UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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In re: Case No.: 01-13264
Robert J. and Suzanne M. Merrill, Chapter 7

Debtors.

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Manheim Automotive Dealers Services, Inc. et al., Adv. Pro. No.: 01-90248

Plaintiff

-v-

Robert J. and Suzanne M. Merrill,

Defendants.

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Appearances:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

**Memorandum, Decision and Order**

Before the court is Manheim Automotive Dealers Services, Inc.'s ("Plaintiff") motion for summary judgment. The question presented is whether based upon the facts of this case the fraud of one stockholder/officer, Defendant Robert Merrill, should be imputed to the other stockholder/officer, Defendant Suzanne Merrill ("Defendant"), in a closely held corporation.

## Facts

The undisputed material facts taken directly from the pleadings follow:

At all relevant times, Robert Merrill was the president and manager of Merrill Automotive, Inc., and supervised the office manager Colleen Stone, two salesmen, a service manager and a few mechanics. At all relevant times, the Defendant was a shareholder and officer of Merrill Automotive, Inc.

In 1994, Merrill Automotive obtained an inventory finance and bridge line of credit from the Plaintiff which was eventually increased to $475,000. As part of the documentation for the line of credit, Mr. Merrill, as president, signed a promissory note and security agreement. Mr Merrill and the Defendant also signed individual personal guarantees. Under the security agreement, Merrill Automotive borrowed funds from the Plaintiff which was to be paid at the earliest of; (1) within 48 hours from the time of sale; (2) within 24 hours from the time Merrill Automotive received payment for the vehicle; or (3) 60 days from the loan. During the several years prior to ceasing its business operation, Merrill Automotive consistently failed to pay its loan to the Plaintiff in accordance with its terms. Often, Merrill Automotive was unable to pay off the loan within 45 days after the sale of the vehicle. Whenever this happened, it gave its customers a second 45 day temporary registration. Robert Merrill directed Colleen Stone to give out the second temporary registrations.

To assure that the cars financed by the Plaintiff on Merrill Automotive's floor plan were in fact on the lot and unsold, the Plaintiff employed Jim Valentini as a floor checker. Often, when Mr. Valentini would make his monthly inspection of the lot, numerous cars were missing. However, before Mr. Valentini would return, usually on the following day, Robert Merrill would

direct his salesman to call customers who had already purchased cars and ask them to return the cars for routine servicing. Thus, the "missing"cars would be on the lot when Mr. Valentini returned. As a consequence of Mr. Merrill's actions, Mr. Valentini believed that the cars on the lot were unsold. In addition, contrary to the terms of the security agreement, and without the Plaintiff's knowledge, Mr. Merrill began double financing cars with Glens Falls National Bank.

Robert J. Merrill and the Defendant were deposed and asked a series of questions about Mr. Merrill's activities and the Defendant's knowledge of them. In response to all questions asked, the Defendant asserted her Fifth Amendment privilege. Throughout the time that Mr. Merrill was engaged in the activities described above, the Defendant received a regular weekly paycheck of $200.

**Argument**

The Plaintiff argues that the facts of this case unequivocally establish Mr. Merrill's fraud and that summary judgment against him should be granted. It further contends Mr. Merrill's fraud can and should be imputed to the Defendant. The Defendant disagrees, arguing that a question of material fact exists with respect to her knowledge of Mr. Merrill's activities, and, as such, summary judgment is inappropriate.

**Discussion**

Summary judgment is a complete remedy that can only be granted when no disputed material fact exists and the evidence must be viewed in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Catrell*, 475 U.S. 574 (1986). The Plaintiff correctly asserts that no material fact exists. However, while it has met its burden with respect to Robert Merrill it has failed to demonstrate

that his fraud should be imputed to the Defendant. Therefore, summary judgment on behalf of the Plaintiff against Robert Merrill is granted and the Plaintiff's request for summary judgment against the Defendant is denied. Moreover, summary judgment is granted on behalf of the Defendant.

*Summary Judgment against Robert Merrill*

Robert Merrill has not opposed the motion for summary judgment.[1] Since the uncontested material facts support a finding of nondischargeability, pursuant to 11 U.S.C. § 523(a)(2) and because there has been no denial of the allegations in the complaint nor any opposition to the summary judgment motion, summary judgment is granted for the Plaintiff against Robert Merrill

*Summary Judgment against the Defendant*

The Plaintiff's argument relies almost exclusively on the Defendant's status as stockholder and officer of Merrill Automotive. Indeed, the record lacks any allegation, let alone evidence that the Defendant participated in any fraudulent activities. Rather, the Plaintiff argues that as a result of Mr. Merrill's activities the Defendant received a financial benefit (a weekly salary of $200) from Merrill Automotive and that the court can draw a negative inference from the Defendant invoking her Fifth Amendment privilege at her deposition. Even when the Defendant's status is coupled with these facts there is simply not enough evidence to convince the court to impute liability to her.

While under § 523(a)(2)(A) the fraud of one partner may be imputed to another, as

[1]Mr. Merrill has, in fact, withdrawn his Answer in the adversary proceeding.

interpreted by the United States Supreme Court[2] and other courts,[3] Merrill Automotive is not a partnership; it is a closely held corporation. None of the law cited by the Plaintiff involves a corporation. The Plaintiff offers several New York cases as support for the proposition "[that] the relationship between officers and shareholders of a closely held corporation are akin to partners." (Plaintiff's Memo of Law pp. 22 - 23.) However, the cases relied upon are not persuasive; they are factually distinguishable and outdated. More importantly, they do not hold that shareholders/officers are the same as partners nor that they should be treated in the same manner, especially when the main reason for forming a corporation is to avoid personal liability. The Plaintiff's arguments to the contrary are not convincing.

The Plaintiff also suggests that since the Defendant received a salary from Merrill Automotive she received a benefit from the fraud perpetrated by her husband and, therefore, it is proper to impute liability and find the debt nondischargeable. In the primary case relied upon by the Plaintiff, *In re Luce*, 960 F.2d 1277 (5th Cir. 1992), the court found that liability may be imputed to an innocent **partner** if a benefit is received. However, courts have moved from this theory for imputing liability. *In re Winkler*, 239 F.3d 740 (5th Cir. 2001). Therefore, the fact that the Defendant received a salary is not a critical detail. More importantly, the Plaintiff has failed to demonstrate that the benefit theory is applicable to corporations.

Finally, the Plaintiff argues that the court could and should draw a negative inference from the Defendant's refusal to testify on Fifth Amendment grounds. However, even if the court did so, the affidavit by Colleen Stone, office manager of Merrill Automotive for 13 years, states,

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[2]*See Strang v. Bradner*, 114 U.S. 555 (1884).

[3]*See Federal Deposit Ins. Corp., v. Calhoun*, 131 B.R. 757 (Bankr. D. Col. 1991).

"[the Defendant] was not involved in the daily activities of [the business]... appeared at the office once every couple of months ... and left after a few minutes ... never reviewed any business records ... and never asked any questions about the operation of the business." (Defendant's Ex. 1.) Ms. Stone also indicated that she "had no reason to believe that [the Defendant] was involved in or was aware of the business practices [of Merrill Automotive]" (Defendant's Ex. 1.) Therefore, notwithstanding the fact that the Defendant invoked her Fifth Amendment privilege, the undisputed affidavit of a non-party, with knowledge of the business routine, establishes that the Defendant was not an active participant in the daily activities of Merrill Automotive. Thus, the facts as well as the legal theory offered by the Plaintiff do not support a finding that liability should be imputed to the Defendant.

The Second Circuit has authorized a *sua sponte* award of summary judgment where based on all the proof submitted there is no disputed issue of material fact and where judgment, as a matter of law, for the non-moving party is appropriate. *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2d Cir. 1975) (citation omitted). Here, as previously noted, there is not even an allegation that the Defendant actually participated in any fraudulent conduct and the Plaintiff has failed to convince the court, based upon undisputed material facts, that liability should be imputed to her.

**Conclusion**

Since there is no disputed material fact and because there was no opposition presented, the Plaintiff's request for summary judgment against Robert Merrill is granted. Moreover, based upon the uncontested facts, judgment for the Defendant is appropriate as a matter of law,

and therefore, summary judgment on her behalf is granted.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr
United States Bankruptcy Judge