

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 Benjamin J. Creel, Individually, )  
 and D/B/A G.J. Creel and Sons, Inc., )  
 and Bucksville Farms, Inc., )  
 Plaintiffs, )  
 vs. )  
 DDG Investments, LLC; Coastal Energy, )  
 LLC; Southern Asphalt, Inc.; Donald )  
 Godwin; and Coastal Energy of South )  
 Carolina, LLC, )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2014-CP-26-06900

**RECEIVED**  
**FEB 09 2016**  
**SC Court of Appeals**

**ORDER GRANTING  
 DEFENDANTS' MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

HORRY COUNTY  
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 CLERK OF COURT

This matter came before the Court on December 16, 2015 for a hearing on Defendants' Motion for Partial Summary Judgment as to Plaintiffs' claims against Defendants for Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, and Declaratory Judgment. Present at the hearing were James P. Stevens, Jr. of Stevens Law Firm, P.C., counsel for Plaintiffs, and Amanda A. Bailey of McNair Law Firm, P.A., counsel for Defendants.

Pursuant to the September 10, 2015 Civil Motions Pilot Program Order, 2015-09-10-01, the parties timely submitted their respective supporting, opposing, and reply memoranda of law prior to the hearing. At the hearing, Plaintiffs provided the Court with complete copies of the deposition transcripts of the 30(b)(6) Witness of DDG Investments, LLC, the 30(b)(6) Witness of Coastal Energy, LLC, the 30(b)(6) Witness of Coastal Energy of South Carolina, LLC, Donald Godwin, individually, and Mark Thorne, without any specific reference to page numbers or lines in support of any particular points. In addition, by e-mail dated December 18, 2015, Plaintiffs submitted to the Court excerpts of the Deposition of Lynn Stevens, Esquire and Defendants responded by letter to the Court dated December 21, 2015.

**COPY**

For the reasons set forth herein, the Court grants Defendants' Motion for Partial Summary Judgment.

### **PROCEDURAL HISTORY**

1. On September 29, 2014, Plaintiffs Benjamin Creel, individually and d/b/a G.J. Creel and Sons, Inc. and Bucksville Farms, Inc. filed an Amended Complaint asserting causes of action against Defendants, DDG Investments, LLC, Coastal Energy, LLC, Southern Asphalt, Inc., Donald Godwin, and Coastal Energy of South Carolina, LLC for Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, and Declaratory Judgment arising out of alleged failures of Defendants to pay \$30,000 annual installment payments beginning on September 4, 2013 and to accelerate future payments under an Asset Purchase and Noncompetition Agreement.

2. On November 17, 2014, Defendants filed an Amended Answer to the Amended Complaint and Counterclaims, denying the material allegations, raising various affirmative defenses, including, *inter alia*, failure of a condition precedent, and counterclaiming for breach of contract and indemnification arising out of Plaintiffs' alleged breach of warranty regarding the number of propane tanks and cylinders and breach of the duty to indemnify and hold Defendants harmless for claims arising out of Plaintiffs' operation of business prior to closing.

3. On October 22, 2015, Defendants moved for partial summary judgment as to all causes of action by Plaintiffs against Defendants on the grounds that Plaintiffs failed to comply with a condition precedent and that Defendants Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to any contract at issue.

4. On November 12, 2015, this Court set a date certain for the trial for the term of Court beginning January 18, 2016.

5. A hearing on Defendants' Motion for Partial Summary Judgment as to all causes of action by Plaintiffs against Defendants was held on December 16, 2015.

## FINDINGS OF FACT

6. On August 29, 2012, Defendant DDG Investments, LLC, as Buyer, entered into an “Asset Purchase and Noncompetition Agreement” with G.J. Creel & Sons, Inc. and Bucksville Farms, Inc., as Seller, and Benjamin Creel, as sole shareholder of Seller, for the sale and purchase of the assets of a propane business operated as “Creel Gas Company.”

7. This Asset Purchase and Noncompetition Agreement was assigned by DDG Investments, LLC to Coastal Energy of South Carolina, LLC.

8. Defendants Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to the Asset Purchase and Noncompetition Agreement.

9. Pursuant to the terms of the Asset Purchase and Noncompetition Agreement, Coastal Energy of South Carolina, LLC, G.J. Creel and Sons, Inc., Bucksville Farms, Inc., and Benjamin J. Creel also entered into a Covenant Not to Compete dated August 29, 2012.

10. Defendants Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to the Covenant Not to Compete.

11. In addition to other payments, the Asset Purchase and Noncompetition Agreement provided for the payment to Benjamin Creel, individually, \$240,000.00 for the noncompetition agreement, payable in installments of \$30,000 per year, “beginning on the first anniversary of the Closing and continuing on each anniversary date thereafter until paid in full (subject to any adjustments pursuant to Section 1.5 below).” The Covenant Not to Compete incorporated these installment payment terms. These installment payments are hereinafter referred to as the “Post Closing Payments”.

12. Section 1.5 of the Asset Purchase and Noncompetition Agreement provides, *inter alia*, for the reduction of the Post Closing Payments based on the number of missing propane tanks or cylinders and the sum representing one-half the cost to move a 30,000 gallon propane tank.

13. In addition, Section 5.1 of the Asset Purchase and Noncompetition Agreement states that G.J. Creel & Sons, Inc. and Bucksville Farms, Inc. will indemnify DDG Investments, LLC for any loss, cost, liability or expense related to, *inter alia*, the incorrectness of any representations, warranties, covenants, or agreements of G.J. Creel & Sons, Inc. and Bucksville Farms, Inc. “contained in this Agreement or any agreement or understanding entered into or instrument given pursuant to this agreement or given on the Closing Date.”

14. Section 5.1 provides for Buyer, in addition to all other remedies, to credit and set off any damages against the Post Closing Payments.

15. The closing occurred on September 5, 2012.

16. As a material inducement for the closing of the Asset Purchase and Noncompetition Agreement, the Parties entered into a Post Closing Agreement on September 5, 2012 setting forth specific continuing duties and obligations to be handled “post-closing”, and acknowledging that seller had not met all of the contractual requirements at the time of closing.

17. Defendants Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to the Post Closing Agreement.

18. The Asset Purchase Agreement and Noncompetition Agreement, the Covenant Not to Compete, and the Post Closing Agreement are hereinafter collectively referred to as the “Transaction”.

19. Plaintiffs are sophisticated parties and were represented by the Bellamy Law Firm with respect to the Transaction and the closing.

20. Specifically, relevant to this Motion for Partial Summary Judgment, Exhibit A to the Post Closing Agreement provides:

1. The parties acknowledge that the Agreement [the Asset Purchase and Noncompetition Agreement] contains several

obligations or responsibilities that are to be performed post closing. The parties fully acknowledge and agree that the obligations to complete such matters post closing shall survive Closing which shall include all on-going representations and warranties made in the Agreement.

2. Pursuant to Section 3.1. of the Agreement, each Seller shall be validly existing and in good standing at the time of Closing. G.J. Creel and Sons, Inc. is currently not in good standing pursuant to the South Carolina Secretary of State. Said Seller has represented that actions have been taken and all tax returns have been or will be filed in order to return G.J. Creel and Sons, Inc. to good standing within 120<sup>1</sup> days. Seller has further represented that there are other assets of the Company to satisfy said tax liabilities. Upon the reinstatement of G. J. Creel and Sons, Inc., said Seller shall reconfirm its conveyance of the personal property to Purchaser by execution of a new Bill of Sale. Reinstatement shall be evidenced by a Certificate of Existence from the South Carolina Secretary of State.
3. *Until the actions set forth in Item 2 above have been satisfied, purchaser shall have no obligation to pay to Creel any of the [P]ost [C]losing [P]ayments due for the Noncompetition Agreement as set forth in the Agreement.*

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(Emphasis supplied.)

21. As required by the Transaction, G.J. Creel & Sons, Inc. has not filed all of its tax returns and did not file all of its tax returns within 120 days from the date of the closing.

22. As required by the Transaction, G.J. Creel & Sons, Inc. is not currently in good standing with the South Carolina Secretary of State as required by the Asset Purchase and Noncompetition Agreement or the Post Closing Agreement and was not in good standing within 120 days from the date of closing.

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<sup>1</sup> The "thirty (30)" is crossed out and 120 days is handwritten with initials "BC".

23. As required by the Transaction, G.J. Creel and Sons, Inc. has not reconfirmed its conveyance of the personal property to Purchaser by execution of a new Bill of Sale and did not reconfirm its conveyance within 120 days from the date of closing.

24. As required by the Transaction, G.J. Creel and Sons, Inc. has not provided Purchaser with a Certificate of Existence from the South Carolina Secretary of State and did not provide a Certificate of Existence within 120 days from the date of closing.

25. Plaintiffs do not dispute that G.J. Creel and Sons, Inc. did not and has not filed all of its tax returns. Further, Plaintiffs do not dispute that G.J. Creel and Sons, Inc. did not and has not had its corporate charter reinstated. G.J. Creel and Sons, Inc. is a dissolved corporation not in good standing with the South Carolina Secretary of State. As a result, Plaintiffs have not satisfied their obligations in Item 2 of Exhibit A to the Post Closing Agreement.

26. No Defendant has made any of the Post Closing Payments.

27. Rather, Defendants maintain that they have no obligation to make any of the Post Closing Payments because Plaintiffs failed to satisfy the conditions precedent.

28. Defendants Coastal Energy, LLC, Southern Asphalt, Inc. and Donald Godwin, individually, also maintain that they have no obligation to make any Post Closing Payments because they are not parties to the Transaction.

#### **STANDARD OF REVIEW**

29. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56, SCRCP. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397; 404, 581 S.E.2d 161, 165 (2003). “Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine

issue of fact remaining for trial.” Sims v. Amisub of S.C., Inc., 408 S.C. 202, 208; 758 S.E.2d 187, 190-191 (Ct. App. 2014).

## **DISCUSSION**

### **A. Failure of a Condition Precedent**

30. Plaintiffs’ claims for Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts and Declaratory Judgment fail, as a matter of law, because Plaintiffs have set forth no genuine issue of material fact as to any of Defendants’ breach of the Asset Purchase and Noncompetition Agreement.

31. “The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach.” S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012).

32. The elements for breach of contract accompanied by a fraudulent action require (1) breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely its making; and (3) a fraudulent act accompanying the breach. Armstrong v. Collins, 366 S.C. 204, 222-223; 621 S.E.2d 368, 378 (Ct. App. 2005).

33. A condition precedent to a contract is “any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.” Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210; 452 S.E.2d 622, 624 (Ct. App. 1994).

34. “The question of whether a provision ‘in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ’.” Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 448; 613 S.E.2d 802, 805 (Ct. App. 2005).

35. “A condition precedent is an act which must occur before performance by the other party is due.” Alexander's Land Co., L.L.C. v. M&M&K Corp., 390 S.C. 582, 596; 703 S.E.2d

207, 214 (2010), citing Wood v. Roy Lapidus, Inc., 10 Mass. App. Ct. 761, 413 N.E.2d 345, 348 n.5 (Mass. App. Ct. 1980).

36. The conditions in Item 2 of Exhibit A to the Post Closing Agreement, including, *inter alia*, that G.J. Creel & Sons, Inc. be in good standing, file tax returns, reconfirm its conveyance of the personal property by execution of a new Bill of Sale, and provide a Certificate of Existence are conditions precedent to any duty or obligation to make the Post Closing Payments.

37. The intent of the parties to the Transaction to create these conditions precedent to any Post Closing Payments under the Asset Purchase and Noncompetition Agreement is clear based on Item 3 of the Post Closing Agreement.

38. Further, counsel for Plaintiffs acknowledged this intent and advised Plaintiffs that G.J. Creel and Sons, Inc. was required to file all of the tax returns and have the corporate charter reinstated “as a condition to [Creel] receiving future payments under the Covenant.”

39. Plaintiffs did not satisfy these conditions precedent timely and have not satisfied these conditions precedent to this date.

40. As such, Defendants’ obligation to perform and/or pay any Post Closing Payments, if any, did not arise and Defendants do not owe Plaintiffs any Post Closing Payments.

41. Plaintiffs argue Defendants’ Motion for Partial Summary Judgment should not be granted because the Post Closing Agreement fails for lack of consideration.

42. The Defendants met their burden to show that the conditions precedent contained in the Post Closing Agreement are supported by valuable consideration.

43. As a condition of closing the Transaction prior to Seller complying with all of the requirements of the Asset Purchase and Noncompetition Agreement, the Buyer and Seller consented to the Post Closing Agreement.

44. The Post Closing Agreement sets forth the consideration on the face of the document, which was executed in conjunction with the closing of the Transaction.

45. Specifically, the Post Closing Agreement provides as follows:

- “As a material inducement for the closing . . . the Parties have required that this Post Closing Agreement be executed”
- “The undersigned acknowledge that the Closing Documents are being executed at this time and the transaction closed and funds disbursed in connection therewith without all of the contractual requirements being met and that the execution of the Closing Documents shall not constitute any admission by the parties that the requirements have been met.”
- “Pursuant to Section 3.1 of the [Asset Purchase and Noncompetition Agreement], each Seller shall be validly existing and in good standing at the time of Closing. G.J. Creel and Sons, Inc. is currently not in good standing pursuant to the South Carolina Secretary of State.”

46. Defendant Coastal Energy of South Carolina, LLC agreed to close the Transaction without Plaintiffs’ prior compliance with Section 3.1 of the Asset Purchase and Noncompetition Agreement, including, but not limited to, warranties that G.J. Creel and Sons, Inc. filed all income tax returns and was a corporation in good standing.

47. By agreeing in the Post Closing Agreement to close on the Transaction prior to such actions having been completed, Defendant Coastal Energy of South Carolina, LLC accepted a risk of potential tax liability on the assets and Plaintiffs agreed to forego any Post Closing Payments unless and until that risk was timely resolved. See e.g., S.C. Code Ann. §12-54-124 (2014); [http://www.sos.gov/Business\\_Filings](http://www.sos.gov/Business_Filings).

48. Such acceptance of risk and forbearance of payment is valid consideration for the Post Closing Agreement. See e.g., *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) (“Valuable consideration may consist of ‘some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other’.”); *Shayne of Miami, Inc. v. Greybow*,

Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (“Anything which confers benefit on the party promising, or is loss or inconvenience to the party to whom the promise is made, is a sufficient consideration.”); Caine & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 293 S.E.2d 859 (1982) (“A forbearance to exercise a legal right is valuable consideration.”).

49. Plaintiffs have failed to come forward with any specific facts that show there is a genuine issue of material fact regarding consideration remaining for trial.

50. Plaintiffs also argue that the Defendants’ Motion for Partial Summary Judgment should not be granted because Defendants waived the condition precedent or are estopped from relying on the condition precedent by subsequently contracting with a third-party to sell assets acquired by Defendants.

51. Defendants have not waived the conditions precedent, nor are otherwise estopped from asserting the condition precedent as grounds to excuse payment of the Post Closing Payments under the Covenant not to Compete.

52. Plaintiffs’ argument as to any waiver or estoppel grounds is misplaced because no Defendant has taken any action to pay Plaintiffs any of the Post Closing Payments.

53. To the contrary, Defendants maintain no payment is due.

54. Notwithstanding, Plaintiffs assert that a contract entered into by Coastal Energy of South Carolina, LLC to sell assets to a third-party more than eight months after closing the Transaction is evidence of waiver and supports equitable estoppel.

55. I find this contract is immaterial for several reasons: (a) the Plaintiffs have provided no foundation to the contract; (b) the contract provides no evidence of the essential elements of either waiver, i.e. an intentional relinquishment of a known right, or estoppel, i.e. misleading a party and consequential change in his position, by any Defendant as to Plaintiffs’ satisfaction of

the conditions precedent; and (c) the contract, even if considered, reflects it was executed after Plaintiffs' time to perform the conditions precedent had expired.

56. Plaintiffs have failed to meet the conditions precedent and Plaintiffs have failed to come forward with any specific facts that show there is a genuine issue of material fact regarding any waiver or estoppel remaining for trial.

57. Plaintiffs also assert that Defendants' Motion for Partial Summary Judgment should not be granted because compliance with the conditions precedent are not legally necessary.

58. The conditions precedent that G.J. Creel and Sons, Inc. file all of the tax returns and have its corporate charter reinstated are enforceable regardless of whether they are "legally necessary" to transfer assets.

59. The "legal necessity" of filing of past due tax returns or reinstatement of a corporate charter is not material to the enforcement of the conditions precedent negotiated by sophisticated parties represented by counsel.

60. Parties to a contract are permitted to agree to whatever terms they deem appropriate and a court will not go back in and second guess the terms of an agreement. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493 (Ct. App. 2004).

61. To the contrary, the court's "duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

62. The right to freedom of contract is no small part of a citizen's liberty, and this Court must enforce and maintain a contract between two experienced parties. State v. Branch Banking & Trust Co., 2015 S.C. LEXIS 76, \*6 (S.C. Feb. 9, 2015).

63. Plaintiffs have set forth no genuine issue of material fact as to any “legal necessity” theory and summary judgment should be granted as a result of Plaintiffs’ undisputed failure to comply with the conditions precedent.

64. Lastly, Plaintiffs assert that Defendants’ Motion for Partial Summary Judgment should not be granted because enforcement of the condition precedent would be inequitable and/or would work a forfeiture on Plaintiffs.

65. In support of this argument, Plaintiffs provided this Court with three out-of-state cases: Oppenheimer Co. v. Oppenheim, 660 N.E. 2d. (N.Y. Ct. App. 1995); Church Ave. Merchants Block Assn., Inc. v. State of New York, 953 N.Y.S.2d. 549 (N.Y. Ct. of Claims 2011); and Beard Family P’Ship v. Commer. Indem. Ins. Co., 116 S.E. 3d 839 (TX Ct. App. 2003). Plaintiffs assert these out-of-state cases stand for the proposition that courts will excuse performance of a condition precedent where it will evoke an inequitable forfeiture. I do not find the cases cited by Plaintiffs to be persuasive or relevant to Plaintiffs’ position. Further, Plaintiffs have set forth no South Carolina case law that stands for this proposition.

66. Notwithstanding, Plaintiffs have nonetheless set forth no evidence that enforcement of the conditions precedent would result in any inequitable forfeiture. Defendant Coastal Energy of South Carolina, LLC accepted a risk of potential tax liability on the assets and Plaintiffs agreed to forego any Post Closing Payments unless and until that risk was timely resolved. See e.g., S.C. Code Ann. §12-54-124 (2014); [http://www.sos.gov/Business\\_Filings](http://www.sos.gov/Business_Filings). Plaintiffs retained the other payments provided in the Transaction and have set forth no evidence to the contrary.

67. Plaintiffs have failed to set forth any genuine issue of any material fact regarding any equitable theory and summary judgment should be granted as a result of Plaintiffs’ undisputed failure to satisfy conditions precedent.

**B. Coastal Energy, LLC, Southern Asphalt, Inc. and Donald Godwin are not parties to the Transaction**

68. In addition to the failure by Plaintiffs of a condition precedent, Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to any contract as alleged in the Amended Complaint and therefore Defendants' Motion for Partial Summary Judgment is proper.

69. The required elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 406; 581 S.E.2d 161, 166 (2003).

70. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." Roberts v. Gaskins, 327 S.C. 478, 483; 486 S.E.2d 771, 773 (Ct. App. 1997).

71. An individual who is not a party to a contract generally cannot be liable for its breach. See Holder v. Haskett, 283 S.C. 247, 251; 321 S.E.2d 192, 194 (Ct. App. 1984).

72. Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin are not parties to the Asset Purchase Agreement and Noncompetition Agreement, the Covenant Not to Compete, and the Post Closing Agreement, the Transaction, or closing.

73. As a result, summary judgment is proper as to these entities on all of Plaintiffs' claims against Defendants.

74. Plaintiffs allege that they have pled that the Defendants DDG Investments, LLC, Coastal Energy, LLC, Coastal Energy of South Carolina and Southern Asphalt, Inc. are the alter-egos of Donald Godwin, individually, and therefore summary judgment should not be granted.

75. An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby. This theory does not apply in the absence

of fraud or misuse of control by the dominant entity which results in some injustice. Colleton County Taxpayers Ass'n v. Sch. Dist., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006).

76. Plaintiffs have failed to set forth any specific evidence, affidavit, testimony, or the like as to the necessary elements of alter-ego.

77. As a result, Plaintiffs have failed to set forth any genuine issue of material fact as to an alter-ego theory and partial summary judgment should be granted as to Defendants Coastal Energy, LLC, Southern Asphalt, Inc., and Donald Godwin as they are not parties to and have not executed any contract at issue.

### CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment as to all causes of action by Plaintiffs against Defendants is GRANTED. I find there is no reason to delay and hereby direct entry of partial summary judgment in favor of Defendants as to all Plaintiffs' claims against Defendants. This order does not end this action and I hereby direct such further proceedings as are just and necessary to determine the remaining counterclaims of Defendants with finality.

IT IS SO ORDERED.

1/5/2016



Honorable William H. Seals, Jr.  
Court of Common Pleas  
Fifteenth Judicial Circuit