8.

⁴ *Id.* at ¶ 9.

⁵ See SMYRNA MART SHOPPING CENTER LEASE AGREEMENT LEASE SUMMARY (“Lease Summary”) dated January 1, 2010 at pg. 2, attached as Exhibit A to Motion to Dismiss (Trans. ID 35987597).

⁶ See Lease Agreement attached as Exhibit A to Motion to Dismiss.

⁷ See Complaint; Motion to Dismiss at ¶ 3.

⁸ See Exhibit B to Motion to Dismiss (Trans. ID 35987597).

Provisions of the Lease were not applicable.⁹ There is no dispute that the provision which would have provided for a personal guarantee was eliminated by Glenwood from the final version of the Lease executed by the parties. Gilliland and Hawkins were unaware that Daybreak was not duly incorporated at the time they executed the Lease on behalf of Daybreak.¹⁰

III. Discussion

Glenwood argues that in order to escape personal liability under these circumstances, Gilliland and Hawkins must show they made a *bona fide* effort to form the corporation and made colorable attempts to comply with statutory requirements. Glenwood argues the record does not support such a finding.¹¹ Glenwood claims that discovery is necessary to determine what steps, if any, Defendants took to form a corporation.¹² In order to establish a *de facto* corporation, Glenwood argues Gilliland and Hawkins must show: “(1) there is a special act or general law under which such a corporation may lawfully exist; (2) a *bona fide* attempt to organize under the law and colorable compliance with the

⁹ See Motion to Dismiss at ¶ 3; Exhibit B to Motion to Dismiss; Initial Draft of the Lease Agreement attached at Exhibit C to the Motion to Dismiss (Trans. ID 35987597).

¹⁰ See Motion to Dismiss at ¶ 4 (“...it was not until the Complaint in this action was served...that any of the Defendants had any knowledge...that, due to an unknown and unintended oversight, Daybreak was (apparently) never formally incorporated...Defendants had always believed in good faith that Daybreak had been duly incorporated...”).

¹¹ See Plaintiff’s Response to Motion to Dismiss at ¶ 1 (Trans. ID 36812682).

¹² *Id.*

statutory requirements; and (3) actual use or exercise of corporate powers in pursuance of such law and attempt at organization....”¹³

The Court is unable to ascertain whether there was a *bona fide* attempt to incorporate, and colorable attempts to comply with Delaware General Corporation law. Because the Court requires additional facts in order to determine whether the Defendants are individually and personally liable for the alleged breach of the Lease, the Court is converting the Motion to Dismiss to a Motion for Summary Judgment and instructing the parties to engage in the necessary discovery.¹⁴

WHEREFORE IT IS HEREBY ORDERED THAT the Motion to Dismiss is converted into a Motion for Summary Judgment and deferred until completion of the necessary discovery.

Jan R. Jurden, Judge

¹³ *Id.* at ¶ 5 (citations omitted).

¹⁴ *Ramirez v. Murdick*, 948 A.2d 395, 397 (Del. 2008) (“The Superior Court converted the motion to dismiss to a motion for summary judgment since matters outside the pleadings needed to be considered.”).