IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ROBERT LYONS Defendant Below, Appellant,	)	
vs.	)	
DBHI, LLC, KURT T. BRYSON and RHONDA BRYSON Defendants Below, Appellees,	)	C.A. No. U607-12-063
vs.	)	
NUTTLE LUMBER COMPANY Plaintiff Below, Appellee.	)	

Submitted January 12, 2010
Decided January 27, 2010

James F. Waehler, Esquire, Attorney for Plaintiff
Donald L. Logan, Esquire, Attorney for Defendant Robert Lyons
Mark Sisk, Esquire, Attorney forDefendants Kurt T. & Rhonda Bryson
DBHI, LLC, unrepresented

DECISION ON MOTION FOR REARGUMENT

At the end of the trial held in this matter on December 16, 2009, the Court ruled from the bench, finding in favor of the Plaintiff against defendants DBHI, LLC and Kurt and Rhonda Bryson, but in favor of co-defendant Robert Lyons. Plaintiff subsequently filed a motion for reargument, asserting that the Court erred (1) in "*sua sponte*" raising the issue of consideration at the end of evidence; and (2) in finding for defendant on that issue since it is an affirmative defense and was not raised by defendant in his responsive pleading, as required by this Court's Civil Rule 8 (c).

FACTS

The Court found the following facts from the evidence: Plaintiff, a building supplies company, extended credit to DBHI, LLC, a construction company, for the

purchase of materials. It did so based upon, and after receipt of, a credit application filled out by DBHI on April 22, 2005. The Brysons, the principals of DBHI, signed personal guaranties contained on the DBHI credit application, agreeing to be personally liable for the debts of DBHI. Plaintiff performed credit checks on the signators and extended credit to DBHI for materials purchases in consideration of the application and guaranties.

In or about July, 2005, defendants the Brysons agreed to transfer ownership of DBHI to their employee Lyons. However, it appears from the evidence that Lyons never actually became vested in any ownership or equity of DBHI. Nonetheless, without any demand or other requirement made known by Plaintiff to DBHI or Lyons, on July 25, 2005 Lyons signed a copy of the original April, 2005 credit application on a blank guaranty line, which was faxed to Plaintiff. Lyons continued as an employee of DBHI until April, 2006. One or both of the Brysons continued to operate DBHI and do business with Plaintiff for some time thereafter. When DBHI failed to make payment on its account, Plaintiff brought this action against DBHI, and against the Brysons and Lyons as personal guarantors, seeking payment for purchases made after April, 2006.

DISCUSSION

The gravamen of Nuttle's claim against Lyons is that he signed the already-executed and approved credit application agreeing to be personally liable for the payment of charges to the DBHI account. Accordingly, Nuttle claims that Lyons breached that agreement and should be held liable for the remaining account balance, plus any financing charges that accumulated.

In order to prevail upon a breach of contract claim against Lyons, Nuttle was required at trial to establish the existence of a contract, the breach of an obligation

imposed by that contract, and resulting damages to Nuttle.[1] To prove the existence of a contract, Nuttle had to establish all of the necessary elements of a contract, including good and valuable consideration, by a preponderance of the evidence.[2] Sufficient consideration is a *prima facie* element of Nuttle's claim against Mr. Lyons. Nuttle therefore presumptively knew it had the burden of proof by a preponderance of evidence that the contract sued upon contained good and valuable consideration.

Based on the evidence and testimony presented at trial, the Court found that Lyons was not liable for damages because there was a lack of consideration to establish an enforceable contract. There was a lack of consideration between the parties because there was no proven additional consideration extended by Nuttle as a bargained-for exchange for the additional guaranty of Mr. Lyons. Moreover, the Court held that Lyons' guaranty signature was gratuitous in nature because Nuttle did not request to have the signature added, or otherwise inform the defendants that Lyons' personal guaranty was required to maintain the already-extended DBHI line of credit. There was no proven increase in the credit line, nor did plaintiff prove that it extended further credit to DBHI in consideration of Lyons' personal guaranty. Thus, the Court found there was no consideration whatsoever for Lyons' gratuitous promise.

Although the Court may have used the term "failure of consideration" when rendering its decision from the bench, it is clear from the Court's description of the circumstances surrounding the contract that it ruled there was a "lack of consideration" given as to Mr. Lyons.

There is a distinction between the terms "failure of consideration" and "lack of consideration."[3] "Failure of consideration occurs when the bargained-for consideration

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[1] *See VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).
[2] *Coreltto v. Morgan*, 89 A. 738, 739 (Del Super. Ct. 1914).
[3] *Hensel v. U.S. Electronics Corp.*, 262 A.2d 648, 651 (Del. 1970).

is not rendered by one of the parties, while lack of consideration refers to the complete absence of a bargained-for consideration."[4] In this matter, the Court found a lack of consideration due to the complete absence of consideration between the parties that rendered the "contract" unformed, and so unenforceable.

In its Motion for Reargument, Nuttle claims that the Court erred by "ruling that the affirmative defense of a 'failure of consideration' was dispositive with respect to the claims asserted against . . . Lyons." However, the Court made no such ruling. Court of Common Pleas Civil Rule 8(c) does indeed state that "a party shall set forth affirmatively…failure of consideration… and any other matter constituting an avoidance or affirmative defense" in its responsive pleadings. Lyons, indeed, did not raise failure of consideration as an affirmative defense in his pleadings or otherwise. However, the Court did not base its ruling upon that affirmative defense. Rather, it held that Nuttle did not establish the necessary elements of an enforceable contract, since it did not prove consideration.

Failure of consideration is included as an affirmative defense and required to be asserted under CCP Civil Rule 8(c), because it does not challenge the formation of a contract, but only subsequent performance by a party.[5] Conversely, a lack of consideration is not an affirmative defense, because a lack of bargained-for consideration is an argument that attacks the validity of the contract itself.[6] Thus, Lyons was not required to assert an argument for lack of consideration as an affirmative defense under CCP Civil Rule 8(c), and did not waive his right to argue lack of consideration at trial.

[4] *Baynard v. Jervey*, 1985 WL 21132, at *3 (Del.Ch. July 5, 1985).
[5] *Baynard*, 1985 WL 21132, at *3.
[6] *Id.*

Since the establishment of consideration for Lyons' guaranty promise is an essential element of the plaintiff's claim against Lyons, plaintiff cannot claim any surprise by the Court's *sua sponte* phrasing of the question. Lyons did assert in his answer that the plaintiff's complaint failed to state a claim upon which relief could be granted, which placed the plaintiff on notice that Lyons denied it could establish the elements of a contract claim. It was incumbent upon plaintiff, in its case in chief, to prove consideration for the guaranty promise by a preponderance of the evidence. After hearing the evidence, the Court found that plaintiff had failed to meet its burden of proof as to this element.

CONCLUSION

Plaintiff is incorrect in its assertion that the issue of consideration was barred from 'consideration' by this Court as an omitted affirmative defense. Likewise, Plaintiff was not deprived of "a meaningful opportunity to confront the issue" after the close of evidence, because it was a fundamental element of Plaintiff's case in chief, whether or not it was specifically raised or argued by defendant Lyons. There is no indication in the record that consideration was conceded or stipulated to by defendant.

Therefore, Plaintiff's Motion for Reargument is **DENIED.**

IT IS SO ORDERED this ____ day of _____, A.D. 2010.

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Kenneth S. Clark, Jr.
Judge