SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Dennis L. Schrader, Esquire
Wilson, Halbrook & Bayard
107 West Market Street
Georgetown, DE 19947

Richard R. Wier, Jr., Esquire
Daniel W. Scialpi, Esquire
Two Mill Road, Suite 200
Wilmington, DE 19806

Re: ***Fuller et al. v. Gemini Ventures, LLC et al.***
C.A. No. 05C-06-019-RFS

Submitted: July 3, 2006
Decided: October 2, 2006

Dear Counsel,

This is a breach of contract action concerning the sale of a restaurant located in Rehoboth Beach, Delaware. The sellers have moved for Summary Judgment. For the reasons set forth herein, the Motion is denied.

BACKGROUND

Gemini (hereinafter "Defendant") is a Delaware Limited Liability Company, formed for the purpose of owning a restaurant in the general vicinity of Rehoboth Beach, Delaware. Christine and Joseph Becker are general partners in the Defendant Company. In January 2004, Defendant was informed by its realtor, Betty Gallo (hereinafter "Gallo"), that a then operating bar and restaurant, known as the Purple Parrot, may meet Defendant's needs.

The Purple Parrot was owned and operated by Hugh Fuller and Troy Roberts

(collectively referred to as "Plaintiffs"). The establishment contained certain inventory items used in the operation of a restaurant and bar and also had an existing lease with the owners of the property, William and Margaret Martin (collectively referred to as "Martins"). On February 24, 2004, Defendant entered into a Bill of Sale (hereinafter "Contract") with Plaintiffs. The Contract contained the specifics of the sale, including the consideration to be paid and the closing date. The Contract also contained an addendum with three contingencies. One of the contingencies at issue in this matter required a "satisfactory review of the lease and terms and the ability of the Buyer to assume the lease if acceptable." The failure of any of the contingencies found in the Contract rendered the Contract null and void.

Defendant paid a ten thousand dollar ($10,000) deposit that was required by the Contract. The money was held in escrow by Gallo pending settlement. Plaintiffs' lease with Martins was through January of 2005, and Defendant was able to assume the balance of said lease. Thereafter, Defendant and Martins signed a commercial lease dated August 18, 2005 for a five year term and tendered a five thousand dollar ($5,000) deposit. On September 26, 2005, the value of the inventory was purportedly reduced from one hundred and fifty thousand dollars ($150,000) to seventy five thousand dollars ($75,000) although the circumstances surrounding the change are not clear.

The commercial lease had a clause which permitted Martins to demolish and rebuild the restaurant upon the acquisition of adjoining properties. If such demolition were to take place, rent was to be abated while the new structure was being constructed. To provide breathing room for the business, Defendant obtained Martins' promise that the demolition

would not start until the fall of 2005. The Plaintiffs were permitted to remain in the property until November 1, 2004, at which time they were to move to a new location. Final settlement on the Contract was to occur on November 1, 2004.

In early October, Martins advised Defendant that the property would be demolished on March 1, 2005, well before the fall date originally anticipated. Therefore, the initial period of business would last only four months, followed by closure for at least eight months. Defendant felt that to open and operate for such a brief time would be a bad business decision. Although the commercial lease provision provided for a fall date for the demolition, Defendant decided not to sue to enforce the lease as written and then sought to terminate it instead.

After learning about the March date, the parties signed a mutual release (hereinafter "Release"). In pertinent part the Release stated:

> [whereas], in consideration of mutual promises and agreement, we ... do hereby mutually release each and the other(s) ... from all sums of money, actions, claims and demands for interest of any nature whatsoever arising from a Contract of Sale dated February 24, 2004, for the purchase of business knows as 'The Purple Parrot,' and do declare the aforesaid Contract of Sale to be null and void and of no effect.

(Defs.' Reply Br. Ex. F). Under the terms of the Release, the ten thousand dollar ($10,000) deposit for the sale of the business was returned by Gallo to Defendant, and the Contract was cancelled. Plaintiffs signed the Release on October 4, 2004, and Defendant signed it on October 6, 2004.

STANDARD OF REVIEW

Summary judgment cannot be granted where material issues of fact exist; only a jury

can resolve such issues. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party must establish the lack of material factual issues. *Id.* Should the moving party establish the absence of material factual issues, the nonmoving party must prove the presence of such issues in order to prevent summary judgment. *Id*. at 681. In the motion for summary judgment context, the evidence is viewed in a light most favorable to the nonmoving party. *Id.* at 680. Where the moving party has produced sufficient evidence under Superior Court Civil Rule 56, the nonmoving party may not rely solely upon her pleadings. *Id*. Evidence must be produced showing a material issue of fact. *Steffen v. Colt Industries*, 1987 WL 8689, at *3 (Del. Super. February 4, 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986)). Summary judgment is not appropriate if the Court determines that it does not have sufficient facts to enable it to apply the law. *Reese v. Wheeler*, 2003 WL 22787629, at *2 (Del. Super. November 4, 2003) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

DISCUSSION

The simple definition of a contract is an agreement upon sufficient consideration to do or not do a particular thing. *Rash v. Equitable Trust Co.*, 159 A. 839 (Del. 1931). For the formation of a binding contract there must be an offer made by one person and an acceptance of that offer by the person to whom it was made. *Salisbury v. Credit Service. Inc,* 199 A. 674 (Del. 1937). Consideration was present under the Contract entered between Plaintiffs and Defendant on February 24, 2004. The overt manifestations of assent control, not the subjective intent, and Defendant has presented no evidence to indicate that Plaintiffs' actions signify anything other than acceptance of the terms presented in the Contract. *See Norse*

Petroleum A/S v. LVO International Inc., 389 A.2d 771 (Del. 1978); *see also Diamond Electric, Inc. v. Delaware Solid Waste Authority*, 1999 WL 160161, at *3 (Del. Ch. March 15, 1999) ("A contract is formed if a reasonable person would conclude, based on the objective manifestations of assent and surrounding circumstances, that the parties intended to be bound to their agreement on all essential terms.").[1]

Defendant argues that the first of the three contingencies in the Contract was not met. The contingency pertained to the Defendant's review of Plaintiffs' existing lease and ability to assume the lease should it be found satisfactory. The date stated in the Contract for completion of this contingency was April 15, 2004, however, the mere designation of such a date does not make that date the essence of the contract. *See* 17A Am. Jur. 2d *Contracts* § 474. Even looking at the facts in a light most favorable to Defendant, Defendant still assumed Plaintiffs' lease and further signed a commercial lease with Martins. There is no disputed question of fact, and theDefendant does not have a tenable argument in this regard. On the other hand, Defendant argues that Plaintiffs cannot enforce the Contract because certain inventory items were not owned by the Plaintiffs'. Such an argument is factually driven. Viewing the record in a light most favorable to Defendant, there may be an overlap of inventory belonging to Oscar's Restaurant (formerly operated by Martins in 1990 before Plaintiffs' began operating as the Purple Parrot) and items on the list being sold under Contract. For example, there is some question about the proper ownership of shelving,

[1] Normally, a bill of sale functions to transfer interests at the closing of a transaction much like the recording of a deed upon a real estate settlement. Frequently, a contract of purchase and sale is first executed, followed by a period of time to satisfy financing, representations and contingencies. The parties are free to contract, and, in this case, only a bill of sale is needed to create such a contract.

tables and stools.

In addition, Defendant alleges a material question of fact concerning a purported modification of the Contract price from One Hundred Fifty Thousand Dollars ($150,000) to Seventy Five Thousand Dollars ($75,000). Delaware law recognizes that even where there is a mixed sales and services contract, Delaware Article 2 will apply if the cause of action centers exclusively on the goods part of the contract. *See Glover School and Office Equip. Co. v. Dave Hall, Inc.*, 372 A.2d 221 (Del. 1977). The essence of this action is found in the sale of inventory and, consequently, Article 2 of the Delaware Uniform Commercial Code will apply. Under 6 Del. C. § 2-209 no additional consideration is necessary for contract modification. There was an attempted modification of the Contract on September 26, 2004, when the stated price on the second page was stricken for a lower figure.[2] A material question of fact exists as to whether that attempt amounts to a valid modification of the Contract. The circumstances are ambiguous as the price remained unchanged on the first page of the Contract. Given the state of the record, Plaintiffs cannot obtain summary judgment finding that the original price was not reduced.

Furthermore, summary judgment cannot be granted if a valid release exists. For a release to be valid it cannot be the product of fraud or misrepresentation. The Complaint alleges that there were "false representations" made at the time the ten thousand dollar ($10,000) deposit was returned. (Compl. ¶ 8). If such representations were made, the Release would not be enforceable. In this regard the focus would have to be on the time

[2] There is ambiguity on the first page of the Contract as to whether the total value mutually agreed upon for the sale was originally two hundred fifty thousand dollars ($250,000) or one hundred fifty thousand dollars ($150,000). The law favors handwritten terms as oppose to typed terms found in contracts, 11 *Williston on Contracts* § 32:13 (4th ed. 2006); however, the Contract in dispute here contains varying handwritten terms

frame when the Release was signed i.e., October 4-6, 2004. This is a jury question.

Plaintiffs also referenced certain deposition extracts purporting to show no consideration was given. However, they were not submitted to this Court. Generally, whether or not there was consideration for a release is a question of law. *See Sabatoro Constr. Co. v. Formosa Plastics Corp. USA*, 1996 WL 453460, at *3 (Del. Super. June 10, 1996), *aff'd*, 1997 WL 45090 (Del. January 30, 1997). The Release recites mutual promises and agreement which support consideration for a valid release. *See* 17A Am. Jur. 2d *Contracts* §§ 121-22 (2006).

---

which preclude summary judgment.

Moreover, the Release is certain and not open to question. The parties released not only themselves but their heirs, executors, administrators, successors and assigns. They broadly released the parties from "all sums of money, actions, claims and demands for interest of any nature whatsoever" arising from the February 24, 2004 Contract to purchase the business knows as the "Purple Parrot." The mutual promises to release each other reflect the parties' choice to start anew when settlement was problematic at best. In this context, Plaintiffs did receive value; they were free of any disputes and the risks of litigation and could sell their inventory elsewhere. Sufficient legal detriment and benefit existed to modify this contract were such consideration necessary.[3]

CONCLUSION

Considering the foregoing, Plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office

[3] In any event, the Release may be viewed as the modification of a contract under the Delaware Uniform Commercial Code, which does not require consideration. 6 Del. C. § 2-209.