

**Budd-Morgan Central Station Alarm Co. Inc. v Jekyll
& Hyde, Inc.**

2011 NY Slip Op 33976(U)

December 21, 2011

Supreme Court, New York County

Docket Number: 603125/2009

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: (HON. CAROL EDMEAD)

PART 35

Justice

Index Number : 603125/2009
BUDD-MORGAN CENTRAL STATION
vs
JEKYLL
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

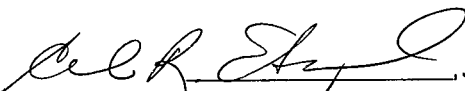
Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant Glen Falcone to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: 12.21.2011


_____, J.S.C.

HON. CAROL EDMEAD

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 35

-----X
Budd-Morgan Central Station
Alarm Company Inc.,

Plaintiff,

Index Number:

-against-

603125/2009

Jekyll & Hyde, Inc. and
Glen Falcone,

Defendants.

-----X

Carol R. Edmead, J:

Defendant Glen Falcone moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint as against him. For the reasons set forth below, this motion is granted.

Parties and Their Allegations

Plaintiff is a New York corporation that, on May 15, 2007, entered into a written contract (the Contract) for burglar alarm materials and monthly servicing (complaint, ¶¶ 1, 4) and it alleges that, as of June 23, 2009, defendants breached the Contract by failing to make payments due and owing under it, leaving a balance due in the sum of \$72,981.10 (*id.*, ¶¶ 4-6).

Falcone is the manager of the restaurant owned by defendant Jekyll & Hyde, Inc. (the Company) (Falcone affidavit, ¶ 1). He states that he signed the Contract for burglar alarm services on the Company's behalf in his capacity as manager, that he was not advised that there was a contractual provision purportedly imposing personal liability and that he had no intention to

assume any personal liability for the Company's debts (*id.*, ¶¶ 2-3, 7).

Plaintiff contends that, since Falcone admits signing the Contract and the Contract contains a provision imposing personal liability, he is bound by these contractual terms and his motion should, therefore, be denied.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary evidence, are not accorded such favorable inferences, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

The Contract and the Personal Liability Provision

Generally, "agreements are construed in accordance with the

intent of the parties and the best evidence of the parties' intent is what they express in their written contract" (*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 176 [2008]). In this case, the Contract is form agreement, drafted by plaintiff on its letterhead, and it identifies the customer as the Company. Falcone signed on the pre-printed signature lines for the customer.

The personal liability provision is in an unnumbered paragraph and is the last sentence above the signature line. It states that "[t]he undersigned agrees to be personally liable for all obligations incurred with respect to this contract." The general rule is that a person who signs a contract as an officer on behalf of a corporation is not personally liable, unless there is clear and explicit evidence of his intention to bind himself personally (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011]; *Weinrib v Stinchfield*, 19 AD3d 482 [2d Dept 2005]). This is so because in a modern commercial context "[t]here is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer [and, consequently, there must be] ... some direct and explicit evidence of actual intent" (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). The inclusion of a single sentence purporting to bind an agent personally is insufficient to establish such intent (*id.*; *Herman v Ness Apparel Co.*, 305

AD2d 217, 218 [1st Dept 2003]).

Moreover, plaintiff does not dispute that "the intended party [to the Contract with it] was the corporation" rather than Falcone individually (*Newman v Berkowitz*, 50 AD3d 479, 480 [1st Dept 2008]) and reading the Contract's provisions "not in isolation, but in the context of the instrument as a whole" (150 *Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]), plaintiff has not shown "the requisite clear and unequivocal evidence ... that [the individual] intended to assume such a liability" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 7 [1964]; *Weinrib*, 19 AD3d at 483; *Herman*, 305 AD2d at 218 [1st Dept 2003]).

Since plaintiff has not shown that Falcone intended to assume the liability of the Company, his motion to dismiss the complaint as against him is granted.

Order

It is, therefore,

ORDERED that the motion of defendant Glen Falcone to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

Dated: December 21, 2011

A handwritten signature in cursive script, appearing to read 'CAROL EDMEAD', written over a horizontal line.

J.S.C.

HON. CAROL EDMEAD