

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RAYMOND VEILLEUX,)
)
 Plaintiff)
)
 v.) Civil No. 99-0148-B
)
 PHILIP FULMER, et al.,)
)
 Defendants)

MEMORANDUM OF DECISION¹

This action arises out of a series of transactions relative to the sale by Plaintiff Raymond Veilleux of his trucking company, Trans Coastal, Inc., to Defendant Ridge Trucking Company. The first transaction was the sale of the stock of Trans Coastal, Inc. to Defendant Ridge Trucking Company pursuant to a June, 1992 contract. The second transaction was a March, 1994 contract by which Plaintiff agreed to a purchase and lease-back of the trucks owned by Ridge Trucking Company. The contract contains several other provisions affecting similar provisions in the 1994 contract, and further provides that Plaintiff would forgive the purchase price due him under the 1992 contract.

The Complaint asserts the following causes of action. In Count I, Plaintiff seeks recovery from Defendant Ridge Trucking Company of amounts allegedly due under the 1992 contract. In Count II, Plaintiff seeks recovery from Defendant Carroll Fulmer of amounts allegedly due under a signed proposal that was later incorporated into the 1994 contract. In Count III, Plaintiff complains against Defendants Ridge Trucking Company, Carroll Fulmer, and Philip Fulmer for

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

transfer of assets from Ridge Trucking Company to unnamed persons for less than fair value. In Count IV, Plaintiff alleges Defendants Carroll Fulmer and Philip Fulmer aided and abetted a breach of the 1992 contract by Ridge Trucking Corporation. In Count V, Plaintiff seeks recovery from Defendant Carroll Fulmer Corporation of rent due him on the trucking facility in Waterville, Maine, from 1992 through 1997. In Count VII, Plaintiff asserts a breach of an employment contract by Defendant Carroll Fulmer Payroll Corporation. Finally, in Count VIII, Plaintiff seeks a judgment against Defendant Carroll Fulmer Corporation as transferee of the assets of Ridge Trucking Corporation.

Defendants assert that Florida law should govern the analysis of the claims in this case by virtue of a choice of law provision in the 1992 contract. Plaintiff notes that the issue, while not in his view so clear as the plain language of the contract, need not be resolved as Florida and Maine law are “essentially identical.” The Court agrees there is no need to resolve the question for purposes of this motion, and therefore declines to do so.

Pending before the Court is Defendants’ Motion for Partial Summary Judgment. Specifically, Defendants seek judgment as a matter of law on Plaintiff’s claim for \$275, 000 in Count I on the grounds that the 1994 contract was substituted for the 1992 contract. In addition, they seek judgment on Counts II, IV, V, and VI on the grounds that the named Defendants in each of those Counts are not parties to the agreements they are alleged to have violated, if indeed such agreements existed.

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Defendants assert they are entitled to judgment on Counts II, IV, V, and VI because Plaintiff has offered no evidence that they are parties to the agreements referenced in these Counts. As to Counts V and VI in particular, Defendants assert Plaintiff bears the burden of proving there were written employment and lease agreements with the named Defendants sufficient to satisfy the statute of frauds.

As to all of the named Defendants other than Ridge Trucking Company, Plaintiff argues that the Court should 'pierce the corporate veil' of Ridge Trucking, and impose liability upon these separate individuals and entities. This doctrine permits a court to impose liability directly

on the principals of a corporation when a plaintiff satisfies the court that: “(1) the defendant abused the privilege of a separate corporate identity; and (2) an unjust or inequitable result would occur if the court recognized the separate corporate existence.” *Johnson v. Exclusive Prop. Unlimited*, 720 A.2d 568, 571 (Me. 1998). Plaintiff’s argument that the named individuals or other corporate entities abused the privilege of a separate corporate identity is supported by the following facts:

1. PLAINTIFF’S STATEMENT OF MATERIAL FACT 12:

Ridge Trucking Corporation (Ridge) is a zero-asset corporation set up by the Fulmers especially for the purpose of holding the stock of TCC. Carroll Fulmer admitted that the only purpose of Ridge Trucking was to distance him and the other Fulmers personally from any liabilities that might arise out of the TCC deal. Carroll Fulmer Deposition at 8-9, 26.

2. PLAINTIFF’S STATEMENT OF MATERIAL FACT 40:

The Fulmers commonly did business through many different corporations, which they used to distance themselves from personal liability. *See* Carroll Fulmer Dep. at 7-8, 26-27; *see also* Anderson Aff. ¶¶ 3, 5-7, 10.

3. PLAINTIFF’S STATEMENT OF MATERIAL FACT 43:

Carroll Fulmer, and all other employees of all the Fulmer entities, were technically employees of Carroll Fulmer Payroll Corp. Anderson Aff., ¶ 6; Philip Fulmer Dep. at 7, 18, 65; *see also* Carroll Fulmer Dep. at 7.

4. PLAINTIFF'S STATEMENT OF MATERIAL FACT 44:

Carroll Fulmer & Co., Inc. is one of a few Fulmer entities to which the revenue of the various branches is initially allocated. It also is the entity to which revenues generated by TCC were allocated. Anderson Aff., ¶¶ 7, 10; Carroll Fulmer Dep. at 21-22..

5. PLAINTIFF'S STATEMENT OF MATERIAL FACT 49:

The many Fulmer entities were controlled by a core group of Fulmer family members that included Carroll Fulmer, his wife and his sons Philip, Tony, and Tim. Philip Fulmer Dep. at 30, 33-34.²

6. PLAINTIFF'S STATEMENT OF MATERIAL FACT 51:

Although he was technically president of Ridge, Philip Fulmer knew very little about that company when asked at his deposition except that it had no assets. Philip Fulmer Dep. at 61-63.³ He also testified that it was created solely to deal with TCC so that Carroll Fulmer's "good name" would not be associated with "somebody that couldn't pay their bills" *Id.* at 59-60.

² This testimony describes two conversations between these parties about possibly purchasing Trans Coastal Corporation. It does not support the assertion that "many Fulmer entities" were controlled by this "core group."

³ The Court is not satisfied that the referenced testimony supports this particular factual assertion. That Philip Fulmer did not know if, or when, Ridge Trucking ever owned machinery does not necessarily mean that he "knew very little about the company." As Mr. Fulmer testified, and as the Court understands from the rest of the record in this matter, Ridge Trucking owned Trans Coastal Corporation, not trucks. P. Fulmer Dep. at 58.

The point is not important at this stage, however, in light of the Court's conclusion on the question of piercing the corporate veil.

In Plaintiff's view, these factors amount to a family that "'dominated' and 'abused' the corporate form by improperly using corporations to minimize their personal liabilities and to manipulate the profitability of other corporations they acquire." Pltf. Mem. at 15. The difficulty with this argument is that the corporate form was created at least in part to minimize the personal liability of the individuals involved in them. Interestingly, the example of a "similarly organized and operated family business" to which Plaintiff directs the Court was described by the Maine Law Court as "closely resembl[ing] a single complex family partnership doing business through numerous entities of varied legal forms." *Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988). The Law Court in no way suggested that it found that particular business organization to be improper.

The Court also finds nothing peculiar in Philip Fulmer's testimony that the family created a separate entity for the purchase of Trans Coastal Corporation at least in part because Trans Coastal had outstanding debt they did not want associated with the name of Carroll Fulmer. Plaintiff has simply not persuaded the Court that this is an "abuse" of the corporate form.

Finally, although Plaintiff repeatedly refers to Ridge Trucking as an "asset-free corporation" or corporate "shell," Pltf. Mem. at 15, the fact is that Ridge Trucking held the stock of Trans Coastal Corp. There is again nothing improper about Ridge Trucking borrowing money from Carroll Fulmer Company for the purpose of paying Plaintiff for the stock of Trans Coastal Corp., and certainly nothing improper about revenues generated by Trans Coastal Corp. going to repay that loan, or to pay for the management services provided by other of the families' companies. C. Fulmer Dep. at pp. 21-22; Anderson Aff. at ¶ 6-10. The fact that Ridge Trucking

may have breached its agreement with Plaintiff does not mean the corporate form was abused, it simply means the corporation breached a contract.

1. Count I - Breach of Contract by Ridge Trucking Company.

Plaintiff asserts a claim against Ridge Trucking Company in Count I of the Complaint for breach of the 1992 agreement to pay \$275,000.00 in exchange for the stock of Trans Coastal Corporation. Defendant argues that there can be no breach of that agreement, because the 1994 agreement was a substituted contract which nullified the earlier agreement. Plaintiff offers three responses to Defendant's substituted contract theory. First, Plaintiff argues that the 1994 agreement was the product of duress and coercion and is therefore unenforceable. Second, Plaintiff asserts that the question whether the 1994 contract was intended to substitute for the earlier agreement is a factual question precluding judgment as a matter of law on this Motion. Third, Plaintiff argues that he was prevented from performing under the 1992 contract which thereby forced him to accept the terms of the 1994 agreement, such that he is entitled to seek a remedy on the basis of the 1992 contract.

The Court is satisfied that the issue whether the parties intended the 1994 agreement to substitute for the 1992 contract is a fact-bound question rendering summary judgment inappropriate. *Akerley v. Lammi*, 217 A.2d 396, 398 (Me. 1966) ("whether the minds of the parties met is a jury question"). Summary judgment is denied on Count I. In light of this resolution of the question whether the 1994 agreement was intended to substitute for the earlier contract, the Court will not now address whether the 1994 contract is invalidated for the reasons Plaintiff offers in his Memorandum.

2. *Count II - Breach of a 1994 agreement by Defendant Carroll Fulmer*

The record reveals that on March 1, 1994, Defendant Carroll Fulmer signed a memorandum, dated February 17, 1994 (Def. Ex. 6), by which Plaintiff proposed purchasing some of the equipment from Defendant Ridge Trucking Company. As one of the terms of that proposal Plaintiff included the statement “I will be paid my \$120,000.00 at no interest.” Def. Ex. 6, p. 3. There is no other reference to \$120,000.00 in the February 17 memorandum. There is, however, a provision in the 1992 agreement between Plaintiff and Defendant Ridge Trucking Company requiring Defendant Ridge Trucking Company to pay to Plaintiff “\$120,000.00 including interest in twenty-four (24) equal monthly payments.” In Count II of the Complaint, Plaintiff seeks to impose liability upon Defendant Carroll Fulmer for breach of the provision in the February 1994 memorandum regarding payment of the \$120,000.00.

Defendant’s first argument on this Motion for Summary Judgment is that Defendant Carroll Fulmer was not authorized to modify the 1992 contract, making the February 17 memorandum unenforceable as a separate agreement. Indeed, that memorandum was expressly incorporated into an agreement between Plaintiff and Defendant Ridge Trucking Company, dated March 30, 1994 (Def. Ex. 7), which was signed on behalf of Defendant by Philip R. Fulmer, its President. The Court concludes, however, that a jury could find the February proposal is an agreement by which Carroll Fulmer personally agreed to pay Plaintiff the \$120,000.00 that Ridge Trucking had not paid pursuant to the 1992 contract. Summary Judgment is denied on Count II of the Complaint.

3. Count IV – Aiding and Abetting Breach of the 1992 contract by Defendants Carroll Fulmer and Philip Fulmer

Defendant’s Motion for Summary Judgment is granted with respect to Count IV of the Complaint. The cases cited by Plaintiff in support of his proposition that Florida law recognizes a cause of action against individuals who aid and abet a breach of contract by a corporation they control do not, in the Court’s view, support that proposition. Specifically, one case involved a complaint that included a claim of aiding and abetting a breach of fiduciary duty, but there was no discussion in the case of the merits of the claim. *Baker v. Petway*, 740 So. 2d 1235 (Fla. Dist. Ct. App. 1999). The other cited case involved a claim of aiding and abetting a breach of a covenant not to compete against a corporation allegedly created for the purpose of providing the individual defendant with an opportunity to compete. *Dad’s Properties, Inc. v. Lucas*, 545 So.2d 926 (Fla. Dist. Ct. App. 1989). Those cases do not provide authority for this cause of action on these facts.

4. Count V – Breach of a lease agreement by Defendant Carroll Fulmer Corporation.

Plaintiff alleges in Count V of the Complaint that Defendant Carroll Fulmer Corporation was obligated to pay rent to Plaintiff for the trucking facility in Waterville, Maine, for a term from 1992 until 1997, and that Defendant breached that obligation by vacating the premises and paying no further rent as of July 20, 1995. Defendant’s Motion for Summary Judgment is granted with respect to Count V of the Complaint. Plaintiff has offered no evidence that he had a written lease agreement with Defendant Carroll Fulmer Corporation sufficient to satisfy the statute of frauds. 33 M.R.S.A. § 51(4) (providing that contracts for “the sale of lands, . . . or of any interest in or concerning them” are unenforceable if not in writing and “signed by the party to

be charged therewith”). To the extent the lease agreement arises out of the 1992 contract for the purchase of Trans Coastal Corporation, or either of the 1994 documents, this Defendant was not a party to those documents. There is no basis upon which to pierce the corporate veil of Ridge Trucking, nor is there any evidence that piercing the veil would lead in any event to this Defendant, a totally separate corporation.

5. Count VI – Breach of an employment contract by Defendant Carroll Fulmer Payroll Corporation.

Plaintiff alleges in Count VI of the Complaint that he was an employee of Defendant Carroll Fulmer Payroll Corporation for a term from May, 1992 until May, 1997, and that Defendant breached that contract by terminating his employment in 1995. Defendant’s Motion for Summary Judgment is granted with respect to Count VI of the Complaint. Plaintiff has offered no evidence that he had a written employment contract with Defendant Carroll Fulmer Payroll Corporation sufficient to satisfy the statute of frauds. 33 M.R.S.A. § 51(5) (providing that agreements that are not to be performed within one year are unenforceable if not in writing and “signed by the party to be charged therewith”). To the extent the employment contract arises out of the 1992 contract for the purchase of Trans Coastal Corporation, or the 1994 proposal signed by Carroll Fulmer, this Defendant was not a party to those documents. There is no basis upon which to pierce the corporate veil of Ridge Trucking, nor is there any evidence that piercing the veil would lead in any event to this Defendant, a totally separate corporation

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is hereby DENIED with respect to Counts I and II, and GRANTED with respect to Counts IV, V, and VI.

SO ORDERED.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 7th day of April, 2000.

TRIAL STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-148

VEILLEUX v. FULMER, et al Filed: 06/09/99
Assigned to: MAG. JUDGE MARGARET J. KRAVCHUK ury demand: Plaintiff
Demand: \$0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt # in Kennebec Superior : is CV-99-89

Cause: 28:1441 Notice of Removal-Breach of Contract

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CARROLL FULMER CO INC
defendant

MICHAEL J. SCHMIDT, ESQ.
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CARROLL FULMER PAYROLL INC
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