

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00128 COA

JOSEPH TRAMONTANA AND BARBARA GHOLSON

APPELLANTS

v.

SUSANNAH SMITH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY O. TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

H. M. YOSTE, JR.

ATTORNEY FOR APPELLEE:

J. FREDERICK AHREND

NATURE OF THE CASE: CIVIL: CONTRACT DISPUTE

TRIAL COURT DISPOSITION: JUDGMENT GRANTED IN FAVOR OF APPELLEE.

BEFORE FRAISER, C.J., McMILLIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Joseph Tramontana and Barbara A. Gholson appeal the Harrison County Circuit Court's judgment in

favor of Susannah Smith. Tramontana and Gholson contend that the court erred in holding them personally liable for breach of contract under a personal guarantee clause contained in a corporate purchase contract which they executed for the corporation as signing officers. We agree and reverse.

FACTS

This case involves a dispute over whether two corporate officers, Gholson and Tramontana, are liable on a personal guarantee clause contained in a corporate purchase contract. Gholson is

president of Behavioral Educational Training Associates, Inc. ("BETA"), and Tramontana is vice-president. On July 1, 1992, Susannah Smith, the seller, and BETA, the purchaser, entered into a contract for the sale of Smith's professional practice, Coast Psychotherapy Associates. The contract contained a personal guarantee clause. Smith argues that this clause required Tramontana and Gholson to guarantee the performance of the warranties and covenants made by them in the agreement and attached exhibits. Tramontana and Gholson executed the contract on behalf of the corporation. The question is whether they executed it as individuals.

BETA ultimately breached the contract. Smith filed a complaint against BETA, Tramontana and Gholson. At trial, BETA admitted liability for the breach. The court also found the individual officers, Gholson and Tramontana, to be personally liable.

DISCUSSION

The central question on this appeal is whether individuals can be bound to the personal liability provision of a contract that they did not as individuals execute. There are also side issues, including whether an attachment to the contract effectively removed the personal liability clauses.

Two corporate officers signed a contract in a manner that facially was an attempt to be an execution only for the corporation, and not as individuals. We must determine whether the attempt was effective. If Tramontana and Gholson did not sign the contract as individuals, then they are no more personally liable than any other two people who had no connection to the transaction.

We first examine the personal guarantee clause itself. This clause was not a separate signed agreement, but rather was one of the many provisions which comprised the contract. The guarantee clause provided that:

The parties acknowledge and agree that they have read this Agreement and the attached exhibits in their entirety and that they understand and agree to be bound by the terms and conditions as stated therein. The parties expressly waive the right to protest the reasonableness of, and individually and personally guaranty the performance of the respective warranties and covenants made by them in this Agreement and the attached exhibits, whether corporate or individual.

We next turn to the signature page of the contract. There Gholson and Tramontana executed the agreement as follows, with the italicized words being those that were handwritten on the page:

BETA, Inc. by

Barbara A. Gholson, M.S.W., *President*

/s/ Barbara A. Gholson (seal)

Purchaser

Beta, Inc. by

Joseph Tramontana, Phd., *Vice President*

/s/ Joseph Tramontana, PhD (seal)

Purchaser

The officers themselves wrote BETA's name, their respective titles, and the qualifier "by" above their own names.

A starting point in the analysis is that the relevant clause refers to the "parties" personally guarantying performance. Are individuals "parties" to a contract that they do not sign as individuals? If a contract refers to three individuals as buyers, but only one signs the contract, the nonsigning second and third individuals are not parties until they do execute the document. We do not rely on the meaning of the word "parties," however, and move on to the effect of the signatures. In this case, the two individuals named in the contract only executed the contract as officers of a third entity named in the contract, a corporation. An officer's mere addition of a title following his signature on a document otherwise purporting to be a personal guarantee does not alter its personal character. *Sebastian Int'l Inc. v. Peck*, 195 Cal. App. 3d 803, 807-08 (Cal. Ct. App. 1987), *cited in American Management Corp. v. Dunlap*, 784 F. Supp. 1245, 1251 (N.D. Miss. 1992). However, "[i]t is

hornbook law that officers of a corporation assume no personal obligation on an instrument which they sign in the clear as the corporation's agents. A corporate officer cannot be held liable on the corporation's written contract if, as herein, it is executed for the corporation 'by' that officer." *Stewart Coach Indus., Inc. v. Moore*, 512 F. Supp. 879, 884 (S.D. Ohio 1981) (citing 19 Am. Jur. 2d *Corporations* §§ 1341-46 (1986); 19 C.J.S. *Corporations* §§ 837-40). "[I]n order to hold a corporate officer individually liable in signing a contract of guaranty, . . . the officer should sign the contract twice -- once in his corporate capacity and once in his individual capacity." *Wired Music, Inc., v. Great River S.B. Co.*, 554 S.W.2d 466, 470-71 (Mo. Ct. App. 1977).

The undertaking so signed must be read as that of the corporation alone. Cases cited by Smith that deal with only adding a corporate name next to a signature, or only adding a title next to a signature, indicate that half-measures are inadequate to prevent finding an individual to have executed the

contract for himself as well as a corporation. BETA could only sign by its officers. Gholson and Tramontana signed the contract only in their representative capacity for the corporation. They did not sign again as individuals, did not add words signifying that the signatures were for the corporation and also as individuals, nor did they make a modest adjustment to the signature block such as just adding their officer titles. The signatures themselves put Smith on notice that the two individuals were not contractually bound. Hindsight can be a harsh measure, but dissatisfaction with that execution should have been addressed at closing, and not when a dispute arose.

A related issue addressed below was the provisions in a supplement to the contract entitled "Exhibit 'H,' number 5." This provision served as a substitution clause and provided:

As the purchase of Coast Psychotherapy Associates is being made as a corporate rather than a personal agreement, the following change shall be made:

Any reference to Barbara A. Gholson, M.S.W. and Joseph Tramontana, PhD., (together referred to as "Purchaser" and/or "Drs. Gholson and Tramontana" whichever reference is appropriate) shall be changed to read "Behavioral Education Training Associates, Inc."

The preamble to "Exhibit H" stated that: "Any provisions set forth in the Asset Purchase Agreement which are contrary to the provisions set forth in this Exhibit "H", shall be void and have no effect." The trial court found this provision only meant that the corporation was the purchaser, not the individuals. In the trial court's view, the provision was not a superior contractual term that canceled the personal guarantee clause. We have resolved that the personal guaranty was of no effect in the absence of personal signatures, and thus need not address whether we agree with the trial court's restrictive reading of Exhibit H.

We conclude that the personal guarantee clause could only be effective against Tramontana and Gholson as individuals if Tramontana and Gholson executed the contract as individuals. They did not. We consequently hold that Tramontana and Gholson are not personally liable for BETA's breach of contract.

Tramontana and Gholson also raise the statute of frauds defense as an issue on appeal. Miss. Code Ann. § 15-3-1(a) (1972). While we do not decide the case on the basis of this issue, it is in effect the same question we have already resolved. The statute's requirement of a signature by the party to be charged has not been satisfied here. Because the officers signed the contract in their capacity as corporate officers, and not as individuals, no writing has been signed by the parties to be charged.

Lastly, we have considered the "salient points" included in Smith's motion for supplemental brief or in the alternative for oral argument and have found that these points do not affect the outcome of this decision.

For the foregoing reasons, we reverse and render judgment here for the Appellants. Though we assume the issue is of little moment, nothing we do here affects the part of the lower court proceedings which conceded liability as to BETA, Inc.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT FINDING TRAMONTANA AND GHOLSON TO BE PERSONALLY LIABLE IS REVERSED AND JUDGMENT REGARDING PERSONAL LIABILITY IS ENTERED FOR THE APPELLANTS. COSTS ARE ASSESSED TO APPELLEES.

FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.

THOMAS, P.J., AND COLEMAN, J., NOT PARTICIPATING.