2013 IL App (2d) 120785-U
No. 2-12-0785
Order filed May 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MERVYN COHEN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 07-CH-1648
	)	
LARRY BASIL, a/k/a Lawrence Basil,	)	
TERRI CRITTENDEN, and BASIL	)	
CONTRACTING CORPORATION,	)	Honorable
	)	Mitchell L. Hoffman,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment denying plaintiff's claim that defendants violated the Uniform Fraudulent Transfer Act and denying plaintiff's request to pierce the corporate veil was not against the manifest weight of the evidence; therefore, we affirmed.

¶ 2 Defendants, Larry Basil and Terri Crittenden, jointly owned Basil Crittenden, LLC (the Company). Plaintiff, Mervyn Cohen, entered into a contract with the Company to build a house. Based on issues with the construction of the house, Cohen filed suit against the Company and obtained a default judgment against it for $932,500. The Company then dissolved. Unable to collect on the default judgment due to the Company's dissolution, Cohen filed a two-count complaint against Basil, Crittenden, and a company owned solely by Basil, Basil Contracting Corporation. In particular, Cohen alleged violations of the Uniform Fraudulent Transfer Act (Transfer Act) (740 ILCS 160/5, 6 (West 2006)) and sought to pierce the corporate veil. Following a bench trial, the trial court denied all relief, and Cohen appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Amended Complaint

¶ 5 On January 25, 2008, Cohen filed an amended two-count complaint. Count I alleged a violation of the Transfer Act but referenced no specific provision of that statute. Cohen alleged as follows in count I.

¶ 6 Basil and Crittenden were the principal members/partners of the Company. In 2002, the Company entered into a $1 million contract with Cohen for the construction of a home in Barrington Hills. On November 16, 2006, plaintiff received a default judgment against the Company for money damages of $932,500. Cohen alleged that though the Company was represented as an operating company with sufficient capital and assets to complete the contract, the Company was undercapitalized in that all profits were withdrawn and distributed to Crittenden and Basil. Cohen alleged that the Company was nearly $500,000 in debt when the default judgment was entered and was "hundreds of thousands of dollars in debt in the years prior" to the judgment.

¶ 7 Cohen further alleged that in 2006, Crittenden and Basil began withdrawing the Company's assets and placing them in their own personal accounts. In addition, they transferred business opportunities from the Company to other business entities, including Basil Contracting Corporation.

The Company's phone number was likewise transferred, allowing Basil Contracting Corporation to exploit business opportunities "without value being paid to" the Company. Also, the Company's "work in progress" was transferred to other businesses without payment to the Company, which violated the Transfer Act.

¶ 8 Cohen alleged that at the time of the November 2006 default judgment, the "unwinding" of the Company was complete. Basil and Crittenden utilized the Company simply as a conduit to transfer money and assets from customers to themselves personally, and the Company was dissolved in contemplation of judgment being entered against it. Cohen sought an amount equal to the sum of all assets transferred from the Company to any other entity.

¶ 9 In count II, Cohen sought to pierce the corporate veil and hold Basil and Crittenden personally liable for paying the amount of the default judgment, $932,500. Cohen repeated in count II many of the allegations in count I, and also alleged that there was "such a unity of interest in ownership" between Basil, Crittenden, and the Company that any separate personality of the Company never existed or did not exist by the time of the November 2006 default judgment. According to Cohen, there had been "through inception a co-mingling of the business affairs" of Basil, Crittenden, the Company, and various other business entities, such as Basil Contracting Company. In particular, Cohen alleged that the Company was used to fund certain expenses for Basil and Crittenden personally, as well as Basil Contracting Company, without adequate consideration. These expenses included vehicles, cell phones, improvements to the office space, computer systems and equipment, supplies and suppliers, and the cost of workman's compensation policies and commercial insurance policies.

¶ 10 Cohen further alleged in count II that: (1) the Company listed other business entities as intercompanies for tax purposes and as subcontractors; (2) the other business entities guaranteed loans and lines of credit obtained by the Company; (3) the Company paid unrealistically high salaries to Basil and Crittenden; (4) the Company paid reimbursements to employees of other business entities; (5) Basil owned and controlled several corporations from a single location with little separation; (6) few corporate formalities were ever observed by the Company; and (7) the Company was formed by Basil and Crittenden simply to avoid personal liability.

¶ 11 B. Bench Trial

¶ 12 A three-day bench trial commenced on February 6, 2012. Cohen testified first as follows. In 2001, Cohen entered into a contract with Basil of Basil & Associates, an architectural firm, to create the architectural plans for a home in Barrington Hills. In 2002, Cohen entered into a separate contract with the Company for the construction of the home. In 2002 and 2003, problems with decking on the foundation and the roof occurred. Cohen filed suit against the Company on October 23, 2003, and on November 16, 2006, a default judgment of $932,500 was entered against the Company.

¶ 13 Basil testified next as follows. Basil, an architect, formed two businesses or "C Corps" in 1980, which he owned solely. One of these businesses, Basil & Associates, was an architectural firm, and the other business, Basil Contracting Corporation, was a general contracting business for residential and commercial construction. Both businesses were located in a big office building that Basil had built in 1994 and also owned. Basil used the same bookkeeper and the same secretary for both Basil & Associates and Basil Contracting Corporation.

¶ 14 Basil hired Crittenden as a staff architect for Basil & Associates in 1994. In 1996, Basil and Crittenden created a business called Basil Crittenden Custom Residential Construction, LLC. The operating agreement for this business was dated October 15, 1996, and it took over the residential portion of the construction work previously handled by Basil Contracting Corporation. The business also shared office space with Basil & Associates and Basil Contracting Corporation and was charged by the amount of square footage it occupied. Later in 1999, Basil and Crittenden decided to shorten the name of the business to Basil Crittenden, LLC (the Company), and the name change was filed with the Secretary of State. Crittenden ran the day-to-day operations of the Company and received a salary. The ownership split began with Crittenden having a one-third interest and Basil having a two-thirds interest in the Company, and then the split became fifty-fifty. The operating agreement was amended by Basil's attorney to reflect this change. After the business was renamed, Basil and Crittenden continued operating under the original operating agreement, and the Company kept the same employer identification number.

¶ 15 Basil further testified that Basil & Associates was the common "paymaster" of the employees working for the Company and Basil Contracting Corporation. The Company and Basil Contracting Corporation submitted time cards and pay requests to Basil & Associates based on the number of hours the employees worked, and then Basil & Associates issued paychecks. Basil & Associates then invoiced the Company and Basil Contracting Corporation for those amounts. Basil testified that he billed the Company for rent and its portion of utilities in the building, which were "pass-through expenses." Regarding rent, Basil did not believe that there was a written lease but "there were written results ending in the amount of rent that was due." Crittenden paid these bills and kept track of expenses.

¶ 16 The three businesses (Basil & Associates, Basil Contracting Corporation, and the Company) shared one phone number that had been in existence since 1985, and all three businesses shared that telephone expense. Basil explained that the general phone number directed people to a specific place; three companies were operating. However, all three businesses maintained separate bank accounts and filed separate tax returns. Tax returns and annual financial statements for the Company were prepared by a professional accounting firm. In addition, the Company maintained its own insurance policies such as workmen's compensation coverage and general liability policies.

¶ 17 Basil also testified that he and Crittenden formed another business, Fine Finish, LLC, which was a subcontracting business that lasted less than two years. For Fine Finish, Basil and Crittenden entered into an operating agreement, registered it with the State, maintained a separate bank account, and filed tax returns.

¶ 18 According to Basil, none of these businesses, Basil & Associates, Basil Contracting Corporation, or Fine Finish, owed money to the Company, had an interest in the Company, withdrew assets from the Company, or were paid for work performed by the Company. In addition, Basil did not personally owe money to the Company, never placed assets of the Company into his own personal account, and never transferred business opportunities or ongoing business from the Company to any of the other businesses. After Basil formed these businesses, he kept his personal and business affairs separate, including personal checking and bank accounts. Prior to the Cohen suit, none of the businesses had been sued by a client. In addition, Basil testified that the Company never funded any personal cell phone expenses or vehicle expenses for Basil or the other businesses. At most, there may have been "some overlap" between the Company and Fine Finish when "Fine Finish was just starting," although Basil had "no direct knowledge of that."

¶ 19 In terms of distributions that Basil and Crittenden received from the Company, the financial statements indicated the following. In 2001, Basil took $230,000, and Crittenden took $154,000. In 2002, Basil took $194,000, and Crittenden took $152,000. Basil explained that the Company was making money then. In 2003, Basil took $80,000 from the Company, and Crittenden took $129,000. In 2004, Basil returned $48,446 to the Company to pay some bills and keep the Company going. In 2004, Crittenden returned $37,000 to the Company and took $109,500. Basil identified a compiled financial statement for 2004 that indicated accounts receivable of $389,465 and accounts payable as $970,461; the Company's payables were roughly twice the receivables. However, Basil explained that it was not uncommon "in a construction company for invoices to come in before a fiscal-year ended when the monies for those invoices had not been yet received." Still, Basil and Crittenden saw "the trend occurring" and tried to correct it after 2004. Basil did not think the Company made any distributions after 2004. The Company's assets in 2004 totaled $705,000. In 2005, the Company's assets totaled $1,508,532, with accounts payable of $1,737,000. In 2006, the Company had no assets.

¶ 20 Basil testified that as the Company grew, it became clear it needed its own bookkeeper. When the bookkeeper saw financial problems with the Company, the problems were brought to Basil's attention, and he spoke to Crittenden about it. Basil thought he became aware of financial problems in late 2003. Crittenden and Basil also discussed the Cohen suit "often." When asked if he did anything to create a reserve to pay potential liabilities, Basil testified that "[i]t didn't seem necessary at the time." Basil testified that there was "work coming in," meaning he and Crittenden thought that they could "turn it around."

¶ 21 On March 6, 2006, Basil hand-delivered a letter to Crittenden indicating his desire to retire from the Company. Crittenden, the only other member of the Company, wanted to take the business on her own. She left the building by mutual agreement and took all of the Company files with her. However, in about October 2006, Crittenden decided not to continue the Company. After the Company left the building, only Basil & Associates and Basil Contracting Corporation remained. Both were still in existence.

¶ 22 Crittenden testified next as follows. Crittenden, a licensed architect since 1984, began as a staff architect for Basil & Associates before forming a business (later known as the Company) with Basil in 1996. Over the years, the Company made money on some jobs and lost money on other jobs. Crittenden handled day-to-day operations for the Company, and Basil brought in business. Crittenden and Basil met regularly to discuss matters, and the accounting firm for the Company prepared annual financial statements that she reviewed with Basil. Crittenden drew a salary and received distributions, and Basil received distributions. There was one year in which Basil took all of the profits in one lump sum whereas she spread it out over a few years.

¶ 23 Crittenden further testified that although payroll for the Company went through Basil & Associates, the Company was a separate entity. Because Basil & Associates served as the common paymaster, it issued pay checks for the Company's employees, and then the Company issued checks back to Basil & Associates. Employees who worked for the Company "just worked on [Company] stuff." In addition, the Company did not share a bank account with Basil & Associates or Basil Contracting Corporation; it had its own separate account. The Company made rent payments to Basil & Associates because Basil owned the building. The Company also paid utilities to Basil & Associates, and rent and utilities were based on the square footage occupied by the Company. The

Company's bookkeeper wrote those checks. In addition, the Company paid the bills of Fine Finish for a brief period as Fine Finish was set up, but any loans made by the Company to Fine Finish were repaid. Fine Finish did not survive long.

¶ 24 Crittenden testified that she never "decided" that the Company was in trouble financially; it had challenges that she believed could be turned around. The Company's costs were increasing with additional employees but the net income was decreasing. When asked why she did not set up a reserve to pay off some of the debt and cover any potential negative financial event, Crittenden replied that she was not wise and did not get advice otherwise. Crittenden counted on future business to "save" it with an influx of cash. In addition, she did not set up a reserve to cover a potential judgment in the Cohen suit because she did not think there would be a judgment to pay. Crittenden continued to draw a salary.

¶ 25 When asked about equipment removed from Cohen's construction project, such as a generator and an entertainment center, Crittenden testified that she remembered a conversation about what would happen to the items that "hadn't been paid for yet." Crittenden thought that these items were brought back to the office and put in storage, although she did not know their current whereabouts. The Company never took back any A.V. equipment.

¶ 26 Crittenden thought that Basil retired because she wanted to go their "separate ways"; the two went through a "business divorce." Basil advised Crittenden that he wanted to be indemnified for any liability from the Cohen project but Crittenden refused. Crittenden moved the Company to Highland Park and took many of the files with her. She and Basil could not come to an agreement, however, on the purchase price or terms. The Company was dissolved on October 16, 2006, which was "10 years to the day" the operating agreement for the Company was signed. At the end when the Company dissolved and she had to let her staff go, she gave them titles to the Company's vehicles because she could not pay them. One of the vehicles was returned to the bank.

¶ 27 Mitchell Cohen, Cohen's nephew, had been a certified public accountant (CPA) since 2003. He testified as follows. He reviewed the Company's 2004 and 2005 tax returns, compiled financial statements, distributions, and other documents. CPA Cohen used "Biz Miner's Industry Financial Profile" from 2005 to 2007 to identify like businesses for comparison to the Company. CPA Cohen reviewed both accounts receivable and accounts payable for the Company from 2005 to 2007 and determined that it "was running a far higher accounts payable number than as compared to accounts receivable." The Company appeared to be "insolvent" because the accounts payable were at a high level, and "it didn't appear that there was any way of paying them off on the ongoing business because the accounts receivable were not close." While there were "small amounts of work in process," there was nothing that came close to the accounts payable owed. CPA Cohen testified that "the receivables to payables generally are close enough that if something were to happen with the company, they'd be able to offset the receivables and pay the payables. This did not appear to be the case in this situation."

¶ 28 CPA Cohen further testified that total member distributions from 2000 to 2004 was $1.3 million. Regarding the distributions, CPA Cohen researched "Illinois statutes" stating that members of limited liability companies cannot take distributions if they are unable to pay the business' bills in a timely fashion. When asked how he knew bills were not being paid on a regular basis, CPA Cohen responded that the Company "was in excess of accounts receivable by large amounts when [he] compared it to Biz Miner." He opined that the Company was not "capitalized properly because the accounts payable were so high and were getting larger." He further testified that bills for Fine Finish were paid by the Company, and there was no evidence of the Company being repaid.

¶ 29 On cross-examination, CPA Cohen admitted that his report stated that he reviewed the compiled financial statements for 2004 and 2005, but he thought it was 2003 and 2004. He could not remember which years he reviewed. CPA Cohen also admitted that he did not review any of the Company's monthly bank statements or investment accounts.

¶ 30 At this point, defendants moved for a directed finding, which the trial court denied.

¶ 31 Basil testified on his own behalf as follows. An independent firm prepared the Company's tax returns and financial statements in order to keep the records of each business separate. A different accounting and tax firm was used to prepare tax returns for Basil Contracting Corporation. Basil and Crittenden decided to use a different firm for the Company's accounting and tax records "because it would be a way to have checks and balances." The Company and Basil Contracting Corporation had their own employer identification numbers.

¶ 32 Basil identified a "tax stub for a check" made out to Basil & Associates by the Company. The document showed line items for payroll, taxes, rent, office expenses, and insurance. The record also included an invoice prepared by Basil & Associates that corresponded to the check stub. Basil & Associates issued invoices twice per month, and exhibit 3 included invoices and corresponding check stubs from September 2002 to January 2006. Basil also testified that he wrote a check to the Company for $48,446 on November 14, 2004, because it needed capital.

¶ 33 Howard Gamer, a CPA and managing partner of PBJ Financial Services, testified as follows. Gamer had 20 years of accounting experience in the construction industry. He reviewed the Company's financial statements from 1998 to 2005, tax returns, accounting records, invoices that

Basil & Associates issued to the Company, and checks from the Company to Basil & Associates. Gamer's firm also prepared Basil's personal tax returns and tax returns for Basil Contracting Corporation.

¶ 34 Gamer created a document comparing the "net income per K-1" with the distributions taken out of the Company from 1997 to 2004. Gamer opined that Basil "distributed what the net income of the [Company's] operations were" and that the Company was paying its bills in accordance with ordinary business practices. Gamer defined "cash flow solvent" as the ability of the Company to pay its bills in the ordinary course of business. Cash flow solvent was used as a determination of a business' capitalization. Based on his review of the Company's books and records, Gamer opined that the Company was sufficiently capitalized. Basil did not receive any distributions from the Company during the first three years of its existence. In addition, the Company did not make distributions to its members (Basil and Crittenden) during the years it showed losses. Besides making a cash contribution to the Company in 2004, Basil also contributed $100,000 to pay off a secured debt.

¶ 35 Gamer explained the benefit of having a common paymaster, such as Basil & Associates, stating that "it's much easier for a company if an infrastructure is already in place in a related company." Based on Gamer's review of the books and records, there was no evidence of commingling of funds between Basil & Associates and the Company.

¶ 36 On cross-examination, Gamer admitted that his opinion of the Company's solvency did not include Crittenden's distributions in the equation.

¶ 37 C. Trial Court's Decision

¶ 38 The trial court denied Cohen's two-count complaint on July 5, 2012. The court began by noting that the Company was a business jointly owned by Basil and Crittenden. However, because Crittenden had received a discharge in bankruptcy, Cohen no longer sought relief from her. This left two defendants, Basil (individually) and Basil Contracting Company.

¶ 39 1. Transfer Act

¶ 40 Regarding count I premised on the Transfer Act, the court stated as follows. Cohen alleged that in 2006, Basil and Crittenden began withdrawing assets of the Company for their personal accounts and transferring business opportunities to other entities, including Basil Contracting Company. Because these transfers were made without value or consideration, Cohen alleged that they were fraudulent transfers under the Transfer Act. Though Cohen did not title count I of his amended complaint, his written closing argument cited two provisions in the Transfer Act that had been violated. See 740 ILCS 160/5(a), 6(a) (West 2006).

¶ 41 The allegedly fraudulent transfers identified by Cohen were payments made by the Company. These transfers included distributions to both Basil and Crittenden individually, as well as payments for rent, utilities, telephone, and other operating expenses. None of the transfers identified by Cohen occurred *after* the default judgment (November 16, 2006), meaning that Cohen could not obtain relief under section 6(a) of the Transfer Act. See 740 ILCS 160/6(a) (West 2006); *Apollo Real Estate v. Gelber*, 403 Ill. App. 3d 179 (2010).

¶ 42 The court then discussed section 5(a)(1) of the Transfer Act, which contained no time restriction regarding the date of the transfer and the date of the debt. However, section 5(a)(1) did require that the transfers be made with "actual intent to hinder, delay, or defraud" the creditor. Yet, Cohen did not allege that the transfers were made with actual intent to hinder, delay or, defraud him, and there was no evidence supporting any such intent. According to the court, the "types of transfers at issue here were unexceptional given the relationships of the parties." The Company shared office space with Basil Contracting Company and Basil & Associates and was charged its *pro rata* share of rent and utilities based on the amount of square footage it occupied in the building. As such, the continued payment of these various expenses in the normal course of business did not support the conclusion that the transfers were made with actual intent to hinder, delay, or defraud. The court further stated that "any suggestion that either Basil or Crittenden took distributions from" the Company with the intent to hinder, delay, or defraud was "undercut by the fact that both of them actually returned money to" the Company prior to Cohen obtaining his default judgment in November 2006. Determining that Cohen failed to prove a violation of section 5(a)(1), the court turned to section 5(a)(2) of the Transfer Act.

¶ 43 Under section 5(a)(2), the court noted that Cohen needed to show that the transfers were made "without receiving reasonably equivalent value." The court said that, "[s]imply put, there was no such evidence." Cohen failed to prove that the amounts paid either to Basil or Crittenden in salary were in any way disproportionate to the value of the services that each performed for the Company. Likewise, Cohen failed to show that the amounts paid for rent, utilities, or other business expenses were excessive. While Cohen relied on vehicles that were given to the Company's employees, Crittenden testified that any vehicles transferred to employees were in place of their unpaid salary. According to the court, it was impossible to know whether the vehicles were transferred without reasonably equivalent value because neither the employees' salaries nor the value of the vehicles were proven at trial. The court concluded that "[i]n sum, since [Cohen] has not provided evidence of transfers for which reasonably equivalent value was not received, [it] need not consider the second part of section 5(a)(2) analysis whether after any of these transfers the assets of the [Company] were unreasonably small or whether the [Company] intended to incur debts beyond its ability to pay."

¶ 44 2. Piercing the Corporate Veil

¶ 45 At the outset, the court noted that the question of whether a party could pierce the veil of an LLC, as opposed to a corporation, was "far from settled in Illinois." However, because the parties assumed that "veil piercing" applied to limited liability businesses such as the Company, the court applied the "corporate veil piercing analysis."

¶ 46 Regarding the first prong of the test, unity of interest in ownership such that the separate personalities of the corporation and the individual no longer existed, the initial factor was inadequate capitalization. According to the court, the Company "was not undercapitalized at its inception," but instead was a "legitimate business that operated successfully for several years prior to its dealings" with Cohen. Out of 10 years of operation, the Company was profitable for 8 of those years. The second factor was the failure to issue stock. The court found that Cohen had not explained how that factor applied in the case of a limited liability company. Because the record indicated that relative ownership percentages were established between Basil and Crittenden, this factor appeared to favor the Company. The third factor, the failure to observe corporate formalities, was eliminated as a consideration in section 10-10 of the Limited Liability Company Act (805 ILCS 180/10-10 (West 2006)). Similarly, the fourth factor, the nonpayment of dividends, did not "seem to apply" in this case. The fifth factor, the insolvency of the debtor corporation, applied in that there was no question that the Company was insolvent at the time Cohen tried to collect his judgment. Accordingly, this factor favored Cohen. The sixth factor, the non-functioning of officers or directors, did not apply.

The seventh factor, the absence of corporate records, favored the Company in that it kept detailed financial records. Both experts were able to give opinions regarding the solvency of the Company based on their review of the financial records and tax returns, and the Company had a written contract with Cohen. The eighth factor, commingling of funds, and the ninth factor, diversion of assets, had not been established. In particular, the diversion of assets factor had already been addressed in the court's rejection of Cohen's claim under the Transfer Act. The tenth factor, the failure to maintain an arm's length relationship among related entities, had not been established. Though Basil's various companies shared space, the court found that each maintained their separate identities and paid their *pro rata* share of rent and utilities. Last, Cohen had not proven the eleventh factor, in that the evidence showed that the Company was not a mere facade for the operation of the members, Basil and Crittenden.

¶ 47 In sum, the majority of factors either favored the Company or were inapplicable to the present circumstances. Because Cohen failed to satisfy the first prong of the test, unity of interest in ownership, it was not necessary to consider the second prong. Even if the court considered the second prong, however, it would find in favor of the Company. The second prong was circumstances showing that adherence to the fiction of a separate corporate existence would promote injustice or inequitable circumstances. The court found that this was a case where a "once successful business ultimately failed." But this fact alone did not establish that the business was a sham or that its stockholders or members should be subjected to personal liability. If that were the case, every corporation or limited liability company would "operate at the personal financial peril of its owners," a condition which the legislature clearly sought to avoid with the adoption of the Limited Liability Company Act. In conclusion, the court determined that Cohen's argument that Basil and Crittenden "effectively looted the coffers" of the Company to avoid paying him was "simply unsupported by the evidence." There was no evidence that Basil took money out of the Company after Cohen's lawsuit was filed. In fact, Basil did not accept dividends or salary from the Company after April 30, 2003, and both Basil and Crittenden returned money to the Company after the filing of Cohen's lawsuit in October of 2003. Therefore, the court found no reason to pierce the corporate veil.

¶ 48 Cohen timely appealed.

¶ 49 II. ANALYSIS

¶ 50 "The trial judge, when sitting as the trier of fact in a bench trial, makes findings of fact and weighs all of the evidence in reaching a conclusion." *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. When a party challenges a trial court's bench-trial ruling, this court defers to the trial court's factual findings unless they are contrary to the manifest weight of the evidence. *Id*. The trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof. *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 31. The evidence considered by the trial judge includes not only the testimony of the witnesses and the exhibits introduced into evidence, but reasonable inferences supported by the evidence. *Id*. A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence. *Staes*, 2012 IL App (1st) 112974, ¶ 35. "We will not disturb the findings and judgment of the trier of fact if there is any evidence in the record to support such findings." *Id*.

¶ 51 B. Transfer Act

¶ 52 Cohen first argues that the Company violated the "fraud in fact" and "fraud in law" provisions of the Transfer Act. See *Gendron v. Chicago & North Western Transportation Co.*, 139 Ill. 2d 422, 437 (1990) (Illinois recognizes two categories of fraudulent conveyances: those which are fraudulent in fact and those which are fraudulent in law).

¶ 53 Section 5 of the Transfer Act encompasses both fraud in fact and fraud in law and provides as follows:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." 740 ILCS 160/5(a) (West 2006).

¶ 54 A cause of action under section 5(a)(1) is for actual fraud or fraud in fact, and the party must prove that the transfers were made with actual intent to hinder, delay, or defraud the creditors. *Apollo Real Estate Investment v. Gelber*, 403 Ill. App. 3d 179, 193 (2010). In fraud in fact cases, actual consideration has been given for the transfer and a specific intent to defraud must be proved. *Anderson v. Ferris*, 128 Ill. App. 3d 149, 153 (1984). Conversely, section 5(a)(2), an alternative to fraud in fact, refers to fraud in law (*Apollo Real Estate Investment*, 403 Ill. App. 3d at 193), and requires that the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer. 740 ILCS 160/5(a)(2) (West 2006). When a conveyance is made for no or inadequate consideration, it is fraudulent in law: fraud is presumed and intent is immaterial. *Anderson*, 128 Ill. App. 3d at 153. Fraud in law requires proof of: (1) a voluntary transfer for inadequate consideration, (2) an existing indebtedness against the donor; and (3) retention by the donor of insufficient property to satisfy the indebtedness. *Casey National Bank v. Roan*, 282 Ill. App. 3d 55, 59 (1996).

¶ 55 The fraudulent transfers identified by Cohen include: (1) the "enormous" cash distributions taken by Basil and Crittenden; (2) the "arbitrary removal of sums of money" from the Company and placement into other businesses owned by Basil "in the name of rent or other arbitrary labeling of monies taken by" Basil personally; (3) the distribution of corporate vehicles to the Company's employees; and (4) the actual theft of Cohen's property from the project site during construction.

¶ 56 We begin by noting that Cohen characterizes his arguments as both fraud in fact and fraud in law claims. However, as stated, for fraud in fact claims under section 5(a)(1), the transfers must be made with "actual intent to hinder, delay, or defraud" the creditor of the debtor, and Cohen made no such allegation in the trial court or on appeal. As the trial court specifically found, Cohen did not allege that the above transfers were made with actual intent to hinder, delay, or defraud him, and there was no evidence supporting any such intent. See *Gambino v. Boulevard Mortgage Co.*, 398 Ill. App. 3d 21, 54 (2009) (a trial court's findings as to the determination of an intent to defraud is reviewed under the manifest-weight-of-the-evidence standard). In any event, the trial court's determination that none of the transfers challenged by Cohen, either under section 5(a)(1) (fraud in fact) or under section 5(a)(2) (fraud in law), were fraudulent is not against the manifest weight of the evidence.

¶ 57 We begin with the Company's distributions to Basil and Crittenden. In 2001, Basil took $230,000, and Crittenden took $154,000. In 2002, Basil took $194,000, and Crittenden took $152,000. As Basil testified, the Company was making money then. In 2003, Basil took $80,000, and Crittenden took $129,000. Cohen filed suit against the Company based on construction defects in October 2003. In July 2004, Crittenden took $109,500 but also returned $37,000 to the Company, and that was the final distribution that she took. Basil took no distribution in 2004, which means that his last distribution was in April 2003, before Cohen filed suit. In fact, both Basil and Crittenden returned money to the Company in 2004 to pay bills and keep the business going.

¶ 58 Pursuant to section 5(a)(1), we agree with the trial court that "any suggestion that either Basil or Crittenden took distributions from" the Company with actual intent to hinder, delay, or defraud was "undercut" by the fact that both of them returned money to the Company prior to Cohen obtaining a default judgment in November 2006. Basil testified that he thought he became aware of the Company's financial problems in late 2003, and he took no further distributions after that year. Crittenden testified that the Company had been successful, and she counted on future business to "save" it with an influx of cash. As stated, her last distribution was in 2004. They both testified that there was work coming in, and the two thought they could "turn it around." Although Basil and Crittenden were unsuccessful in doing so, the two refrained from taking any further distributions after the Company showed signs of financial difficulty. Basil ceased taking distributions three years before the default judgment, and Crittenden ceased taking distributions two years before it. Accordingly, Basil and Crittenden took distributions when the Company was doing well but made payments back to the Company after Cohen filed suit and the Company began struggling financially. Therefore, Cohen has not shown that any of the distributions were made with "actual intent to hinder, delay, or defraud" him.

¶ 59 Likewise, pursuant to section 5(a)(2), Cohen has not shown that the distributions were made without receiving a reasonably equivalent value in exchange for the transfer. The court found that Cohen failed to prove that the amounts paid to Basil or Crittenden were in any way disproportionate to the value of the services that each performed for the Company. The two shared a fifty-fifty split in the Company. Crittenden drew a salary and received distributions based on running the Company's daily operations, and Basil was responsible for bringing in new business. Based on their individual roles, the two took distributions when the Company was making money and ceased taking distributions when it stopped making money. Gamer opined that at least with respect to Basil, he did not receive any distributions during the Company's first three years of existence; he distributed appropriate net incomes given the Company's operations; and the Company was paying its bills in accordance with ordinary business practices. As stated, Basil and Crittenden ceased taking distributions when the Company showed signs of financial difficulty, and there is no evidence that the distributions they did receive exceeded the value of their services.

¶ 60 Cohen next points to the "arbitrary removal of sums of money" from the Company and placement into other businesses owned by Basil "in the name of rent or other arbitrary labeling of monies taken by" Basil personally. At trial, Basil testified that he billed the Company for rent in the building that he owned and its portion of utilities, which were pass-through expenses. Though Basil did not recall a written lease, he said that there were "written results ending in the amount of rent that was due," which Crittenden paid. Crittenden confirmed this by testifying that the Company made rent and utility payments to Basil & Associates because Basil owned the building. She further testified that rent was based on the square footage occupied by the Company, as were utility payments. Because the Company shared the same phone number as Basil & Associates and Basil Contracting Corporation, Basil explained that all three businesses shared that telephone expense as well. The record contains invoices issued by Basil & Associates and corresponding check stubs paid by the Company from September 2002 to January 2006. The invoices contained line items for payroll, taxes, rent, office expenses, and insurance.

¶ 61 The court determined that the rent and utility payments made by the Company were not fraudulent transfers under either sections 5(a)(1) or 5(a)(2) of the Transfer Act. Beginning with section 5(a)(1), the court found that the Company shared office space with Basil & Associates and Basil Contracting Company and thus was charged its *pro rata* share of utilities and rent based on the amount of square footage it occupied in the building. According to the court, the continued payment of these various expenses in the normal course of business did not support the conclusion that the transfers were made with actual intent to hinder, delay, or defraud Cohen. We agree. Cohen presented no evidence supporting his claim that these transfers were "arbitrary," much less made with "actual intent to hinder, delay, or defraud" him.

¶ 62 In addition, there was no evidence that any of these payments for rent, utilities, and other business expenses were transferred to Basil Contracting Corporation. Basil testified that Basil Contracting Corporation never owed money to the Company, never had an interest in the Company, and never withdrew assets from the Company. Though the Company, Basil & Associates, and Basil Contracting Corporation all shared space in the same building, they were separate businesses that maintained separate bank accounts, filed separate tax returns, and had independent employer identification numbers. Likewise, there was no evidence that Basil transferred any of these payments into his own personal account. Basil testified that he kept his personal and business affairs separate, including personal checking and bank accounts, and never placed assets of the Company into his own personal account. Thus, there is no evidence supporting Cohen's assertion that money was removed from the Company and placed into Basil's other businesses or taken by Basil personally.

¶ 63 Regarding section 5(a)(2), the court found that Cohen failed to show that the amounts paid for rent, utilities, or other business expenses were excessive, *i.e.*, paid without receiving a reasonably equivalent value in exchange for the transfer. As stated, the invoices issued by Basil & Associates contained line items for each expense, and both Basil and Crittenden testified the payments were based on the space in the building that the Company occupied. Other than Cohen's conclusory statements, there is no evidence that the Company paid any more than its *pro rata* share of expenses. Therefore, Cohen failed to prove fraud in law under section 5(a)(2).

¶ 64 The third transfer Cohen points to is the distribution of the Company's vehicles to its employees. Cohen argues that the value of the vehicles, according to the tax returns that he placed in evidence, was "substantial and in the tens of thousands of dollars."

¶ 65 Under section 5(a)(1), there was no evidence that the vehicles were transferred with actual intent to hinder, delay, or defraud Cohen. Crittenden explained that the vehicles were given to the Company's employees in lieu of their salaries. She testified that at the end, when the Company dissolved in October 2006 and she had to let her staff go, she gave them titles to the Company's vehicles because she could not pay them. Therefore, Crittenden's testimony belies any claim that the vehicles were transferred with actual intent to hinder, delay, or defraud him.

¶ 66 Regarding section 5(a)(2), whether the vehicles were transferred without reasonably equivalent value, the record does not support Cohen's assertion that the value of these vehicles was "substantial." On this issue, the court stated that it was impossible to know whether the vehicles were transferred without reasonably equivalent value because neither the employees' salaries nor the value of the vehicles was proven at trial. Moreover, Cohen has forfeited this argument on appeal by citing to 83 pages of the record as opposed to a specific portion of the record as evidence that the vehicles' value was substantial. See *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 651 (2007) (the argument was forfeited where the plaintiffs provided a 25-page record citation without identifying the specific portions of the record relied on).

¶ 67 Finally, Cohen's general argument that the Company stole his property from the project site does not fall under sections 5(a)(1) or 5(a)(2) because the theft of property does not constitute a "transfer" as defined by the statute. See 740 ILCS 160/2(l) (West 2006) (a "transfer" means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting *with an asset or an interest in an asset*, and includes payment of money, release, lease, and creation of a lien or other encumbrance") (emphasis added). Clearly, Cohen cannot claim that property belonging to him and stolen by the Company is at the same time an "asset" of the Company that has been fraudulently transferred. See 740 ILCS 160/2(b) (West 2006) (an "asset" means "property of a debtor"). Therefore, this argument is easily rejected.

¶ 68 In sum, the trial court properly found that the types of transfers identified by Cohen were "unexceptional given the relationship of the parties." Therefore, Cohen failed to establish fraud in fact or fraud in law under sections 5(a)(1) and 5(a)(2) of the Transfer Act.

¶ 69 Cohen next argues that the above transfers violated section 6(a) of the Transfer Act, which provides:

> "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor *whose claim arose before the transfer was made* or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." (Emphasis added.) 740 ILCS 160/6(a) (West 2006).

Accordingly, in order to obtain relief under section 6(a), the transfers had to have been made after the date of the default judgment, November 16, 2006. See *Apollo Real Estate Investment*, 403 Ill. App. 3d at 192 (distinguishing section 5, where the creditor's claim arose either before *or* after the transfer, and section 6, "where the creditor's claim arose only before the transfer"). However, none of the transfers identified by Cohen occurred after the November 16, 2006, default judgment. The Company dissolved in October 2006. As for the distributions to Basil and Crittenden, the payments for rent, utilities, telephone, and other operating expenses, and the distribution of the Company vehicles, these all occurred prior to the default judgment. Therefore, section 6(a) affords no relief to Cohen.

¶ 70 C. Piercing the Corporate Veil

¶ 71 Cohen next argues that the trial court erred by not piercing the corporate veil and holding Basil personally liable for the default judgment. As a preliminary matter, our research has revealed no Illinois case holding that the doctrine of piercing the corporate veil applies to limited liability companies. Noting that the "question of whether veil of an LLC may be pierced is far from settled in Illinois," the court proceeded to apply the analysis based on its reading of the Limited Liability Company Act (805 ILCS 180/1-1 *et seq.* (West 2006)), *dicta* in *Westmeyer v. Flynn*, 382 Ill. App. 3d 952 (2008), and both parties' agreement that the corporate veil of a limited liability company may be pierced.

¶ 72 Section 10-10 of the Limited Liability Company Act provides:

> "(a) *** the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a manager.
>
> (b) (Blank).
>
> (c) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." 805 ILCS 180/10-10 (West 2006).

In *Westmeyer*, the first district determined that, under Delaware law, the doctrine of piercing the corporate veil applied to a limited liability company. *Westmeyer*, 382 Ill. App. 3d at 960. In reaching this conclusion, the *Westmeyer* court discussed in *dicta* the Illinois Limited Liability Act. The court stated, "while the [Limited Liability] Act provides specifically that the failure to observe the corporate formalities is not a ground for imposing personal liability on the members of an LLC, it does not bar the other bases for corporate veil piercing, such as alter ego, fraud or undercapitalization." *Westmeyer*, 382 Ill. App. 3d at 960; see also William F. Knee, *The Illinois Limited Liability Company Act After a Dozen Years - What Guidance Have the Courts Given Us*

About LLCS in Illinois?, 18 Du Page County Bar Association 28, 29 (2006) (while it is unclear whether the 1998 amendment to section 10-10 of the Limited Liability Act eliminated the doctrine of piercing the corporate veil, as an equitable doctrine, the courts are likely to disregard the LLC where recognizing it would promote fraud or injustice). Based on the *dicta* in *Westmeyer*, we, like the trial court, apply the doctrine in this case.

¶ 73 Generally, the law views a corporation as an entity separate and distinct from its officers, shareholders, and directors, and those parties will not be held personally liable for the corporation's debts and obligations. *Tower Investors v. 111 East Chestnut*, 371 Ill. App. 3d 1019, 1033 (2007). A primary purpose of doing business as a corporation is to insulate stockholders from unlimited liability for corporate activity, and limited liability will ordinarily exist even when the corporation is closely held or has a single shareholder. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 500 (2005). Yet, a court may disregard a corporate entity and pierce the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity. *Id*. The doctrine of piercing the corporate veil imposes liability on the individual or entity that uses a corporation merely as an instrumentality to conduct that person's or entity's business. *Id*.

¶ 74 The doctrine of piercing the corporate veil is an equitable remedy. *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 185 (2009). It is not itself a cause of action but instead is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract. *Id*. Piercing the corporate veil is a task which a court undertakes reluctantly since there is a presumption of corporate regularity. *Id*. "The court should not interfere with the corporate form anymore than it would a private contract, and the corporate veil should only be pierced when it appears that something in the particular situation has 'gone amiss.' " *Tower Investors*, 371 Ill. App. 3d at 1033.

Moreover, in breach of contract cases, courts should apply even more stringent standards to determine when to pierce the corporate veil than in tort cases. *Id*. The reason for applying a more stringent standard is because the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity, and is expected to suffer the consequences of the limited liability associated with the corporate business form. *Id*.

¶ 75 Courts use a two-prong test in order to determine whether to pierce the corporate veil: (1) there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *Fontana*, 362 Ill. App. 3d at 500. We will not reverse the finding of the trial court regarding piercing the corporate veil unless it is against the manifest weight of the evidence. *Id*.

¶ 76 In determining whether the unity of interest and ownership prong of the piercing-the-corporate-veil test is met, a court generally will not base its decision on a single factor but will consider many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Gass*, 392 Ill. App. 3d at 186.

¶ 77 The trial court in this case discussed each of the above factors in determining not to pierce the corporate veil. On appeal, Cohen challenges only three of the factors decided by the court:

inadequate capitalization; the failure to observe corporate formalities; and the absence of corporate records. Of these three factors, Cohen argues that the inadequate capitalization factor alone is sufficient to satisfy the unity of interest and ownership prong of the piercing-the-corporate-veil test.

¶ 78 As evidence of undercapitalization in this case, Cohen argues that: (1) the Company's financial statements revealed the trend of more payables and decreasing income; (2) Basil could not explain why year after year the accounts receivable diminished and the accounts payable increased, yet distributions continued; and (3) the Company was used as a "cash draining mechanism" by its two members over a four-year period when they took $1.3 million, which left it unable to pay the default judgment.

¶ 79 For his capitalization argument, Cohen relies on two cases. First, he cites *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 959 (2001), which stated that the capitalization of a corporation is a major factor in assessing whether a legitimate separate corporate entity existed. The *Fiumetto* court stated that to determine whether a corporation is adequately capitalized, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled. *Id.* "Absent adequate capitalization, a corporation becomes a mere liability shield, rather than an independent entity capable of carrying on its own business." *Id.* In that case, the reviewing court reversed the grant of summary judgment on the issue of piercing the corporate veil based on the corporation not being sufficiently capitalized at its inception. *Id.* at 959-60. Second, Cohen relies on *Fontana*, where the reviewing court upheld the trial court's finding that the corporation was not capitalized at its inception.

¶ 80 The trial court in this case considered both of these decisions in finding that the Company was not undercapitalized. According to the court, both *Fontana* and *Fiumetto* were concerned about whether the corporations were sufficiently capitalized *at their inception* or, on the other hand, whether they were created only to shield their principals from liability. Unlike the situation in those cases, the court found that the Company here was not undercapitalized at its inception. Instead, the court stated that it was a "legitimate business that operated successfully for several years prior to its dealings" with Cohen; it was "profitable for eight out of ten years that it operated." In addition, the court reasoned that undercapitalization is a less significant factor in a breach of contract case, and Cohen's underlying suit was a breach of contract case. See *Fontana*, 362 Ill. App. 3d at 505 ("It is true that undercapitalization is less significant in a contract case, where the claim arises from a consensual transaction, than in a tort case, where there is no voluntary dealing").

¶ 81 At trial, Basil was questioned about the Company's accounts payable versus accounts receivable. He explained that it was not uncommon in a construction company for invoices to come in before a fiscal year ended when the monies for those invoices had not yet been received. Crittenden testified that the Company made money on some jobs but not on other jobs. Basil and Crittenden took distributions from the Company during the years it made money. However, the two stopped taking distributions when they saw the "trend" of financial difficulty, although the two still thought that they could turn it around. Crittenden counted on future business to save the Company with an influx of cash. Overall, the court found that the Company had been successful but ultimately failed. According to the court, Cohen's argument that Basil and Crittenden "looted the coffers" of the Company was "simply unsupported by the evidence." Basil ceased taking distributions before the 2003 lawsuit was filed and returned money to the Company after the lawsuit was filed. Crittenden took one more distribution after the lawsuit was filed but then returned money to the Company.

¶ 82 Finally, though CPA Cohen testified that the Company was "not capitalized properly because the accounts payable were so high and were getting larger," Gamer testified that the Company was sufficiently capitalized and paying its bills in accordance with ordinary business practices. See *Chicago Title Land Trust Co.*, 2012 IL App (1st) 063420, ¶31 (when contradictory testimony that could support conflicting conclusions is given at a bench trial, we will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent). Therefore, the trial court's finding that the Company was adequately capitalized was not against the manifest weight of the evidence.

¶ 83 Cohen next argues the Company failed to observe corporate formalities. However, as the trial court reasoned, this factor was eliminated as a consideration in the unity of interest and ownership prong of the piercing-the-corporate-veil test. In particular, the factor of observing corporate formalities was eliminated by section 10-10 of the Limited Liability Act, which provides that "the failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability" on the members for liabilities of the company. 805 ILCS 180/10-10 (West 2006). Accordingly, as the trial court found, the Company's lack of company formalities cannot form a basis for piercing the corporate veil.

¶ 84 The final factor Cohen points to is the absence of corporate records. Cohen argues that at trial, Basil produced no corporate records. However, this is because Crittenden admitted to taking nearly all of the Company's files with her when she left the building and ventured out on her own. In any event, the trial court found that this factor favored the Company because it kept "detailed financial records." According to the court, both experts were able to give opinions regarding the solvency of the company based on their review of the financial records and tax returns. Basil testified that tax returns and annual financial statements were prepared for the Company by a professional accounting firm, and these documents are part of the record. In addition, the trial court took special note that the Company had a written contract with Cohen regarding the construction of the home. Thus, the trial court's finding that this factor favored the Company is not against the manifest weight of the evidence.

¶ 85 For all of these reasons, the trial court's decision not to pierce the corporate veil was not against the manifest weight of the evidence. Because Cohen failed to establish the first prong of the piercing-the-corporate-veil test, we need not consider the second prong.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County denying Cohen's complaint in its entirety.

¶ 88 Affirmed.