

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

William L. O'Day, Jr. Esquire
Woloshin, Lynch, Natalie & Gagne, P.A.
3200 Concord Pike
P.O. Box 7329
Wilmington, Delaware 19803
Attorney for Plaintiff

Donald L. Gouge, Jr., Esquire
800 N. King Street, Suite 303
Wilmington, Delaware 19801
Attorney for Defendants

**Re: GS Petroleum, Inc. v. R and S Fuel, Inc., Susan
Stamm and Richard Simpson
C.A. No. 07C-09-023 RRC**

Submitted: April 30, 2009
Decided: June 4, 2009

On Defendant's "Motion for Summary Judgment to Dismiss Defendants
Susan Stamm & Richard Simpson."

GRANTED.

Dear Counsel:

This case arises from the sale of a gas station by GS Petroleum, Inc. to R and S Fuel, Inc. GS Petroleum entered into an agreement with R and S Fuel purporting to sell a Shell gas station and its inventory to "R and S Fuel, Inc., a Delaware corporation." However, at the time the contract was signed, R and S Fuel had not filed for incorporation; however, R and S Fuel properly incorporated two weeks later and proceeded to write checks and run the gas station in its corporate capacity. The issue before this Court is whether

Susan Stamm and Richard Simpson, the principals behind R and S Fuel, are personally liable for R and S Fuel's failure to make payment, pursuant to the terms of the contract, or whether Ms. Stamm and Mr. Simpson were released from liability by the subsequent incorporation of R and S Fuel.

I. FACTUAL AND PROCEDURAL HISTORY

On or about March 13, 2006, GS Petroleum, Inc. ("Plaintiff") entered into a one page contract entitled "Agreement of Sale of Inventory and Business" ("Agreement"), which purported to sell a Shell gas station located at 2503 Concord Pike, New Castle County, Delaware, its inventory, and good will. The Agreement stated that it was "entered by and between R and S Fuel, Inc., a Delaware Corporation . . . and GS Petroleum, Inc., a Delaware Corporation." However, R and S Fuel did not incorporate until March 27, 2006, two weeks after the Agreement was signed.

The substance of the Agreement, which is the focal point of the instant motion, states in its entirety:

This agreement made this 13th day of March, 2006, entered by and between R And S Fuel inc., [sic] a Delaware Corporation, (herein referred to as "Buyer") and GS Petroleum, inc. [sic] a Delaware Corporation (herein referred to as "Seller") provides:

1. That Seller acknowledges that Seller was a tenant at the location known as 202 Shell, 2530 Concord Pike, Wilmington, DE 19803, up to April 14, 2006.
2. That Seller acknowledge [sic] that he is aware that Buyer is new Tenant for the location known as 202 Shell, 2530 Concord Pike, Wilmington, DE 19803, beginning April 15, 2006.
3. That Buyer and Seller acknowledge that Seller owns the inventory of goods at the location stated in 1. and 2. Above.
4. The Seller is desirous of selling and Buyer is desirous of buying the said inventory described in 3. Above.
5. That Seller and Buyer have taken a physical inventory on April 14, 2006, and agree that its value is \$25000.00. And Good Will of business is \$75000, Plus actual inventory of gas at cost is 19194.80 [This figure appears to be written in by hand.]

6. That Buyer hereby certifies that Buyer will Make payment in full of amount in 5. Above Inventory with in [sic] 2 Weeks beginning from April 13, 2006. Buyer has no claim against Seller whatsoever after receipt of payment in full of the amount in 5. Above.

7. That Seller certifies that the inventory being sold to Buyer is free and clear of any liens and encumbrances and that if any legitimate obligation [sic] are discovered by the Buyer subsequent to payment to Seller by Buyer, in connection with the inventory, that Seller agrees to do whatever it takes to clear-up the obligations within 10 days after notification by Buyer.

[Signature of witness]
WITNESS

[Signature of Richard Simpson]
R And S Fuel Inc.
Buyer
Susan Stamm And Richard Simpson

[Blank]
WITNESS

[Signature of Gagan Kumar]
GS PETROLEUM, INC.
Seller
GAGAN KUMAR, PRESIDENT

The Agreement illustrates that while Ms. Stamm's name was printed in the signature section of the Agreement, she did not sign the document.

Pursuant to the terms of the Agreement, R and S Fuel took over operation of the gas station on April 15, 2006. Prior to operating the gas station, R and S Fuel filed its certificate of incorporation on March 27, 2006, obtained a temporary business license from the State of Delaware Division of Revenue on April 3, 2006, opened a corporate bank account on or before April 2, 2006, and filed a merchant change of ownership form on April 14, 2006.¹ Shortly after taking over operation of the gas station, R and S Fuel wrote checks from its corporate bank account and insured the gas station in the corporation's name.²

¹ Mot. for Summ. J. to Dismiss Defs Susan Stamm & Richard Simpson, D.I. 11, Ex. 2, Ex. 3, Ex. 4, Ex. 5.

² *Id.* at Ex. 4, Ex. 6.

Plaintiff filed suit on September 5, 2007 alleging that R and S Fuel, Ms. Stamm, and Mr. Simpson are jointly and severally liable for failure to make payment pursuant to the Agreement in the amount of \$123,744.89.³

II. THE PARTIES' CONTENTIONS

Defendants first contend that Susan Stamm and Richard Simpson are not personally liable because R and S Fuel was a *de facto* corporation at the time the Agreement was signed. Defendants also contend that Susan Stamm cannot be personally liable because she did not sign the Agreement. Pursuant to the Court's request for supplemental briefing on the issue of promoter's liability for preincorporation agreements, Defendants further maintain that Ms. Stamm and Mr. Simpson, as promoters of R and S Fuel, were released from liability by R and S Fuel's acceptance of the Agreement because it was clear from the Agreement that Ms. Stamm's and Mr. Simpson's liability was not intended.

In response, Plaintiff first contends that R and S Fuel did not exist on March 13, 2006, and thus it could not have been a party to the agreement; nor was R and S Fuel a *de facto* corporation because it did not make a bona fide attempt to organize as a corporation until after the Agreement was signed. Plaintiff also maintains, but without citation to any authority, that Mr. Simpson had "apparent agency" to bind Ms. Stamm to the Agreement. Pursuant to the Court's request for supplemental briefing, Plaintiff maintains that it is not clear from the Agreement that Ms. Stamm's and Mr. Simpson's liability was not intended.

III. STANDARD OF REVIEW

Summary judgment is appropriate where "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."⁴ Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law,

³ Compl., D.I. 1 at ¶ 7.

⁴ Super. Ct. Civ. R. 56(c).

the facts must be viewed “in the light most favorable to the nonmoving party.”⁵

IV. DISCUSSION

The issue before this Court is whether Ms. Stamm and Mr. Simpson were released from liability where the Agreement stated that it was “entered by and between R and S Fuel, Inc., a Delaware Corporation (herein referred to as “Buyer”) and GS Petroleum, Inc., a Delaware Corporation (herein referred to as “Seller),” where R and S Fuel subsequently properly incorporated before taking over operation of the gas station, and R and S Fuel accepted the benefits of the Agreement. In essence, Defendants contend that Ms. Stamm and Mr. Simpson were promoters of a preincorporation agreement and that their personal liability was extinguished by R and S Fuel’s adoption of the Agreement (and its acts in conformity therewith) and the clear intent of the Agreement to hold R and S Fuel alone liable. A promoter’s liability in connection with a preincorporation agreement is an issue of apparent first impression in Delaware.

In *American Legacy Foundation v. Lorillard Tobacco Company*, the Court of Chancery applied the doctrine of adoption to preincorporation agreements.⁶ Citing *Fletcher Cyclopedia of the Law of Corporations*, which the Court of Chancery characterized as a “leading treatise,” the *American Legacy Foundation* Court noted:

American courts generally hold that promoters’ contracts made on the corporation’s behalf may be adopted, accepted or ratified by the corporation when organized, and that the corporation is then liable, both at law and equity, on the contract itself and not merely for the benefits which it has received. *Accordingly, if the corporation accepts the contract’s benefits, the corporation will be required to perform its obligations.*⁷

The Court of Chancery concluded that “[u]nder Delaware law, if the subsequently formed corporation expressly adopts the preincorporation

⁵ *Mason v. United Servs. Auto. Ass’n*, 697 A.2d 388, 392 (Del. 1997).

⁶ *Am. Legacy Fdn. V. Lorillard Tobacco Co.*, 831 A.2d 335, 350 (Del. Ch. 2003).

⁷ *Id.* at 350 (citing Carol A. Jones and Britta M. Larsen, 1A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 207 (perm. ed. rev. vol. 2002)) (emphasis in original).

agreement or implicitly adopts it by accepting its benefits with knowledge of its terms, the corporation is bound by it.⁸

In the instant case, R and S Fuel accepted the benefits of the Agreement. It is undisputed that R and S Fuel may be held liable for a breach of the Agreement.⁹ This Court must decide whether Ms. Stamm and Mr. Simpson may also be held liable.

Fletcher Cyclopedia of the Law of Corporations squarely addresses this issue:

It is the general rule that adoption, acceptance or ratification creating corporate liability on a preincorporation contract is insufficient, standing alone, to release promoters from liability under the contract. Subsequent to the corporation's adoption or ratification, promoters may be released, however, where it is clear that the promoter's liability was not intended, the contract or other agreement releases the promoters, or there is a novation. The exact theory upon which this principle is rested varies among authorities. Moreover, language in some opinions suggests that in some jurisdictions, mere adoption by the corporation may relieve a promoter from liability. In any case, formation of the corporation is a prerequisite to a promoter's release. If there was no adoption or succession in liability, the promoters remain liable under the contract.¹⁰

In this case, there was no subsequent agreement releasing the promoters, nor was there a novation. The remaining inquiry is whether it was clear from the Agreement that the promoters' liability was not intended.

The first paragraph of the Agreement identified the parties to the Agreement:

This agreement made this 13th day of March, 2006, entered by and between R And S Fuel inc., [sic] a Delaware Corporation, (herein referred to as "Buyer") and GS Petroleum, inc. [sic] a Delaware Corporation (Herein referred to as "Seller").

It is notable that the term "Buyer" is in the singular and that nowhere in the body of the Agreement does Ms. Stamm's or Mr. Simpson's names appear.

⁸ *Id.*

⁹ Defs' Supplemental Letter Memorandum, D.I. 22 ("RS accepted and adopted the Agreement with GS. It accepted the benefits of the Agreement, to wit, receiving the service station business and therefore is bound by the Agreement's obligations . . .").

¹⁰ Carol A. Jones and Britta M. Larsen, 1A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 216 (perm. ed. rev. vol. 2002).

The signature lines also suggest that the Agreement was between R and S Fuel and GS Petroleum:

[Signature of unidentified witness]
WITNESS

[Signature of Richard Simpson]
R And S Fuel Inc.
Buyer
Susan Stamm And Richard Simpson

[Blank]
WITNESS

[Signature of Gagnan Kumar]
GS PETROLEUM, INC.
Seller
GAGAN KUMAR, PRESIDENT

The Agreement, taken as a whole, evidences an intent to bind R and S Fuel and GS Petroleum to its terms. While Ms. Stamm's and Mr. Simpson's names were not followed by a corporate title, it is nonetheless clear that Mr. Simpson was signing on behalf of R and S Fuel, just as Mr. Kumar was signing on behalf of GS Petroleum.

The Court also takes note of the fact that while R and S Fuel was not a corporate entity on March 13, 2006, the date the Agreement was signed, R and S Fuel properly incorporated on March 27, 2006, more than two weeks before it took over operation of the gas station on April 15, 2006. There is no indication (nor any suggestion by the parties) that R and S Fuel was a sham corporation. Prior to taking over operation of the gas station, R and S Fuel obtained a temporary business license from the State of Delaware Division of Revenue, opened a bank account, and filed a merchant change of ownership form on April 14, 2006. Shortly after taking over operation of the gas station, R and S Fuel wrote checks from its corporate bank account and insured the gas station in the corporation's name.¹¹ The Court concludes that Ms. Stamm's and Mr. Simpson's liability was not intended and therefore R and S Fuel alone may be held liable for any alleged breach of the Agreement.¹²

¹¹ *Id.* at Ex. 4, Ex. 6.

¹² Because the Court finds that Ms. Stamm and Mr. Simpson were released from liability by R and S Fuel's subsequent incorporation and adoption of the Agreement, combined with the clear intent of the Agreement to bind the corporation alone, the Court need not reach the parties' remaining contentions.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is **GRANTED**.

Richard R. Cooch

cc: Prothonotary