

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

HON. PAUL A KATZ

CLERK OF THE COURT  
W. Bobrowski  
Deputy

GOHSAG L L C

LAWRENCE K LYNDE

v.

JAMES E ACRIDGE, et al.

FRANK W MOSKOWITZ

**UNDER ADVISEMENT RULING**

This Court having conducted a bench trial in this matter; having reviewed the evidence presented at said trial; and good cause appearing enters the following findings of fact and conclusions of law, verdicts and orders:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. On or about August 4, 2004, Gohsag, LLC (“Gohsag”) and Defiance Industries, Inc. (“Defiance”) entered into a lease purchase agreement with Gohsag as lessor and Defiance as lessee.
2. Neither party was represented by counsel, but Gohsag was represented by real estate agent, Renee Walton and Defiance was represented by real estate agent Jan Moore-Acridge.
3. The seven page lease agreement, exhibit 1 at trial is initialed on each of its pages by James E. Acridge, Sr. (“James Acridge”) and a representative of Gohsag who was not identified at trial, with the initials CB. Exhibit one is only signed by James Acridge on behalf of Defiance Industries, Inc. but is

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

not signed by a representative or agent of Gohsag. However, there is no dispute that this seven page lease agreement was in fact executed by both parties.

4. This sixty month lease with an option to purchase requires rent payments of \$5,875 per month, beginning on September 1, 2004. The parties in paragraph 33 of the lease further agreed that the commission due the two real estate agents would be credited toward the first two months of rent.
5. The first five pages of the lease is a form that was provided by Defiance's real estate agent and the two page addendum or attachment was drafted by her as well.
6. Plaintiff's broker, Renee Walton testified that she and James Acridge had at least two to three negotiating sessions before the terms of the lease/option agreement were agreed upon. She confirms that the named lessee was Defiance but further testified that James Acridge was acting like he was negotiating on his own behalf, and not on behalf of Defiance or a yet to be formed LLC (there was no mention of an LLC).
7. The lease addendum, attachment A at paragraph A states that the lessee/purchaser is Defiance Industries, Inc. or nominee. However, the lease at paragraph 6 specifically states that the lessee, Defiance will not assign or sublet the subject property or any portion thereof without the prior written consent of the lessor. In this Judge's 32 years of experience he has never seen a case or read any published court opinions in which the term nominee is used interchangeably with the terms assignee or sublessee. This Court believes that with respect to the lease of the subject property, the only lessee was Defiance and that the nominee provision would only apply in the event that Defiance were to exercise its purchase option.
8. Even if the parties contemplated that DEFI #001, LLC ("DEFI") could be substituted as the lessee, this Court finds as a matter of law that paragraph 6 of the contract prevails and that any such assignment would require the written consent of the landlord, which could not be unreasonably withheld. Notwithstanding this finding, neither Defiance nor James Acridge ever notified Gohsag of their nomination of DEFI as Defiance's nominee, assignee, or sublessee. Finally, on this issue, even if this Court were to find that the contract language in paragraph 6 of the lease and paragraph A

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

of its addendum are inconsistent, any ambiguity in the contract must be construed against Defiance whose agent submitted the form contract and drafted the addendum.

9. It is virtually undisputed that at the time the lease was negotiated, Gohsag through its agent Renee Wallace, was well aware of the fact that James Acridge had recently come out of Chapter Seven bankruptcy proceedings and was dependent upon his ability to procure financing for Defiance in order to make the lease work. The subject property had previously been operated as a gas station and it was the intent of the parties that Defiance would remodel and reopen this service station facility together with a convenience market. This purpose is well stated in the lease.
10. The parties were well aware of the fact that without financing, not only would Defiance be unable to make its lease payments, but would be unable to complete the necessary repairs and renovations in order to allow this service station facility to re-open. Without question, Defiance was undercapitalized at the time that the lease agreement was executed between the parties. However, James Acridge was upfront with Renee Wallace in advising her as to Defiance's lack of capital and yet, Gohsag as part of its due diligence never requested that Defiance produce a financial statement or its corporate books and records for review. Additionally, as a sophisticated business operator, Plaintiff never requested a personal guarantee from James Acridge or from any other third party in order to guarantee Defendant's performance.
11. It also appears that Defiance as a fledgling corporation never issued shares of stock, kept formal corporate books and records or ever filed a tax return. However, James Acridge was forthright in his negotiations on behalf of Defiance and did nothing fraudulent to induce Defendant into executing the subject contract.
12. This Court believes that James Acridge was dishonest with this Court in suggesting that during the subject term of the lease, Defiance was owned and operated by his son, James Acridge ("Jessie Acridge"). From the trial testimony of Renee Walton and Gohsag's chief financial officer, Linda Kroupa, as well as from James Acridge's letter of February 18, 2005, trial exhibit 33, that substantially all of the gas station operations during Defiance's ten month occupancy of the subject property were the fruits of

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

James Acridge's labor with little to no input or work being performed by Jessie Acridge.

13. Even if Defiance was incorporated with Jessie being its sole shareholder and president, it would appear from the testimony that unlike his father, James Acridge, Jessie Acridge had virtually no prior experience in the service station or retail industry, paid no consideration to acquire his shares of stock, made no loans or capital contributions to Defiance and was rarely present upon the leased premises once the service station opened for business. This Court believes that James Acridge was essentially using the corporate veil in his son's name, to shield himself from his creditors and his then wife with whom he was in the middle of divorce proceedings. However, James Acridge's motives in attempting to hide the true ownership and or management of Defiance in his son, Jessie has no legal significance in the outcome of this trial; it does however affect his credibility as a witness including any claimed offsets that Defiance is seeking for capital improvements made to the subject property and or the non-return of Defiance's trade fixtures.
14. Based upon the above findings, there is no legal basis to allow Plaintiff to pierce the corporate veil. There is no injustice here, as the Plaintiff had every opportunity to conduct a due diligence study prior to entering into the subject lease and could have insisted upon a personal guarantee before executing the same.
15. This Court has already found that Plaintiff is entitled to \$58,504.21 in contractual damages for breach of the lease agreement; this amount includes a credit for \$9,390 in rent paid by Defiance.
16. Plaintiff is not entitled to \$495 for video surveillance, \$3,432 for security services or \$125 for locksmiths, fees allegedly incurred in the repossession of the subject property.
17. During Defiance's pending bankruptcy, Defiance remained as a debtor in possession of the leasehold premises (the subject property) until the Bankruptcy Court order of July 14, 2004 confirming Defiance's rejection of this executory contract pursuant to 11 U.S.C. Section 365. The Bankruptcy Court on this date ordered that Defiance surrender and turn over to Gohsag, the subject property by July 16, 2005 together with the

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

keys to the premises. A copy of the Bankruptcy Court order is trial exhibit 44.

18. Trial exhibit 46 is Defiance's schedule of assets and liabilities, filed with the Bankruptcy Court. Nowhere in the schedule of assets does Defiance list any trade fixtures or other personal property located upon the subject property for which it claimed an ownership interest. This Court finds that by Defiance's failure to list trade fixtures or personal property located upon the leased premises in its rejection of the lease, Defiance has abandoned all right, title and interest in said trade fixtures that it might otherwise have been entitled to under paragraph 19 of the lease. At no time during the pendency of the bankruptcy did Defiance request that it, during its occupancy of the subject property be allowed to remove trade fixtures, at its expense, from the subject property, nor did they request permission of the Bankruptcy Court or of the Plaintiff to reenter upon the property after its surrender, for purposes of doing so.
19. Defiance, through James Acridge claims that it made \$49,000 in improvements to the subject property, in the name of DEFI. However, DEFI is not a party to this litigation or the subject lease and if it incurred debt on behalf of Defiance, that is a matter to be resolved between said companies, and is not of concern to Plaintiff. Even if Defendant were to claim that Plaintiff has been unjustly enriched by virtue of these improvements, Defiance made said improvements pursuant to its business plan and did so, under the lease, at its own expense.
20. Of the alleged improvements made by Defiance, the only matters that it would have been entitled to, had a timely request been made, would have been the removal of its trade fixtures; it was not entitled to reimbursement for any repairs, additions or installation of fixtures, other than trade fixtures, upon the subject property.
21. Even if Defiance were entitled to compensation for the trade fixtures it left behind, the various bills, checks and invoices presented to the Court indicating certain repairs or renovations made to the subject property by DEFI on behalf of Defiance do not delineate which, if any of these expenses relate directly to the installation of new trade fixtures, Defiance has presented no evidence as to the increase in value to the property as the result of such renovations or installations, nor has it presented any evidence to suggest the costs that might be incurred by Gohsag should it

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2005-052587

03/25/2008

need to remove said trade fixtures for the sale or releasing of the subject property.

22. The Court will allow Defiance a \$2,100 additional credit or offset against the rent arrearages previously established by this Court for repairs made to the subject property.
23. Plaintiff is entitled to an award of its attorney's fees pursuant to paragraph 26 of the lease.

VERDICTS

Now therefore the Court enters the following verdicts:

This Court finds in favor of the Plaintiff, Gohsag, LLC on its claim for breach of contract against Defendant, Defiance Industries, Inc. and finds Plaintiff's full damages to be \$56,404.21.

This Court finds in favor of Defendants James E. Acridge, Sr. and Jane Doe Acridge, husband and wife and James E. Acridge, Jr. and Jane Doe Acridge, husband and wife on Plaintiff's claim for breach of contract/piercing the corporate veil as against these individual Defendants.

ORDERS

Now therefore, IT IS ORDERED that Plaintiff's counsel shall lodge a proposed form of judgment with this Court on or before April 8, 2008 hand-delivering a copy thereof to Defendants' counsel on the date said proposed form of judgment is lodged with this Court. On or before April 8, 2008, Plaintiff shall file its application for attorney's fees together with supporting affidavit. Defendants shall have until April 18, 2008 to file its objections to the proposed form of judgment and application for attorney's fees. The objections to the proposed form of judgment shall be limited to the failure of said proposed judgment to conform with the verdicts of this Court, and shall not be used as a means of seeking a rehearing, reconsideration or new trial.