

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

84 LUMBER COMPANY,)
Plaintiff,)
v.) C.A. No. S08L-11-014 RFS
)
JEAN S. DERR, SHANE M. BRICE)
and BRICE BUILDERS, INC.)
Defendants.)
)
AND)
)
SHANE M. BRICE and BRICE)
BUILDERS, INC.)
Third Party Plaintiffs,)
)
v.)
)
MEDICUS HIGHT,)
Third Party Defendant.)

MEMORANDUM OPINION

Plaintiff's Motion for Summary Judgment. Denied.
Defendant Brice's Motion for Summary Judgment. Denied.

Submitted Date: July 22, 2010
Decided Date: July 29, 2010

Michael C. Heyden, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Joseph C. Raskauskas, Esquire, Bethany Beach, Delaware, Attorney for Defendant
Jean S. Derr.

Dean A. Campbell, Esquire, Georgetown, Delaware, Attorney for Defendants
Shane M. Brice and Brice Builders, Inc. Stanton.

STOKES, J.

Pending before me are cross motions for summary judgment filed by Plaintiff 84 Lumber (“84 Lumber”) and Defendant Shane M. Brice (“Brice”). The case involves a mechanics lien and breach of contract brought by 84 Lumber against the real property of Defendant Jean Derr (“Derr”) and Defendant Brice Builders, Inc. (“Builders”), respectively. Brice, the individual, is named in the suit as the personal guarantor of the debts of Builders. The mechanics lien is not currently under consideration. For the reasons explained below, the cross motions are denied.

Facts

As alleged in the Complaint, Builders purchased \$17,722.93 worth of materials from 84 Lumber. Of this amount, \$7,689.59 was for materials to be used on the Derr residence, located at 19 W. Atlantic Street, Fenwick Island, Delaware.¹ These purchases were made during July 2008. Brice denies liability for the claim, asserting that a third party, Defendant Medicus Hight (“Hight”) charged the materials to Brice’s account without authority to do so. 84 Lumber allowed the charges. There is no written instrument or other record evidence to show that Hight was Brice’s agent, but 84 Lumber asserts that Hight was Brice’s ostensible agent.

In his deposition, Brice stated that he never authorized Hight to act on his behalf in any capacity. Brice gave Hight the siding work on some of his custom-built houses. From time to time, Hight used or rented Brice’s forklift and dump trailer imprinted with

¹The remaining \$10,033.34 is apparently the alleged amount due on a related matter that is not before the Court at this time.

Builders' logo. According to 84 Lumber, Hight was present at the construction site when the materials in question were delivered. In the Third Party Complaint, Brice claims that Hight committed fraud by charging materials to Brice's account without his permission or knowledge.

In January 1989, Brice began the operation of a contracting business as a sole proprietorship. Brice's credit application with 84 Lumber, the instrument which 84 Lumber relies upon as a guarantee for the debt in question, is dated April 10, 1999. The application was approved by 84 Lumber on April 14, 1999. Builders was incorporated June 21, 1999, with Brice as the sole shareholder. The credit application was not modified following the incorporation of the business, nor was a new instrument prepared. Near the end of 2006, Brice finished his last house. Builders ceased operation due to an accident which hospitalized Brice and disabled him for some period of time. He was also going through a divorce.

Builders did no business from late 2006 through 2009, aside from small jobs such as replacing handrails. Brice subcontracted some minor jobs to two men who had worked as his foremen, Herb Stevens and Donny Swartley. Brice maintained that even on these minor jobs, he always placed the materials orders with 84 Lumber. Brice testified that at this time, he put a freeze on his credit account with 84 Lumber. He had had trouble with unauthorized charges made by either his stepson or his son-in-law, both terms being used in his deposition. Brice told Craig Nielander, the salesman he dealt with at 84 Lumber,

that no one could put anything on his account without him being present in the store or without him sending over a purchase order number.

Brice testified at his deposition that Nielander told him that Hight made the disputed purchases and that he had told Nielander that he was going to sell some property to pay off the debt.

84 Lumber produced numerous delivery tickets and invoices, but none was signed by Brice. No signed purchase orders or delivery tickets were produced. Derr produced several checks made payable to Hight, but no contracts with or checks to Brice or Builders. 84 Lumber sent the disputed invoices to Brice's prior address in Georgetown, Delaware where he lived until he got divorced in 2006 and closed his business. He then moved to Frankford, Delaware, and informed Nielander of his new address. Nine months later he moved to Ocean View, Delaware, where he has resided ever since. Brice testified that he provided his Ocean View address to Nielander. Brice denied having received the invoices in question. The record shows that the disputed invoices were sent to the Georgetown address.

84 Lumber filed its Complaint for a mechanics lien and breach of contract on November 7, 2008. As of the date of this decision, Derr has not answered the Complaint, and service has not been made on Hight.

The Parties' Contentions

Brice argues first that Delaware's UCC statute of frauds, 6 *Del. C.* § 2-201(1), precludes the claim that Brice is liable for Builders' corporate debts. Brice contends that he signed the credit application in his personal capacity as the sole proprietor of Brice Builders and prior to the formation of the corporation. Brice asserts that none of the three exceptions to the writing requirement set forth in § 2-201(3) applies.

Second, Brice contends that if the Court finds that he is liable for the Builders' debt, there is no writing to satisfy the statute of frauds for a personal guarantee, as required by 6 *Del. C.* § 2714(a). Brice asserts that the only document produced by 84 Lumber is the credit application signed by Brice on behalf of the sole proprietorship prior to formation of the corporation.

In its Answer, 84 Lumber argues that the credit application is a writing that satisfies the statute of frauds because it is signed by the parties to be charged, that is, Shane Brice and Brice Builders, the sole proprietorship. 84 Lumber asserts that the goods in question were "received and accepted," in conformity with 6 *Del. C.* § 2-201(3)(c), thereby falling within the statute of frauds.

In its cross claim for summary judgment, 84 Lumber argues that Hight was Brice's ostensible agent because Hight occasionally used Brice's equipment and the equipment had Brice's business name on it.

In response, Brice argues that 84 Lumber has not produced: (1) a writing signed by

Brice as President of Brice Builders, Inc., (2) a credit application for Brice Builders, Inc., (3) a signed writing whereby Brice guaranteed the debts of Brice Builders, Inc., (4) a writing signed by Brice authorizing Hight to place orders to Brice's account; (5) a single affidavit to counter any of the facts stated in Brice's deposition; (6) any evidence to contradict Brice's position that 84 Lumber knowingly sent the invoices to the wrong address; (7) any evidence that Brice knew Hight was charging materials to Brice's account; (8) any evidence that Hight was authorized to charge to Brice's account; and (9) any evidence that Hight was held out by Brice as someone with authority to charge to Brice's account.

Finally, Brice argues that section 2-201(3)(c) does not apply to him because 84 Lumber has produced no evidence that the goods were "received and accepted" by Brice or his agent.

Standard of Review

A motion for summary judgment will be granted only when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law.² When opposing parties make cross motions for summary judgment, neither party's motion will be granted unless no genuine issue of material exists and one of the parties is entitled to judgment as a matter of law.³ If it seems desirable to inquire more thoroughly into the

²*McKesson Corp. v. Derdiger*, 793 A.2d 385 (Del. Ch. 2002).

³*Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742 (Del. 1997).

facts in order to clarify the application of the law, summary judgment will not be granted.⁴

Discussion

Based on the parties' contentions, two issues are now before the Court. The first issue is whether this case falls within the scope of the Uniform Commercial Code (UCC) Statute of Frauds pursuant to 6 *Del. C.* § 2-201(3)(c).⁵ The second issue is whether Brice's personal guaranty is a continuing obligation that was not revoked by the incorporation of Brice's business, pursuant to the 6 *Del. C.* ch. 27 Contracts Statute of Frauds set forth in § 2714(a).

UCC Statute of frauds. The UCC statute of frauds set forth in 6 *Del. C.* § 2-201(3) provides in part as follows:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

It is uncontested that the materials in question were goods within the meaning of the UCC. It is also uncontested that the goods were not "received and accepted" by Brice. The next questions are whether Hight accepted the goods and, if so, whether he was acting as Brice's agent or apparent agent. If the answers to both these questions is

⁴*Myers v. Nicholson*, 192 A.2d 448 (Del. 1963).

⁵The case does not fall within 6 *Del. C.* § 2-201(a) because the credit application does not reflect the "quantity of goods shown in such writing."

affirmative, the provisions of § 2-201(3)(c) are met, and the case falls within the scope of the UCC statute of frauds.

Brice testified at his deposition that he never authorized Hight to act as his agent. He also testified that in 2006 he instructed Craig Nielander of 84 Lumber to freeze his account and not to allow any charges to his account without Brice's direct authority. He had not lifted the freeze at the time the disputed charges were made in 2008. In reply, 84 Lumber argues that Hight was using Brice's equipment which was imprinted with Brice's business logo and that Hight was present at the job site at the time of delivery.

There is no evidence of record that shows actual agency. Thus, the question becomes one of apparent agency.⁶ The Restatement (Third) of Agency indicates that apparent agency exists when:

One who represents that another is his servant or another agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by a lack of care or skill of the one appearing to be a servant or other agent as if he were such.⁷

Because this definition is more suited to negligence cases, the Court also refers to the definition of apparent authority in the Restatement (Third) of Agency § 3.03:

⁶The Court notes that although 84 Lumber uses the phrase "ostensible agent," Delaware courts favor the phrase "apparent agency" or "apparent authority." The former phrase is not used in the Restatement (Second) of Agency.

⁷Restatement (Second) of Agency § 267 (cited in *Fulton v. Quinn*, 1993 WL 19674 (Del. Super.)).

Apparent authority. . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third person reasonably believes the actor to be authorized and the belief is traceable to the manifestation.⁸

Neither party has adequately addressed the elements of apparent authority. 84

Lumber has not provided an affidavit in response to Brice's testimony that he never authorized Hight to act as his agent or made any manifestation of such authority. 84

Lumber asserts only that Hight used equipment that belonged to Brice and that had Brice's company logo imprinted on it. On this slim record, the arguments as to Hight's apparent agency or apparent authority raise questions of material fact that must be answered at trial.

The effect of incorporation on Brice's personal guaranty. The next issue is whether the act of incorporation revoked Brice's personal guaranty for the corporate debts of Builders, pursuant to 6 *Del. C.* § 2714(a). No relevant Delaware case law was found. Consequently, other jurisdictions must be considered. In *NEBCO, Inc. v. Adams*,⁹ the Nebraska Supreme Court held that a guarantor, who had guaranteed the debts of his sole proprietorship, was liable for debts that the business incurred after it was incorporated. The court reasoned that the guaranty did not specify a definite duration of time and was therefore a continuing obligation. Further, the court found that the incorporation did not

⁸Restatement (Third) of Agency § 3.03 (cited in *Nichols v. Lewis*, 2008 WL 2253192 (Del. Ch.)).

⁹704 N.W.2d 777 (Neb. 2005).

change the relationship between the parties, the principal continued to control the business after incorporation, and there was no resulting change in the risk he had undertaken as guarantor of the business.¹⁰ Other courts have used a similar analysis.¹¹

This Court finds the reasoning of *NEBCO* to be instructive. That is, Brice's obligation under his personal guaranty will survive the incorporation of the business if certain facts are found. Of course, if there is a continuing obligation, there is no statute of frauds problem. The guaranty in the credit application provides in pertinent part as follows:

By signing below I hereby certify that I am a principal of the above business, and I do personally guarantee this account and payment of any sums due by the above-named business. . . .

Thus, as in *NEBCO*, the guaranty in this case does not specify a definite duration of time, and it therefore creates a continuing obligation on Brice's part. Next, it appears that the relationship between Brice and 84 Lumber did not materially change, although this question needs clarification. It also appears that Brice continued to control the business following incorporation.

¹⁰*Id.* at 782-83.

¹¹*Bernardi Bros. v. Great Lakes Distributing, Inc.*, 712 F.2d 1205 (7th Cir. 1983) (holding that incorporation and name change of debtor were not material changes in loan relationship so as to justify releasing guarantor from its guaranty obligations); *Raynor Manufacturing Co. v. Raynor Door Co., Inc.*, 2010 WL 744801 (Kan.App.) (affirming trial court's granting of summary judgment that personal guarantor was not released from his obligation after incorporation where guaranty clearly created a continuous obligation).

The record does not show whether Brice's risk increased after incorporation. That is, it may be inferred that Brice expected his business to grow, but inferences do not suffice on summary judgment. While the record suggests that his business flourished until late 2006, the record also shows that the business operated in a minimal fashion from late 2006 through 2009. The record must be expanded at trial so that a determination can be made as to whether Brice's risk increased when he incorporated Builders.

Conclusion

Considering the foregoing, Brice's motion for summary judgment is **DENIED**, and 84 Lumber's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge