IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ARAWAK FOODS, INC., Plaintiff,	) CIVIL NO. 764/1983
v.	
ERIK J. LAWAETZ, Defendant.	) ACTION FOR DEBT

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PETERSEN, Judge

MEMORANDUM OPINION
February 21, 1985

I.

This matter is before the Court on a Motion to Dismiss, pursuant to Rule 50(a), Federal Rules of Civil Procedure. For the reasons set forth below, this Court will grant the motion.

II.

FINDINGS OF FACT

1. Defendant Erik Lawaetz is President of St. Croix Hotel Corporation [hereinafter, SCHC]. Defendant and his wife are the sole owners of the corporation.

2. SCHC owns the hotel, St. Croix By the Sea, the surrounding land, and three condominiums.

3. On November 1, 1977, SCHC and Prinair Hotel Corporation [hereinafter, Prinair] entered into a joint venture. Prinair agreed to maintain full control of the management, operation and financial transactions of the Hotel. In return, SCHC would receive 75% (seventy-five percent) of the profits generated.

4. On April 1, 1979, the joint venture ceased. SCHC resumed full control of the hotel, including its management, operation and financial transactions. SCHC assumed the debts of the joint venture, which included a debt owed to Arawak Foods [hereinafter Arawak]. At that time, the joint venture owed Arawak approximately $70,000.00. (Seventy Thousand Dollars).

5. In April, 1979 SCHC began paying for new shipments with Arawak on a cash basis. (Plaintiff's Exhibit 6)

6. In November, 1979 Ellen Donovan, then attorney for

Arawak, communicated by telephone and by letters with Mr. Steven Bowman and Mr. Erik Lawaetz about the collection of the debt owed by St. Croix By the Sea Hotel [hereinafter, SCBSH].

7. On November 26, 1979, Mr. Bowman, then General Manager of SCBSH, wrote a letter of commitment to establish a payment schedule to Arawak. There was no mention that the letter of commitment was sent in exchange for Arawak's forebearance from suit nor that the amount of the debt had been established.

8. On November 27, 1979, Attorney Donovan wrote Mr. Bowman requesting that Mr. Lawaetz personally guarantee repayment of the debt as consideration for Arawak's forebearing from suing the corporation and allowing the corporation to repay the debt.

9. On December 12, 1979, Defendant wrote a letter on SCBSH stationery indicating that a payment schedule had been established. In pertinent part, the letter stated, "Rest assured that I personally guarantee that this debt to Arawak will be paid in full. I feel very strongly about this situation and it has always been my intention to see that Arawak and every other legitimate creditor receives full payment. As promptly, as our situation allows." The letter is signed "Erik J. Lawaetz President, St. Croix Hotel Corporation" (Plaintiff's Exhibit 3).

10. Sometime in 1981, SCHC declared bankruptcy. The record indicates that the status of the corporation is unknown.

III.

ISSUES

1. Whether a valid, binding contract was formed between Arawak Foods and Defendant Lawaetz, whereby defendant personally became liable for the debts of the St. Croix Hotel Corporation.

2. Whether an officer or shareholder can be held personally liable for the debts of a corporation.

IV.

CONTRACTUAL OBLIGATION

A. Guaranty

By relying on the Restatement of Contracts 2d Section 88, Plaintiff asserts that Defendant Lawaetz is personally liable for the debts incurred by SCHC. Plaintiff alleges that in the December 12, 1979 letter written by Defendant Lawaetz to Attorney Donovan, (Plaintiff's Exhibit 3) the defendant assured her that he would personally assume the debt owed to Arawak in exchange for the Plaintiff's forebearance from instituting suit, and thus a contract was formed.

Section 88 of the Restatement provides in pertinent part:

> A promise to be a surety for the performance of a contractual obligation, made to the obligee, is binding if: . . . the promisor should reasonably expect the promise to induce action or forbearance of a substantial character on the part of the promisee or a third person, and the promise does induce such action or forbearance.

Before this Court can decide whether Defendant Lawaetz was a guaranty, this Court must first determine whether a contractual obligation was formed. In her November 27, 1979 letter, Attorney Donovan asked Mr. Bowman's thoughts on obtaining a personal guarantee from Defendant Lawaetz in exchange for forbearance from suit. This does not constitute an offer, but rather a preliminary negotiation. See, e.g. Corbin on Contracts, Section 22 (1963).

To determine whether a preliminary communication is an offer or not, it must be considered in light of all the surrounding circumstances. Corbin, supra, Section 23. This Court finds that in light of all the circumstances and the three letters of Mr. Bowman, Attorney Donovan, and Defendant Lawaetz, an offer was not made. Mr. Bowman's letter of November 26, 1979 (Plaintiff's Exhibit 2) established a payment schedule for SCBSH. Attorney Donovan's letter of November 27, 1979 (Plaintiff's Exhibit 7) states

> Arawak would rest a lot easier if a personal guarantee were given by Mr. Lawaetz. In view of the substantial amount of money involved, they feel they should get some consideration in return for their willingness to forbear from suit and allow you to retire this debt over a period of months. I would appreciate hearing your thoughts on this matter. (emphasis added)

The letter was clearly written to excite Mr. Lawaetz through his agent Mr. Bowman with a "bargaining desire". Corbin, *supra*. The fact that she wanted to hear "his thoughts" on the matter indubitably shows that she wanted to acquaint Lawaetz with Arawak's position.

Courts are reluctant to construe a negotiation as an offer unless it is quite clear that a promise has been made. 1 Corbin Section 23. In the case at bar, a clear promise has not been made. Courts, therefore, will not lightly determine that a person has taken a significant step of creating a power of acceptance unless he quite clearly has made a commitment. 1/ Thus, it is not relevant to discuss whether

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1/ *See United States* v. *Braunstein*, 75 F. Supp. 137, 139 (S.D.N.Y. 1947), *appeal dismissed*, 168 F.2d 749 ("It is true

Defendant Lawaetz's letter constituted an acceptance; if there is no offer, there can be no acceptance.

Assuming, *arguendo*, that a contractual obligation existed, this Court would not have found that Defendant Lawaetz intended to assume liability for SCHC's debt. Defendant Lawaetz's letter of December 12, 1979 (Plaintiff's Exhibit 3) neither mentions nor implies that his assurance that SCHC would repay the debt would render him liable for the debt, thereby inducing forebearance on the part of Arawak from instituting a lawsuit.

There is no indication that he intended to become a guaranty. "Every expression in the nature of an assurance is not a guaranty". *Keane* v. *Gartrell*, 334 F.2d 556 (D.C. Cir. 1964) citing, *Stone* v. *Commonwealth Finance Corp*., 216 N.Y.S. 639, 641-642 (1924), *aff'd*, 243 N.Y. 528 (1926).

In *Keane*, the Court held that the words "you can feel sure we will live up to this agreement, even if I have to pay you personally" constituted a gratuitous promise since neither the promise nor any part of the letter mentioned the

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1/ continued from page 6.
that there is much room for interpretation once the parties are inside the framework of a contract, but it seems that there is less in the field of offer and acceptance. Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract.")

necessary element of consideration. The Court further held that the use of the words "personally guarantee", must be read in context with the surrounding circumstances of the entire letter.

This Court finds that Defendant Lawaetz did not intend to be bound personally for the debts of SCHC. In fact, the letter clearly shows that Lawaetz interpreted the debt as SCHC not as his own. The letter is written on SCBSH stationery and is signed by him in his official capacity. He further states that " . . . it has always been my intention to see that Arawak and every other legitimate creditor receives full payment as promptly as our situation allows." (Plaintiff's Exhibit 3, emphasis added). "Our situation", taken in the context of the letter and in light of the facts, clearly and unequivocably indicates the "situation" was the indebtedness incurred by SCHC while under the management of Prinair. There is not one scintilla of evidence, except for an isolated reading of the words, that he intended to bind himself personally.

B. Statute of Frauds

Even if a contract were assumed to be formed, in the instant case, it would not have been a valid one. A contract to answer for the debt of another is within the Statute of Frauds. 28 V.I.C. Section 244. By applying the statute to the case at bar, it is not clear that Mr. Lawaetz intended to become personally liable for the debts of SCBSH, even if the letters are read as a whole. The November 26, 1979 letter of Mr. Bowman establishes a payment schedule for the debt. However, nowhere is it stated that the schedule was made to induce forebearance of a lawsuit, that the specific amount of the debt owed had been determined, or that Mr. Lawaetz would personally become liable for the debt. The November 27, 1979 letter of Attorney Donovan likewise does not mention the specific amount of the debt. While her letter mentions obtaining the personal guarantee of Defendant Lawaetz, it is not specified that the words "personal guarantee" were to be construed as guaranteeing the debt from his personal funds. For the first time, it was mentioned that a personal guarantee would provide consideration in exchange for Arawak's promise to forbear suit. It is interesting to note that the letter does not mention who Arawak was forebearing to sue. Her letter closes "I would appreciate hearing your thoughts on this matter". (Plaintiff's Exhibit 7) There was a mere offer to enter into a contract, which is not binding. The December 12, 1979 letter of Defendant Lawaetz never addresses "his thoughts" on Arawak's promise to forebear from suing in exchange for his guarantee to become personally liable for SCBSH's debt. He only states that ". . .I personally guarantee that this debt to Arawak will be paid in full. I feel very strongly about this situation, and it has always been my intention to see that Arawak and every other legitimate creditor receives full payment as promptly as the situation allows". (Plaintiff's Exhibit 3) To infer that Defendant Lawaetz intended to become personally liable is ludicrous at best. The letter is written on SCBSH rather than on personal stationery, is signed by "Erik J. Lawaetz, President, St. Croix Hotel Corporation", and states that Arawak, as well as other creditors, would be paid as soon as possible.

Even if the letter could be interpreted as valid consideration for forebearance from suit, the contract would fail for lack of essential terms. There is no time provision stated for the amount of time that either SCHC would have to repay the debt or Arawak would forebear from suing. The total amount of debt is not specified.

V. LIABILITY FOR CORPORATE DEBT

This Court will next consider whether the defendant, absent a contract, can be held personally liable for the debts of SCHC. Under general principles of corporation law, shareholders of a corporation generally are not liable on a contract made by the corporation. The corporation is an entity 'separate and distinct' from its shareholders. Penick v. Frank E. Basil, Inc., of Delaware, 579 F. Supp. 160 (1984) citing Harris v. Wagshal, 343 A.2d 283 (D.C. App. 1975). A "party seeking to disregard the corporate entity has the burden of showing by affirmative proof that a unity of ownership and interest exists and that the corporation was created or used for the purpose of perpetrating a fraud or wrong," McAuliffe v. C & K Builders, 142 A.2d 605, 607 (D.C. Mun. App. 1958) (emphasis in the original).

To impose liability on a corporate officer for the debts incurred by the corporation, there must exist evidence of fraud or an indication by the corporate official that he would personally assume liability. If the parties intend that the corporation alone is to be bound, the fact that an officer signs as an individual does not render him liable. See, Knox v. First Security Bank of Utah, 196 F.2d 112 (10th Cir. 1952), In re Delpark, 65 F.2d 582 (2nd Cir. 1933). They are, of course, liable on agreements made by them as individuals to pay debts or obligations of the corporation. Weinberg v. Murray, 188 F. Supp. 263, aff'd, 293 F.2d 158 (D.C. Cir. 1961). They are liable where they personally guarantee the payment of the obligation of the company. In Salzman Sign Co. v. Beck, 206 N.Y.S.2d 525 (1960), aff'd, 217 N.Y.S.2d 55 (1961), the Court held that a contract executed by the individual as president on behalf of corporation was not sufficient, in absence of explicit evidence of actual intent, to bind officer individually by reason of a paragraph stating that the officer personally guaranteed payments.

Neither the allegations made by Arawak nor the record indicate any evidence of fraud. Nor is there an indication that Defendant Lawaetz would personally assume liability. Although his letter stated that he personally guaranteed payments, there is no explicit evidence to show intent. Salzman, supra.

This Court has concluded that no contract regarding a personal promise to become liable for the debt of SCHC in exchange for Arawak's forebearing from instituting a lawsuit existed between Plaintiff Arawak and Defendant Lawaetz, and that Defendant Lawaetz is not personally liable for SCHC's debt. In light of the foregoing reasons, Defendant's motion to dismiss, pursuant to Rule 50(a), Federal Rules of Civil Procedure will be granted.

Eileen R. Petersen

EILEEN R. PETERSEN
Judge