IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Richard Wassel and Carol Wassel	)	
	)	
Plaintiffs,	)	ST-09-SM-279
vs.	)	
	)	Action for Debt
John S. Herbert and Richard M. Heyl	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

This matter came before the Superior Court of the Virgin Islands, District of St. Thomas and St. John, Magistrate's Division for trial on July 10, 2009. Plaintiffs, Richard Wassel and Carol Wassel (hereinafter jointly referred to as "the Wassels") and Defendant, John S. Hebert ("Hebert") appeared *pro se.* The Court took Hebert's Motion to Dismiss or in the Alternative to Continue ("Motion") under advisement, heard testimony and admitted evidence offered by the parties. Upon consideration of the testimony and the evidence, the Court will dismiss the action against Heyl, deny Hebert's Motion, and enter judgment in favor of the Wassels in the amount of $10,000, with interest at 4% from the date of Judgment, plus $40.00 costs.

Factual and Procedural Background

On or about February 25, 2006, Hebert and Carol Wassel executed a Lease for a residence that she and her husband Richard Wassel owned. The property is located at No. 12 Saunders Gut, St. John, Virgin Islands. The term of the lease was for eighteen (18) months, commencing on March 1, 2006 and ending August 31, 2007. Rent was $2,200.00 per month. It was understood that the house would be occupied by construction workers employed by The Pro Shop, Inc. ("Pro Shop"). Hebert initialed every page and signed the Lease in his own name without identifying his capacity or relationship to Pro Shop. On November 23, 2007, Hebert

signed a Residential Lease Renewal Agreement ("Renewal") for the Wassels' property for the period November 27, 2007 through September 30, 2008. Although the body of the Renewal identified Pro Shop as tenant, Hebert again signed the Renewal as "Tenant" without identifying the capacity in which he was signing.

On or about March 31, 2008, and without written notice, the Wassels learned that the property had been vacated. In an attempt to mitigate their damages, the Wassels immediately advertised the property. The property remained vacant until September 15, 2008. As a consequence, the Wassels lost rent and incurred other expenses for clean up, repairs and electricity bills in excess of $11,000.00. In a further attempt to mitigate their damages, the Wassels accepted a Promissory Note from Heyl for $6,100.00. According to Hebert, the Note was delivered as full and final satisfaction of Pro Shop's obligations under the Lease. The Wassels denied receiving the original Note as well as Hebert's assertion that the Note was accepted as full and final satisfaction of the tenant's entire obligation under the Lease.

The Wassels filed the instant action on or about April 27, 2009. Hebert was personally served. The Wassels attempted to serve Heyl by United States mail. Hebert filed his Motion on June 2, 2009.

Plaintiffs' service on Heyl

Plaintiffs served Heyl by mailing a copy of the complaint and summons to him at this address in St. Louis, Missouri. Super. Ct. R. 27 requires that summons shall be served in the same manner as required by Rule 4 of the Federal Rules of Civil Procedure. Subdivision (3) of Rule 4 governs service by mail on noninhabitants of the *Virgin Islands. Liburd v. Platzer,* 25 V.I. 171 (D.V. 1990). Rule 4(e) specifically requires that service within any judicial district of the United States, unless waived, may be made only by following the state law of the district where

the party resides or by personal service on the party, leaving a copy at the individuals dwelling or usual place of abode with someone of suitable age and discretion who resides there or delivering a copy to an agent authorized or appointed by law to receive service of process. Although the Wassels presented a United States Postal Service return receipt, service on Heyl was defective because it did not comply with Rule 4(e) as mandated by Super. Ct. R. 27. Accordingly, the Court lacks personal jurisdiction over Heyl. Therefore, the action against Heyl will be dismissed without prejudice.

Hebert's Motion

Title 13 V.I.C. § 344(b) bars suit against any officer, director or stockholder for any debt or liability of a corporation until judgment against the corporation has been obtained. Hebert contends that under § 344(b) he is not personally liable. He asserts that the Wassels were fully aware that the Lease was with Pro Shop and not him personally. However, conspicuously absent from Hebert's pleading is any assertion that he was, at the time he signed the Lease, an officer, director or stockholder of Pro Shop. Furthermore, Hebert did not offer any evidence at trial that he was an officer, director or stockholder of the Pro Shop when he signed the Lease and the Renewal. Although Hebert testified that he is the treasurer of Pro Shop, he did not testify that he held that office at the time he signed the Lease or the Renewal or that he was acting in that capacity when he signed those documents. In the absence of any evidence that Hebert was an officer, director or stockholder of Pro Shop when he signed the Lease or the Renewal, the Court can not find that the action against Hebert is barred by § 344(b). Therefore, his Motion will be denied.

Hebert's Liability

Hebert admits that he signed the Lease and the Renewal, but contends that he did so as Pro Shop's agent and not as an individual. Therefore, he asserts that he is not personally liable for Pro Shop's obligations under the Renewal. However Hebert offered no evidence, other than his statement, that he was authorized to sign the Lease and the Renewal for Pro Shop. Based Hebert's testimony that he was acting as the agent of Pro Shop and the designation of Pro Shop in the body of the Lease as the "party of the second part" and as the "tenant" in the body of the Renewal, the court finds that Hebert had implied authority to act on behalf of Pro Shop when he signed the Lease and Renewal. This does not, however, preclude Hebert's personal liability.

The Restatement (Third) Agency, § 6.10 Agent's Implied Warranty of Authority, provides that:

> A person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal, unless
>
> (1) the principal or purported principal ratifies the act as stated in § 4.01; or
>
> (2) the person who purports to make the contract, representation, or conveyance gives notice to the third party that no warranty of authority is given; or
>
> (3) the third party knows that the person who purports to make the contract, representation, or conveyance acts without actual authority.

Based on the evidence, Hebert's actions were not ratified by Pro Shop. The note from Heyl corroborates this finding. Hebert did not give the Wassels notice that he lacked authority to bind the Pro Shop. And, there is no evidence that the Wassels were aware that Hebert lacked authority to bind Pro Shop. Accordingly, under § 6.10, Hebert gave an implied warranty of the

authority to the Wassels and is subject to liability to them for damages caused by breach of that warranty, including loss of the benefits expected from performance by Pro Shop.

It is well established that "[i]f there is no indication in a contract that the person signing does so as an agent—that is, if the principal's name does not appear in the instrument as the principal of the person signing, then the agent is personally liable on such a contract." *3 Am Jur 2nd Agency* § 170 Moreover, "[e]ven where an agent discloses the name of the principal, if the agent signs a contract in his or her own name only, the agent will be personally bound thereby where the contract does not show upon its face that he or she is acting for another." Id.

In the instant case, the name "The Pro Shop, Inc." appears as the "party of the second part" in the Lease and as "tenant" in the Renewal, but Pro Shop does not appear in, on or above the signature line on the Lease or the Renewal. Hebert signed both documents without using words that would identify him as the agent of Pro Shop, i.e. "by", "for", "on behalf of", "agent", or "per". The name Pro Shop does not appear above or below the signature line or in association with the word "tenant" on the signature line of either document. There is nothing in the body of the Lease or Renewal, when read as whole, which indicates that Pro Shop alone was the contracting party.

Accordingly, the Court finds that: (1) Hebert signed the Lease and Renewal in his own name only; (2) Hebert was not authorized to act as Pro Shop's agent; (3) Pro Shop did not ratify his actions; (4) Hebert did not give the Wassels any notice that he lacked authority to bind Pro Shop; and (5) the Wassels did not know that Hebert did not have authority to bind Pro Shop.

Conclusion

Based on the foregoing, the Court concludes that (a) Hebert gave the Wassels an implied warranty of authority, (b) Hebert became bound by the terms of the Lease and Renewal when he

signed both with a "naked signature" and (c) Hebert is personally liable to the Wassels in the amount of $10, 000.00. An appropriate Order of even date will follow.

Dated: July 28, 2009

ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

By: _____
PAULINE D. OTTLEY
Court Clerk Supervisor 7/29/2009