IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

A.G. BARR P.L.C.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02C-09-120-JRJ
	)	
AGRIBUSINESS PARTNERS INTERNATIONAL, L.P. and AGRIBUSINESS MANAGEMENT COMPANY L.L.C.,	)	
	)	
Defendant.	)	

Date Submitted: November 25, 2002
Date Decided: April 14, 2003

O R D E R

Upon Defendant's Motion to Dismiss – **DENIED**

Donald E. Reid, Esquire and James G. McMillan, Esquire, Morris, Nichols, Arsht & Tunnell, 1201 North Market Street, Wilmington, Delaware 19899, for Plaintiff.

Jeffrey L. Moyer, Esquire, Richards, Layton & Finger, P.A., One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899, for Defendants.

JURDEN, J.

Upon consideration of Defendants Agribusiness Partners International, L.P.'s ("API") and Agribusiness Management Company L.L.C.'s ("AMC") motion to dismiss, it appears to the Court that:

1. Plaintiff A.G. Barr p.l.c. ("A.G. Barr") is a United Kingdom company with its principal place of business in Scotland. A.G. Barr is engaged in the manufacture, distribution and marketing of branded carbonated soft drinks.[1]

2. Defendant API is a Delaware limited partnership with its principal place of business in Nebraska. API is an investment partnership that invests in the agribusiness and food industries in the countries of the former Soviet Union. The sole general partner of API is C.I.S. Management Company L.L.C., an affiliate of America First Companies.[2]

3. Defendant AMC is a Delaware limited liability company with its principal place of business in Nebraska. AMC is the investment manager for API and a subsidiary of America First Companies.[3]

4. KLP Soft Drinks Limited ("KLP") is a Cypriot company with its principal place of business in Moscow, Russia. KLP is engaged in the business of

[1] Pl.'s Compl. ¶ 1.

[2] *Id.* ¶ 2.

[3] *Id.* ¶ 3.

bottling and distributing soft drinks. API is the majority stockholder of KLP and, on information and belief, controls the management of KLP in Moscow.[4]

5. According to the Complaint, in July 1998, A.G. Barr began distribution of soft drinks in Russia through a franchise agreement with KLP with financing provided by API. A.G. Barr alleges that it supplied soft drink concentrate to KLP for processing, bottling and distribution in Russia.[5]

6. As of October 5, 1999, A.G. Barr alleges that KLP owed A.G. Barr an outstanding balance of $297,877 in accordance with the franchise agreement. A.G. Barr contends it advised KLP that no further orders of concentrate would be shipped until the outstanding balance was cleared.[6]

7. A.G. Barr maintains that it received a letter dated October 7, 1999 from AMC's President and CEO, Robert Peyton, stating, in part:

> those past due receivables will be paid as quickly as possible. KLP management has promised the Fund [API] that they will be cleaned up by the end of the calendar year. If for any reason they are not, our fund [API] will infuse the necessary additional capital to do so.[7]

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[4] *Id.* ¶ 4.

[5] *Id.* ¶ 5.

[6] *Id.* ¶ 6.

[7] *Id.* ¶ 7 (contents in brackets added by A.G. Barr).

8. A.G. Barr alleges that it resumed shipment of soft drink concentrate to KLP in return for AMC's and API's alleged guarantee.[8]

9. A.G. Barr further alleges that as of December 31, 1999, KLP's debt was $460,470.10 and that when KLP requested shipment of additional concentrate, A.G. Barr agreed on the condition that KLP would prepay for all additional shipments. A.G. Barr maintains that all orders beginning in April 2000 were shipped pre-paid and additional payments were applied to reduce KLP's debt to A.G. Barr.[9]

10. Based on the foregoing allegations, A.G. Barr avers that AMC and API materially breached the terms of the October 7, 1999 letter and that AMC and API are liable to A.G. Barr for $354,362.18, the outstanding balance owed pursuant to the franchise agreement.[10] A.G. Barr requests entry of judgment against both AMC and API for $354,362.18, plus interest and costs, and such other and further relief the Court deems just or equitable.

11. For the purpose of deciding a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint must be accepted

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[8] *Id.* ¶ 8.

[9] *Id.* ¶ 9.

[10] *Id.* ¶¶ 13, 14.

as true.[11] The test for sufficiency of a complaint challenged by a motion to dismiss is "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[12]

12. A.G. Barr concedes for purposes of its opposition to Defendants' motion to dismiss that Nebraska law applies to the substantive claims of the Complaint.[13]

13. Pursuant to Nebraska law, "a guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance."[14] A guaranty is essentially a

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[11] *Crowhorn v. Nationwide Mut. Ins.*, 2001 WL 695542, at *2 (Del. Super.) (citing *Spence v. Funk*, 369 A.2d 967, 968 (Del. 1978)). *See also* 38 AM. JUR. 2D *Guaranty* §114 (1999) which states:

> [t]he general rules of pleading in contract actions govern the pleadings of the parties in an action to enforce a contract of guaranty. To state a valid claim on an unconditional guaranty of payment, a creditor must allege the existence of the guaranty delivered to the creditor securing repayment of a debt which is in default. When the guaranty is conditional, such as a guaranty of collection, the creditor should also allege the occurrence or waiver of all conditions to the contract of guaranty. It has been held that it is not necessary for the creditor to allege consideration for the guaranty, as each element of contract formation need not be alleged, although there is contrary authority. It is not necessary to incorporate by reference the terms of a guaranty attached to the complaint, or to specifically refer to the attached guaranty as an exhibit.

[12] *Crowhorn,* 2001 WL 695542, at *2.

[13] Pl.'s Opp'n Defs.' Mot. Dismiss at 3 n.1.

[14] *Northern Bank v. Dowd*, 562 N.W.2d 378, 379 (Neb. 1997). Although some courts draw a distinction between the term "guarantor" and "surety," Nebraska courts have used the terms

contract by which the guarantor promises to pay if the principal debtor defaults.[15] "A guaranty is interpreted using the same general rules as are used for other contracts."[16]

14. "Agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further resulting from another's consent to so act."[17] To determine if an agency relationship exists one must look to the facts underlying the relationship of the parties regardless of the words or terminology used by the parties to describe the relationship.[18] To be exempt from liability upon an instrument executed within the scope of the agency, "the agent must not only name his or her principal, but must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If the agent expresses this, the principal is bound and the agent is not."[19] Absent an

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interchangeably. *Id.* (citations omitted). "A guaranty…is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than primary or original." *Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.*, 350 N.W.2d 1, 4 (Neb. 1984).

[15] *Northern Bank,* 562 N.W.2d at 379.

[16] *Spittler v. Nicola*, 479 N.W.2d 803, 807 (Neb. 1992).

[17] *Landmark Enterprises, Inc. v. M.I. Harrisburg Assoc.,* 554 N.W.2d 119, 122 (Neb. 1996).

[18] *Id.*

[19] *780 L.L.C. v. DiPrima*, 611 N.W.2d 637, 644 (Neb. Ct. App. 2000).

"agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or incur personal responsibility," an agent who contracts on behalf of a disclosed principal is not liable to the other contracting party.[20]

15. Accepting all well-pleaded facts as true, the Court finds that there exists a reasonably conceivable set of circumstances under which A.G. Barr could recover from AMC for breach of a contract of guaranty under Nebraska law. In paragraphs 6 and 7 of its complaint, A.G. Barr alleges that after A.G. Barr advised KLP that it would make no further shipments to KLP, AMC sent a letter dated October 7, 1999 to A.G. Barr promising to answer for the debts of KLP. Specifically, A.G. Barr maintains that the language used by AMC in the October 7, 1999 letter promises that "A.G. Barr 'will be paid,'" guaranteeing KLP's debt to A.G. Barr.[21] In paragraph 8 of its complaint, A.G. Barr avers that, in return for the guarantee, it resumed shipments to KLP. Furthermore, in paragraphs 11 and 12, A.G. Barr alleges that AMC has breached the promise stated in October 7, 1999 letter by refusing to make payment to A.G. Barr on the debt owed by KLP.

16. The Court notes that although A.G. Barr has properly alleged a breach of contract of guaranty with regard to the promise that A.G. Barr "will be paid,"

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[20] *Id.*

[21] Pl.'s Opp'n Defs.' Mot. Dismiss at 3; Pl.'s Compl. ¶ 7.

A.G. Barr has not alleged in its complaint a cause of action for either breach of contract or breach of guaranty regarding the promise to "infuse the necessary additional capital."[22]

17. The Court finds that there exists a reasonably conceivable set of circumstances under which A.G. Barr could recover from AMC and API under a theory of agency for the breach of guaranty under Nebraska law. A.G. Barr maintains that it is reasonably conceivable based on the relationships between AMC, API and KLP as alleged in paragraphs 2, 3, 4 and 5 of the Complaint that,

> API is simply an investment fund, a pool of money. AMC manages API; that is, AMC controls API. AMC is, thus, promising that it will cause these debts to be paid out of funds that are part of the API funds.[23]

Furthermore,

> AMC controls API, and API in turn is the majority stockholder of KLP, [and] that it's a fair reading of [the October 7, 1999 letter] that

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[22] *See* Hr'g Tr. (Nov. 25, 2002) at 43-44.

> MR. MCMILLAN: Just, Your Honor, that as I said before, even if it's not a guarantee, there's still another promise in here. That's the promise to infuse the necessary capital.
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> THE COURT: I don't disagree with you there, but you haven't alleged that they violated that. So the complaint is defective insofar as you haven't alleged that they didn't uphold that promise.
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> …
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> I don't have any allegation that they failed to infuse capital. What I have is that KLP failed to pay you, but you would have to amend the complaint to assert that.

Id.

[23] *Id.* at 29.

> AMC has the authority to cause API to pay; API has the authority to cause KLP to pay [a]nd Mr. Peyton is making a promise on behalf of API/AMC.[24]

The Court recognizes that A.G. Barr, when referring to "the Fund" and "our fund" in paragraph 7 of the Complaint, inserted "API" which could create an inference that A.G. Barr had notice that AMC was acting on behalf of API, however, it is reasonably conceivable that the insertion of API by A.G. Barr in its complaint suggests that A.G. Barr thought "AMC was acting on its own behalf to bind itself and that it had the authority to cause its 'fund' to answer for the debts of KLP."[25]

18. For purposes of deciding this motion, the Court, at this stage, makes no determination as to the validity or interpretation of the letter as a contract of guaranty.

For the foregoing reasons, Defendants' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[24] *Id.*

[25] Pl.'s Opp'n Defs.' Mot. Dismiss at 5.