

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

KEN CAUDILL,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 04C-10-090 WCC
v.	)	
	)	
SINEX POOLS, INC., ROMIE	)	
BISHOP and SHIRLEY BISHOP,	)	
	)	
Defendants.	)	
	)	
v.	)	
	)	
EDNA CAUDILL,	)	
	)	
Counterclaim Defendant.	)	

Submitted: January 3, 2006  
Decided: January 18, 2006

**ORDER**

**Upon Defendants Shirley Bishop's Motion for Summary Judgment.**

**GRANTED.**

**Upon Defendant Romie Bishop's Motion for Summary Judgment.**

**GRANTED.**

Donald L. Gouge, Jr.; Heiman, Gouge & Kaufman, LLP; 800 King Street, Suite 303; P.O. Box 1674; Wilmington, Delaware. Attorney for Plaintiff Ken Caudill and Counterclaim Defendant Edna Caudill.

Douglas A. Shachtman; 1200 Pennsylvania Avenue, Suite 302; Wilmington, Delaware. Attorney for Defendants Sinex Pools, Inc. and Shirley Bishop.

Romie D. Bishop; 2715 DuPont Parkway; Middletown, Delaware. *Pro Se* Defendant.

**CARPENTER, J.**

After consideration of the record and the parties' submissions, the Court hereby grants Defendants Shirley Bishop and Romie Bishop's Motion for Summary Judgment for the reasons set forth below.

### **Facts**

On February 28, 2004, a contract was executed by and between Plaintiff Ken Caudill ("Mr. Caudill") and Defendant Sinex Pools, Inc. ("Sinex Pools"). Sinex Pools was to construct an in-ground swimming pool on Mr. Caudill's property. Within the complaint, Mr. Caudill alleges Sinex Pools breached the contract by failing to properly construct and complete the pool installation. A counterclaim against Edna Caudill ("Mrs. Caudill" and collectively with Mr. Caudill, "the Caudills") alleging Mrs. Caudill's interference affected Sinex Pools' ability to complete its job was thereafter filed. On May 25, 2005, an amended complaint was filed by Mr. Caudill to include Romie Bishop ("Mr. Bishop") and Shirley Bishop ("Mrs. Bishop" and collectively with Mr. Bishop, "the Bishops"), individually, based on the allegation Sinex Pools is not recognized as a legal entity.

Both Mr. Bishop and Mrs. Bishop have filed motions for summary judgment (the "Motions").<sup>1</sup> The Court held oral arguments for both Motions on October 12, 2005, and thereafter allowed additional discovery with respect to the validity of Sinex

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<sup>1</sup>While two separate motions were filed, one by Mr. Bishop and one by Mrs. Bishop, the motions are virtually identical. As such, for simplicity sake, the motions will be referred to as one motion throughout the opinion, unless indicated otherwise.

Pools as a corporation. After the completion of this discovery, the parties filed additional submissions relevant to the corporate status issue. Since discovery is now complete as to this issue, the Summary Judgment Motions are ripe for decision.

### **Standard of Review**

Summary Judgment is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law.<sup>2</sup> In considering such a motion, the court must evaluate the facts in the light most favorable to the non-moving party.<sup>3</sup> Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.<sup>4</sup>

### **Discussion**

A corporation *de facto* is a corporation which failed to incorporate properly, despite a good faith and bona fide effort, but is nevertheless treated as a duly formed corporation by the Courts.<sup>5</sup> Three factors must exist for a corporation *de facto*'s creation: 1) there is a special act or a general law under which such a corporation may

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<sup>2</sup>*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

<sup>3</sup>*Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

<sup>4</sup>*Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

<sup>5</sup>*See Read v. Tidewater Coal Exchange, Inc.*, 116 A. 898, 904 (Del. Ch. 1922).

lawfully exist; 2) a bona fide attempt to organize under the law and colorable compliance with the statutory requirements, and 3) actual user or exercise of corporate powers in pursuance of such law and attempted organization.<sup>6</sup>

There appears to be no dispute that Sinex Pools meets two of the three requirements set forth in *Read* for a corporation *de facto*'s existence. First, there is no dispute that Sinex Pools held itself out to the general public as a builder and supplier of pools, and all business was exercised in the name of the corporation. Therefore, in spite of not having the formal incorporation status granted by the State, its business was conducted as if that status had been granted. Second, there is a general incorporation statute in Delaware which would have lawfully created the corporation if Sinex Pools' had completed the appropriate documentation, and filed it with the appropriate fee. As such, the sole remaining issue to be addressed by this Court is whether there was actually a good faith and bona fide effort by Mrs. Bishop to incorporate Sinex Pools.

There are no clear set of circumstances nor a unique bright line at which a business demonstrates a *de facto* corporation status. However, generally if there has been a good faith or bona fide attempt to create and operate a corporation, but certain

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<sup>6</sup>*Id.* at 898.

procedural or technical shortcomings prevent a corporation from being created, the Courts have found a *de facto* corporation exists.<sup>7</sup>

Each case is unique and is highly dependent upon its facts in determining whether a corporation *de facto* exists. For instance, at one extreme you have the Court determining a business, which had been operating for thirty years prior, was a *de facto* corporation when the only defect was a lack of all trustees' signatures on the certificate of incorporation.<sup>8</sup> At the other extreme you have the circumstances such as that found in *Gallant v. Fashion Piece Dye Works*,<sup>9</sup> where the Court found no corporate status when a contract simply contemplated the creation of a corporation after certain conditions had been met. Unfortunately, most disputes in this area lie in the gray area between these extremes and require a careful analysis of how the business is being operated and the efforts made to distinguish it as a corporate unit.

In deciding what central facts the Court should consider, the case of *Big Valley Assoc. v. DiAntonio*<sup>10</sup> provides particular insight. There, an oversight by an attorney delayed the corporation from being legally commenced. After careful analysis of case

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<sup>7</sup>*Big Valley Assoc. v. DiAntonio*, 1995 WL 339072 (Del. Super. Ct.).

<sup>8</sup>*Id.* at \*2 (citing *Trustees of Peninsula Annual Conference v. Spencer*, 183 A.2d 588 (Del. Ch. 1962)).

<sup>9</sup>174 A. 248 (Del. Ch. 1934).

<sup>10</sup>1995 WL 339072.

law, the Court determined the corporation in question took a number of steps, which showed a bona fide, good faith attempt to incorporate. Namely, the corporation began to operate as a business, obtained an IRS corporate identification number and made an election to be an S-corporation. In addition, by the time the contract in question was executed, the company had corrected any deficiencies with respect to incorporation.<sup>11</sup>

In the present case, a number of similar factors exist. First, Sinex Pools was purchased by Mrs. Bishop on January 19, 2004, and it appears shortly thereafter, Mrs. Bishop attempted to incorporate Sinex Pools by completing the appropriate and necessary documentation for incorporation. By affidavit and testimony, Mrs. Bishop indicates that shortly thereafter she submitted those forms to the Secretary of State to have Sinex Pools labeled an S-corporation. Further, the Notary Public who notarized the Certificate of Incorporation for Mrs. Bishop, did so on February 1, 2004. Copies of each of these forms were attached as exhibits to Mrs. Bishop's Motion for Summary Judgment. In addition, Mrs. Bishop treated Sinex Pools as a corporation by establishing bank accounts in the name of Sinex Pools, obtaining an employer identification number from the IRS for Sinex Pools, taking out insurance on behalf of Sinex Pools and filing 2004 tax returns in the name of Sinex Pools. The Bishops

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<sup>11</sup>See also *In re Mitchell's Restaurant*, 67 A.2d 64, 66 (Del. Ch. 1949).

argue that it is these events, unrelated to this litigation, that evidence their good faith effort to incorporate.

It is the Plaintiff's position that since the Bishops have failed to provide any evidence that the incorporation documents were sent to the Division of Corporations, *de facto* status should not be granted. The Court agrees that the documents attached by counsel, in support of its motion, only show that the incorporation documentation was completed by Sinex Pools at about the time Mrs. Bishop purchased the business. And, it is true that, except for Mrs. Bishop's testimony, there is no evidence of actual submission to the Secretary of State. However, that fact alone is not dispositive of the issue. It is simply a factor the Court must consider in determining whether a bona fide attempt has been made.

The Caudills further rely on *Murphy v. Bishop*,<sup>12</sup> wherein it appeared the Court of Common Pleas of Delaware determined Sinex Pools was not a corporation. Within that opinion, the Court of Common Pleas noted Mrs. Bishop admitted on the witness stand that Sinex Pools was not incorporated in Delaware. It has not been disputed by any party that, in the time frame relevant to the contract in dispute here, Sinex Pools was not a *de jure* corporation. However, this Court hesitates to conclude that the Court of Common Pleas has decided that Sinex Pools was not a corporation *de facto*.

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<sup>12</sup>*Murphy v. Bishop*, 2005 WL 991400 (Del. C.P. 2005).

Neither party was represented by counsel, and aside from what Mrs. Bishop stated on the stand, the issue of *de facto* status was not argued by the parties or addressed by the Court in its opinion. Under such circumstances, this Court does not feel compelled to follow the findings of the lower court, nor does it find the decision to be determinative as to whether Sinex Pools is a *de facto* corporation.

When the Court considers all of the documentation and testimony established in discovery, it finds that the only thing preventing corporate status in this case is the authorization from the Secretary of State. Sinex Pools has operated as a corporation since Mrs. Bishop bought the company in January 2004, which is even evidenced by the contract at issue in this case. Contracts were executed in the name of the corporation, and there is nothing to suggest either bad faith or a deviant motive by Mrs. Bishop in the representations that were made about the business's corporate status. While the Court can only speculate why the incorporation process was not completed, the Court finds that Sinex Pools has met the criteria for a *de facto* corporation status.

## Conclusion

For the foregoing reasons, viewing the evidence in the light most favorable to the non-moving party, the Motions for Summary Judgment are hereby GRANTED, and the Defendants Romie Bishop and Shirley Bishop, individually, will be dismissed from this litigation.<sup>13</sup> The case will proceed against Sinex Pools, Inc.<sup>14</sup>

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

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<sup>13</sup>Because this Court has determined Sinex Pools is a *de facto* corporation, the status of Sinex Pools may only be challenged by the Secretary of State in a *quo warranto* proceeding, in accordance with *Trustees of the Peninsula Annual Conference v. Spence*. 183 A.2d 588, 592 (Del. Ch. 1962). *See also*, Honorable William T. Quillen, *Basic Provisions of the General Corporation Law of the State of Delaware*, 483 PLI/Corp 9 (1985).

<sup>14</sup>As a result of this dismissal, all counter-claims filed by the individual Defendants are also dismissed.