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

CHESTNUT HILL PLAZA HOLDINGS CORP., a Delaware corporation,	)	**C.A. No. N10C-09-161 DCS**
Plaintiff,	)	
v.	)	
PARKWAY CLEANERS, INC., a Delaware corporation, DONALD R. CICCARONE, an individual, and SUSAN A. CICCARONE, an individual,	)	
Defendants.	)	

Submitted: February 8, 2011
Decided: May 17, 2011

Upon Defendants, Donald R. Ciccarone's and Susan A. Ciccarone's Motion to Dismiss - **DENIED**

MEMORANDUM OPINION

Appearances:

Brent C. Shaffer, Esquire and William E. Gamgort, Esquire, Wilmington, Delaware, Young Conaway Stargatt & Taylor, LLP, Attorneys for Plaintiff Chestnut Hill Plaza Holdings Corp.

Christopher J. Curtin, Esquire, Centreville, Delaware, MacElree Harvey, Ltd., Attorney for Defendants Parkway Cleaners, Inc., Donald R. Ciccarone, and Susan A. Ciccarone.

STREETT, J.

The instant matter involves breach of contract and environmental indemnification actions brought in 2010 by a commercial lessor against a dry cleaning business and its officers in their individual capacity, arising from a commercial lease entered into on October 1, 1999. The lessees have filed a Motion to Dismiss the lessor's complaint against them as individuals.

FACTS

Donald R. Ciccarone and Susan G. Ciccarone (collectively "the Ciccarones") are co-owners and, respectively, president and secretary of a dry cleaning business, Parkway Cleaners, Inc. ("Parkway"). Chestnut Hill Plaza Holdings Corp. ("Chestnut Hill") is a Delaware corporation that owns Chestnut Hill Plaza, a shopping center in Newark, Delaware. In 1989, the Ciccarones began leasing a commercial space for their dry cleaning business in Chestnut Hill Plaza. In 1999, the Ciccarones entered into a new lease with Chestnut Hill for a different commercial space within Chestnut Hill Plaza.

The new lease ("the 1999 lease") commenced on October 1, 1999 and was scheduled to expire on September 30, 2004. The 1999 lease was signed by Chestnut Hill's president (landlord) and by the President and Secretary of the Corporation, respectively Donald Ciccarone and Susan Ciccarone (tenants). The space for signature by individuals and the remainder of the signature page were left blank.

The1999 lease established terms for payments of rent, property maintenance, taxes, and other specified expenses. The 1999 lease forbade Parkway from using any hazardous substance at or near the Chestnut Hill Plaza premises. The 1999 lease also included two optional five-year renewal terms, which were exercised, thus extending the 1999 lease through September 30, 2014.

On March 1, 2004, Parkway corporation was declared "inoperative and void" for failure to pay its state franchise taxes.[1] However, Parkway continued to be in operation and checks continued to be issued from the Parkway checking account through 2009.[2]

In January 2006, environmental tests conducted at the Chestnut Hill Plaza shopping center revealed that the property was contaminated with PCE, a dry cleaning chemical. Parkway is the only dry cleaning business in Chestnut Hill Plaza.[3] Chestnut Hill, in conjunction with the Delaware Department of Natural Resources and Environmental Control, took steps to have the PCE contamination removed and incurred expenses in connection with the cleanup. Around this time, Parkway also fell behind in rent payments.

On June 16, 2010, Chestnut Hill wrote to Parkway and the Ciccarones and notified them of certain payment defaults under the 1999 lease and gave them ten days to cure the defaults.[4] The letter was received on June 23, 2010.

On July 8, 2010, Chestnut Hill brought a claim for possession of the Parkway premises in the Delaware Justice of the Peace Court. On June 28, 2010, Chestnut Hill returned $4,000 offered by Parkway and on July 19, 2010, Chestnut Hill again rejected Parkway's offer of $500.

[1] The record, at this point, is silent as to whether the forfeiture was inadvertent and whether the Ciccarones were aware of it.

[2] The extent of the actions taken by the Ciccarones following Parkway's forfeiture in 2004 remains unclear, but checks were issued from the Parkway corporate account and signed by Susan Ciccarone dated November 17, 2008; February 2, 2009; as well as two additional checks from 2009 whose exact dates are illegible. Plaintiff's Response to Defendants' Motion to Dismiss, Ex. D.

[3] It should be noted that the source of the contamination is in dispute. Chestnut Hill alleges that the cleaners caused the contamination, however the Ciccarones state that the environmental hazard was overstated, was caused by a contractor, and/or was caused by a previous tenant who operated a furniture finishing business in Chestnut Hill Plaza.

[4] The letter specifically enumerates 32 defaults occurring on or after January 1, 2010 totaling $20,660.55. The letter also notifies the Ciccarones of additional past due rents and other fees from the years prior to 2010 which total $49,308.61. The letter only requests that the Ciccarones cure the defaults on or after January 1, 2010; however, it states that Chestnut Hill reserves the right to pursue all other past due payments as well.

On August 10, 2010, Parkway submitted a payment plan. Chestnut Hill rejected this offer, too. Parkway voluntarily surrendered the premises to Chestnut Hill on August 30, 2010.

Chestnut Hill then filed the instant action against Parkway and the Ciccarones on September 21, 2010 seeking damages for unpaid rent as well as indemnification for the cleanup expenses incurred by Chestnut Hill when it removed the PCE contamination from Chestnut Hill Plaza.

On November 22, 2010, the Ciccarones moved to dismiss the claim against them as individual defendants. Chestnut Hill filed a response to the Ciccarones' Motion to Dismiss on January 11, 2011. The Court heard oral argument on the Motion to Dismiss on January 19, 2011. In support of their motion, the Ciccarones filed a supplemental letter with the Court on February 7, 2011. Chestnut Hill filed its own letter in response on February 8, 2011. Additionally, as of February 28, 2011, Parkway's corporate charter has been revived.

THE PARTIES CONTENTIONS

The Ciccarones argue that they are not personally liable for Parkway's debts because they never individually guaranteed the 1999 lease and because Chestnut Hill's claim for personal guaranty liability does not satisfy the Statute of Frauds. The Ciccarones contend that the original 1989 lease agreement did not require guarantors and that while the 1999 lease mentions guarantors, they signed the 1999 lease only as corporate officers (not as individual guarantors). Therefore, the Ciccarones assert, the guaranty referenced in the 1999 lease does not satisfy the Statute of Frauds as to them in their individual capacity. Indeed, the signature page of the 1999 lease, which bears their signatures as officers of the corporation, has left blank the space for signatures of the "GUARANTOR(S)." The Ciccarones contend that this is proof of their intent

to sign the 1999 lease only in their corporate capacity, and therefore, that Chestnut Hill is barred by the Statute of Frauds from recovering against them personally for Parkway's debt.

Alternatively, the Ciccarones contend that the "personal benefit" exception to the Statute of Frauds is inapplicable to this case.[5] They argue that they are not individually liable for Parkway's debts because, although Parkway's corporate charter was voided in 2004, it was recently reinstated. They contend that all actions that they took in Parkway's name during the 2004-2011 forfeiture are now valid, and, therefore, they can no longer be accused of reaping personal benefit from the corporation during that time. Thus, the Ciccarones conclude that Chestnut Hill's remedy is only against the Parkway corporation.

Chestnut Hill argues that the Ciccarones individually guaranteed the 1999 lease and that the guaranty satisfies the Statute of Frauds, making the Ciccarones personally liable for Parkway's debts. In support thereof, Chestnut Hill cites several sections within the 1999 lease that reference the Ciccarones as guarantors, arguing that these references, when combined with the Ciccarones signatures on the last page of the 1999 lease, evidence a clear intent that the Ciccarones are liable as individuals for the corporation's debts. Chestnut Hill contends that the Ciccarones could have struck the portions of the 1999 lease that reference them as guarantors before signing it if it was truly their intention not to personally guarantee Parkway's debts. Additionally, Chestnut Hill points out that the absence of a signature line before the word "GUARANTOR(S):" on the signature page of the 1999 lease suggests that "GUARANTOR(S):" references the Ciccarones' signatures.

Alternatively, Chestnut Hill argues that the Ciccarones are liable for Parkway's debts under the "personal benefit" exception to the Statute of Frauds because Parkway corporation was

[5] "An agreement is not within the statute of frauds … where the promisor receives a personal benefit." *Borish v. Graham*, 655 A.2d 831, 834 (Del. Super. 1994)(citing *Woodcock v. Udell,* 48 Del. (7 Terry) 69, 75 (Super. 1953)).

declared void in 2004 and remained void until 2011. During that period of forfeiture, Chestnut Hill maintains that the Ciccarones operated Parkway corporation for their personal benefit. Chestnut Hill contends that even if Parkway has been reinstated, the Statute of Frauds does not apply if the Ciccarones benefitted between 2004-2011 from the 1999 lease agreement in a capacity other than as officers of the corporation.[6] Chestnut Hill asserts that since it is unclear whether the Ciccarones received benefit in a non-corporate capacity from 2004-2011, additional discovery is needed to establish the flow of funds. Consequently, Chestnut Hill argues that the Motion to Dismiss is premature.

STANDARD OF REVIEW

When reviewing a Rule 12(b)(6) motion to dismiss, all well-pled allegations must be accepted by the Court as true.[7] A complaint will not be dismissed on a motion to dismiss if the plaintiff presents any conceivable set of circumstances susceptible of proof to support its claim under the complaint.[8] The Court will only dismiss a complaint that is clearly without merit.[9]

DISCUSSION

There are two issues before the Court. The first issue is whether the language of the 1999 lease and the Ciccarones' signatures on the 1999 lease could establish that the Ciccarones personally guaranteed Parkway's debts in satisfaction of the Statute of Frauds. The second issue

[6] At this time, Chestnut Hill does not purport to know the specific ways in which the Ciccarones personally benefited from the Parkway corporation following the 2004 forfeiture. However, Chestnut Hill draws the Court's attention to the fact that, after the 2004-2011 forfeiture, the Ciccarones continued to conduct business as Parkway Cleaners, presumably receive income, hold out Parkway as a valid corporation, and issue checks from the corporate checking account. Chestnut Hill argues that further discovery would flesh out how the Ciccarones operated Parkway and how they used the corporate funds during that time.

[7] *Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *4 (Del. Super. Sept. 14, 2010) (citing *Precision Air Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995)).

[8] *Id.* (citing *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 227 (Del. 1982)).

[9] *Charlton v. Gallo*, 2009 WL 1639536, at *1 (Del. Super. May 29, 2009) (citing *Diamond State Telephone Co. v. University of Delaware,* 269 A.2d 52, 58 (Del.1970)).

is whether the Ciccarones benefited personally from the 1999 lease after Parkway lost its corporate status.

Whether the Ciccarones Personally Guaranteed Parkway's Debts In Satisfaction of the Statute of Frauds.

It is settled law that an officer of a corporation is not personally liable for corporate debts as long as they do not purport to bind themselves individually.[10] The Ciccarones contend that they are not individually liable for Parkway's debts because they only signed the 1999 lease in their capacities as corporate officers, not as individuals. Therefore, they assert that the Statute of Frauds bars them from being held individually liable for Parkway's debts. Chestnut Hill argues that because the 1999 lease uses guarantee language in two places and because the 1999 lease is signed at the end by the Ciccarones, it is reasonable to infer that the Ciccarones personally guaranteed the corporation's debts in satisfaction of the Statute of Frauds.

The Ciccarones cite *Kent General Hospital, Inc. v. Russell*, in which this Court held that a purported guarantor had not assumed liability to answer for his wife's debt where he did not sign any of the documentation referencing him as his wife's guarantor.[11] The court found that the plaintiff hospital had identified the defendant as a guarantor as a matter of its own internal policy and had asked the defendant's wife to list the defendant as her guarantor in her own financial documents which the defendant never signed.[12] Relying on the court's decision in *Kent*, the Ciccarones argue that because the space for the signature of "GUARANTOR(S)" on the signature page of the 1999 lease was left blank and unsigned, this Court should find that they did not assume personal liability for Parkway's debts.

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[10] *Wallace ex. rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180-83 (Del. Ch. 1999).

[11] 1997 WL 524079, at *3 (Del. Super. July 14, 1997).

[12] *Id.*

The *Kent* decision is distinguishable from the present matter. In *Kent*, the defendant never signed *any* of the documentation assuming liability.[13] Here, both Donald and Susan Ciccarone have signed the 1999 lease document which makes reference to them as guarantors. Such evidence was entirely lacking in the *Kent* case.

The Ciccarones also rely on *Falco v. Alpha Affiliates, Inc.*, in which the Delaware District Court found that the defendant could be deemed personally liable for a lease debt because he had signed the guaranty line on the signature page of the lease with his name, the word "individually," and his social security number.[14] The Ciccarones contend that because such evidence is lacking in this case, the guarantee is unenforceable against them individually.

The Ciccarones interpret *Falco* too narrowly. The court in *Falco*, also faced with a motion to dismiss, emphasized that "the procedural posture of a motion to dismiss dictates the Court consider the possibility that [the plaintiff] may be able to hold [the defendant] liable as a guarantor because [the plaintiff] has put forward a set for facts in support of its claim which would entitle it to relief."[15] With that in mind, the court found that "as long as some guarantee language [was] written on the contract and signed by the person to be charged", the Statute of Frauds was satisfied for purposes of imposing guaranty liability on the defendant as an individual.[16] Here, while the Ciccarones did not sign the 1999 lease with the word "individually" beside their names or with their social security numbers, there is some guarantee language in the 1999 lease agreement and it is signed by the Ciccarones. This could potentially entitle Chestnut Hill to relief against the Ciccarones.

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[13] *Id.*

[14] *Falco*, *supra* note 6, at *7.

[15] *Id.* at 7.

[16] *Id.* at 8.

Chestnut Hill analogizes this case to *Citizens Bank v. Gupta*.[17] In *Gupta*, this Court found that even though the defendants had affixed their corporate seal beside their names on the signature page of the loan, they were nonetheless personally liable for the debts of their business because the entire loan document and the surrounding circumstances made it clear that the defendants had personally guaranteed the loan.[18] Relying on *Gupta*, Chestnut Hill argues that, in this case, the entire lease document shows that the Ciccarones assumed personal liability for Parkway's debts.

The facts of the *Gupta* case, too, are somewhat distinguishable. In *Gupta*, in addition to considering the document as a whole, the Court based its finding that the defendants had guaranteed their loan as individuals on the fact that the defendants, after signing the loan, sent a letter notifying the bank of their withdrawal of their personal guarantees of the loan and thus clearly understood that they had assumed individual liability for the debt.[19] Here, beyond the 1999 lease document itself, the Ciccarones did not take any other action that would evidence their awareness of their individual liability for Parkway's debts.

Delaware law holds that a contract of guaranty is "an agreement to pay the debt of another" in the event that the primary debtor defaults.[20] As such, it is governed by the Delaware Statute of Frauds. 6 *Del. C.* § 2714 states, in pertinent part, that an agreement to pay the debt of another is only enforceable if it is (1) "reduced to writing" and (2) "signed by the party to be

[17] 2004 WL 196524 (Del. Super. Aug. 26, 2004).

[18] *Id.* at *2.

[19] *Id.* at *1.

[20] *Falco v. Alpha Affiliates, Inc.*, 1997 WL 782011, at *5 (D.Del. Dec. 10, 1997) (citing *Jones Motor Co., Inc. v. Teledyne, Inc.*, 690 F.Supp. 310, 313 (D.Del. 1988)(citation omitted)).

charged therewith."[21] "[A] contract to pay the debt of another must … contain on its face enough to show that the person signing it was assuming that liability."[22]

Having considered the guidance offered by the *Kent*, *Falco*, and *Gupta* decisions, the Court finds that, in this case, the 1999 lease document as a whole could be interpreted to support the claim that the Ciccarones assumed individual liability for Parkway's debts. There are two references to guarantors in the body of the 1999 lease. Page 1 clearly states "Guarantor(s): Don and Susan Ciccarone." Page 16 further states that "Each guarantor shall be jointly and severally liable with Tenant for the payment and performance of Tenant's obligations under this Lease and extensions and renewals thereof." The document is also signed at the end by Donald and Susan Ciccarone. Thus, Chestnut Hill has satisfied its burden of presenting a conceivable set of circumstances under which the 1999 lease could be read to establish the Ciccarones' individual liability for the debts of Parkway in satisfaction of the Statute of Frauds.

Whether the Ciccarones Personally Benefited from the 1999 Lease in Satisfaction of an Exception to the Statute of Frauds.

The Ciccarones argue, alternatively, that they cannot be held personally liable for Parkway's debts under the personal benefit exception to the Statute of Frauds because they received no personal benefit from the 1999 lease. The Ciccarones further contend that because Parkway corporation was reinstated as of February 28, 2011, all actions that they took during the corporation's forfeiture from 2004-2011 are valid and are the exclusive liability of the corporation. Chestnut Hill asserts that it is unclear whether the Ciccarones personally benefited from the 1999 lease. Chestnut Hill argues that because Parkway's corporation was void in March 2004 and because the Ciccarones continued to operate Parkway Cleaners thereafter and

[21] 6 *Del. C.* § 2714 (a).

[22] *CBA Collection Services, LTD. v. Potter, Cross & Leonard, P.A.,* 1996 WL 527214, at *3 (Del. Super. Aug. 14, 1996) (quoting *Woodcock v. Udell,* 48 Del. (7 Terry) 69, 75 (Super. 1953)).

issued checks from Parkway's corporate account, the Ciccarones may have personally benefited from the 1999 lease making them personally liable for Parkway's debts.

The personal benefit exception to the Statute of Frauds holds that a contract is not within the Statute of Frauds where the promisor receives a personal benefit.[23] In summary, pursuant to the Statute of Frauds, an agreement to pay the debt of another must be in writing and signed by the guarantor in order for the guarantor to be held personally liable for the debt;[24] however, if the guarantor gains personal benefit for assuming liability for the debt, the Statute of Frauds does not apply, and the guarantor may be personally liable.[25]

Parkway corporation was declared inoperative and void in March 2004 for failure to pay state franchise taxes. There is evidence that, following the 2004 forfeiture, the Ciccarones continued to operate their dry cleaning business and issued checks from Parkway's corporate bank account. However, Parkway's corporate powers were restored as of February 28, 2011. Pursuant to 8 *Del. C.* § 312, this reinstatement validates the corporate status and corporate liability for all contracts and other matters undertaken by the Ciccarones during the time that Parkway's charter was inoperative valid.[26]

Nevertheless, pursuant to *Borish v. Graham*, it is still necessary to consider whether the Ciccarones have benefitted personally from the 1999 lease, even if their capacity as corporate

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[23] *Borish*, *supra* note 5.

[24] 6 *Del. C.* § 2714 (a).

[25] *Borish*, 655 A.2d at 834. The court, in *Borish*, also recognized that, under the doctrine of equitable estoppel, a defendant may be estopped from asserting the Statute of Frauds as a defense where the plaintiff agreed to the loan contract in reliance on the defendant's verbal promise to personally guarantee the loan. However, the *Borish* court ultimately found that estoppel did not apply in that case because there was no evidence that the defendant had verbally promised to personally guarantee the loan before plaintiff loaned the corporation money. Here, as in *Borish*, there is no evidence that the Ciccarones verbally promised to personally guarantee the lease with Chestnut Hill prior to the parties signing the 1999 lease.

[26] See *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968).

officers has been reinstated.[27] In *Borish*, which both parties have relied on, this Court found that the defendants were not personally liable for the corporation's debts within the exception to the Statute of Frauds because they did not benefit from the loan that they signed, other than in their capacity as corporate officers.[28] There, the court found that the proceeds of the loan were used for working capital purposes and did not in any way personally benefit the defendants or improve their status.[29] Thus, regardless of whether Parkway has been reinstated, if, upon losing the corporate status, the Ciccarones improved their status or benefited from the 1999 lease in any capacity other than as corporate officers, the Statute of Frauds does not apply and they could be found to have assumed liability for the Parkway's debts.

Here, it is unclear whether the Ciccarones received any personal benefit from the 1999 lease agreement with Chestnut Hill. Further discovery is needed. Since it is possible that the Ciccarones have benefitted personally from the 1999 lease, the Court finds that, regardless of whether the agreement satisfies the Statute of Frauds, Chestnut Hill has presented a conceivable set of circumstances which could support its claim that the Ciccarones assumed individual liability for the debts of Parkway.

CONCLUSION

Based on the foregoing, the Ciccarones' Motion to Dismissed is **DENIED**.

Judge Diane Clarke Streett

[27] *Borish,* 655 A.2d at 833-34.

[28] *Id.*

[29] *Id.*