2018 IL App (1st) 172220-U

SECOND DIVISION
September 11, 2018

No. 1-17-2220

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GOLFWOOD SQUARE LLC, Plaintiff-Appellee, v. MICHAEL K. O'MALLEY and ROBERT STEJSKAL, Defendants (Michael K. O'Malley, Defendant-Appellant; 3 Squared LLC, Third-Party Respondent-Appellant).	)	Appeal from the Circuit Court of Cook County, Illinois No. 12 L 1566 Honorable Alexander White, Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Because judgment debtor had unfettered access to funds nominally held by defunct company, and was using that access to circumvent trial court's charging order, trial court properly ordered those funds to be turned over to judgment creditor in satisfaction of the judgment.

¶ 2 In 2012, plaintiff Golfwood Square, LLC obtained a judgment for $915,000 via a settlement with defendants Michael O'Malley and Robert Stejskal. This appeal concerns Golfwood's postjudgment efforts to collect that judgment from O'Malley. (Stejskal is not party to this appeal.) In particular, Golfwood alleges that O'Malley is using various "shell companies," including Shefield Street Group, LLC (SSG) and 3 Squared LLC, to circumvent payment of the judgment.

¶ 3 In 2017, Golfwood moved for an order directing O'Malley to turn over 3 Squared's funds in satisfaction of the judgment. The trial court granted the motion. O'Malley appeals, arguing that the trial court improperly pierced the corporate veils of 3 Squared and SSG and also improperly gave Golfwood a right of input and control over those entities. Finding no merit in either contention, we affirm.

¶ 4 BACKGROUND

¶ 5 O'Malley, SSG, and 3 Squared

¶ 6 O'Malley is the managing member of SSG and owns a 90% interest in the company. The remaining 10% is owned by his business manager, Pam Szekely. O'Malley assigned her that interest in 2012 as compensation for services she provided to O'Malley's various business entities.[1] SSG has no operating agreement, no employees, and does not operate any business. As O'Malley admitted, "On a daily basis [SSG] doesn't do anything."

¶ 7 As for 3 Squared, it was created solely to own a condominium at 130 North Garland Court, Unit 3701, Chicago, Illinois (the Garland condo). It received rental income from the property but never operated any other business or had any other assets. Regarding the ownership

[1] No documents evidencing the assignment or the gift to Szekely of a percentage of an interest in 3 Squared, referenced in ¶ 7 *infra*, are contained in the record, so we cannot determine whether they pre- or post-date the settlement with Golfwood.

of 3 Squared, the parties agree that in 2008, SSG was the company's sole member. In 2012, O'Malley signed a document purporting to give 10% of his interest in 3 Squared to Szekely ("I, Mike [O'Malley], hereby assign my 10% interest to Pam [Szekely]")—but by his own admission, O'Malley never personally had an ownership interest in 3 Squared. 3 Squared's 2015 annual report, signed by O'Malley, lists SSG as the sole member, as do the Illinois Secretary of State's records. Additionally, it is undisputed that SSG is the managing member of 3 Squared, thereby giving O'Malley control over its management.

¶ 8 The Judgment and Golfwood's Collection Efforts

¶ 9 In 2009, defendants became co-guarantors of a commercial lease between Golfwood and MAC Enterprises LLC, an entity indirectly owned by the defendants. When MAC defaulted on its rent and defendants failed to honor their guaranty, Golfwood filed a breach of contract action against defendants. On April 9, 2012, pursuant to the parties' settlement agreement, the trial court entered a judgment of $915,000 for Golfwood. See *Golfwood Square, LLC v. Stejskal*, 2013 IL App (1st) 123444-U.

¶ 10 After the judgment, Golfwood initiated supplementary proceedings under section 2-1402 of the Code of Civil Procedure (735 ILCS 5/2-1402 (West 2014)), which included the issuance of citations to discover assets to SSG and 3 Squared in September 2012. On March 7, 2013, pursuant to section 30-20 of the Limited Liability Company Act (805 ILCS 180/30-20 (West 2012)), the trial court issued a charging order directing SSG to "pay any distributions that would otherwise be paid or owing to O'Malley to Golfwood in partial satisfaction of its judgment against O'Malley."

¶ 11 Twelve days later, on March 19, 2013, O'Malley filed a bankruptcy petition in the bankruptcy court for the Northern District of Illinois. His bankruptcy case is still pending, but in

September 2014, the bankruptcy court entered an order compelling the bankruptcy trustee to abandon various entities associated with O'Malley, including SSG and 3 Squared, entitling Golfwood to pursue satisfaction of its judgment from those entities.

¶ 12 Later in September 2014, 3 Squared sold its sole asset, the Garland condo. After using the sale proceeds to pay off the condo's mortgage, 3 Squared was left with around $224,000. Once the condo was sold, in O'Malley's words, "3 Squared basically doesn't exist any longer *** other than an account." 3 Squared's operating agreement provided for the dissolution of the company as follows:

> "6.1.7 Distribution of Sale Proceeds. Upon sale of the assets of the Company, *** the Company will be dissolved and the net proceeds of such sale and all other Company assets, after payment of Company liabilities, shall be applied and distributed in the following order:
>
> A. To payment and discharge of all the Company debts and liabilities to persons or organizations other than Members ***.
>
> B. To the payment and discharge of any *** debts and liabilities to Members; and
>
> C. To the Members in the amount of their respective capital account balances as of the date of distribution, adjusted to reflect the allocations of Gain on Sale or Loss on Sale upon liquidation."

According to O'Malley, 3 Squared had "no direct liabilities." Nevertheless, 3 Squared did not dissolve, nor did it distribute the sale proceeds. Instead, the money remained in a bank account nominally owned by 3 Squared, although 3 Squared's 2014 tax return reflects that it distributed the proceeds directly to O'Malley.

¶ 13 In any event, O'Malley admits having "unfettered access" to 3 Squared's account. O'Malley spent money from the account on numerous occasions after entry of the charging order, including:

- $22,000 to Szekely. According to O'Malley, $12,000 of this money was to pay her income taxes, and he was "not sure" whether the payment was related to 3 Squared's business. O'Malley did not know the purpose of the remaining $10,000.
- $13,500 for legal services in 2015. O'Malley was unable to describe what legal services 3 Squared would have required in 2015, long after the sale of its only asset, and he admitted it was "possible" that the fees at issue were incurred by himself or one of his other business entities.
- $10,500 to an entity owned by O'Malley's then-girlfriend, to repay a loan that she made to O'M & Associates, one of O'Malley's other entities. ("Why is 3 Squared paying that back?" asked counsel for Golfwood. O'Malley replied, "Because O'M & Associates didn't have the money.")
- $20,658.43 to American Express in credit card bills for a card owned by O'M & Associates.
- $1500 to fulfill a tax obligation owed by Benchwarmers, another entity associated with O'Malley. O'Malley admitted that the tax obligation at issue would ultimately have been his responsibility to pay.
- $5649 to a storage facility to pay for storage of property from the Garland condo. O'Malley described the property as a "waste of money" and also said, "I can't get a junk guy to take it for free."

In all, O'Malley personally spent around $80,000 of the Garland sale proceeds, leaving around $144,000 in 3 Squared's account.[2]

¶ 14 On May 5, 2017, Golfwood moved for an order directing O'Malley to turn over all of 3 Squared's remaining funds to Golfwood in order to enforce the court's 2013 charging order. Golfwood argued that after 3 Squared sold the Garland condo, it should have dissolved and distributed the net proceeds to SSG, which would have distributed them to Golfwood per the charging order. But O'Malley instead employed a "shell game" to circumvent the charging order by keeping the funds nominally under 3 Squared's ownership while spending them freely for his own purposes. Golfwood therefore argued that turnover of the funds was necessary to enforce the charging order. Golfwood also requested a preliminary injunction enjoining O'Malley and 3 Squared from spending any of the remaining funds until the court ruled on Golfwood's motion.

¶ 15 On May 11, 2017, by agreement of the parties, the court entered an order preventing 3 Squared from making any distributions until further order of court.

¶ 16 On August 6, 2017, the court granted Golfwood's motion for an order directing O'Malley to turn over 3 Squared's remaining funds, reasoning that such an order was necessary to give effect to its 2013 charging order. The trial court additionally found that 3 Squared was holding assets of O'Malley that should be applied to satisfy the judgment. In reaching these conclusions, the court made a factual finding that SSG was the 100% owner of 3 Squared. The court also explicitly rejected O'Malley's arguments that a turnover order would improperly pierce the corporate veil or give Golfwood a right of input or control over 3 Squared.

¶ 17 ANALYSIS

[2] The payments listed above add up to roughly $74,000. Although is unclear how the remaining $6000 was spent, it is undisputed that only roughly $144,000 remained in 3 Squared's account by May 2017.

¶ 18 O'Malley argues that the 2017 turnover order must be reversed because it (i) improperly pierced the corporate veils of 3 Squared and SSG and (ii) allowed Golfwood input into or control over 3 Squared's affairs. O'Malley also seeks reversal of the May 11, 2017 injunctive order. Because the trial court did not hold an evidentiary hearing on Golfwood's turnover motion and decided the issues based on the parties' oral arguments and the record, we review the trial court's order *de novo*. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007).

¶ 19 Initially, Golfwood argues that O'Malley's brief should be stricken for numerous violations of Supreme Court Rule 341(h) (eff. Nov. 1, 2017). O'Malley does not set forth the applicable standard of review, as required by Rule 341(h)(3), nor does he cite the statutes involved, as required by Rule 341(h)(5). Additionally, O'Malley's statement of facts is replete with rhetoric and omits crucial facts, most notably O'Malley's expenditures from 3 Squared's account. Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017) (statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment").

¶ 20 Failure to comply with the rules regarding appellate briefs is not inconsequential, and a brief that lacks substantial conformity with those rules may justifiably be stricken. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. Nevertheless, the shortcomings of O'Malley's brief do not hinder our review, particularly since Golfwood's brief serves to shore up these deficiencies. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 15 (striking a brief is appropriate "only when the violations of procedural rules hinder our review"). We therefore decline to strike O'Malley's brief, although we strongly admonish counsel to follow the applicable rules should they file a brief with this court in the future.

¶ 21 In issuing the 2017 turnover order, the trial court relied on both section 2-1402 of the Code (735 ILCS 5/2-1402 (West 2016)) and section 30-20 of the Limited Liability Company Act (805 ILCS 180/30-20 (West 2016)). Under section 2-1402 of the Code, a judgment creditor may initiate supplementary proceedings to discover (i) whether the judgment debtor is in possession of assets that should be applied to satisfy the judgment and (ii) whether third parties are holding assets of the judgment debtor that should be applied to satisfy the judgment. *Pyshos v. Heart-Land Development Co.*, 258 Ill. App. 3d 618, 623 (1994). In the latter case, the court may order the third party to deliver those assets to the judgment creditor in satisfaction of the judgment. *Id.*; 735 ILCS 5/2-1402(c)(3) (West 2016) (court may compel "any person cited" to deliver up assets).

¶ 22 Section 30-20 of the Act provides, in relevant part:

> "(a) On application by a judgment creditor of a member or transferee, a court may enter a charging order against the distributional interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's distributional interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor. A charging order grants no other rights with respect to the assets or affairs of the company.
>
> (b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:
>
> * * *
>
> (2) make all other orders necessary to give effect to the charging order."

805 ILCS 180/30-20 (West 2016).

¶ 23 The parties do not dispute the propriety of the court's 2013 charging order. The trial court found that the 2017 turnover order was "necessary to give effect to the charging order" under section 30-20 of the Act. The court additionally found that 3 Squared was holding assets of O'Malley that should be applied to satisfy the judgment under section 2-1402 of the Code, which explicitly authorizes the court to order turnover of such funds from "any person cited." 735 ILCS 5/2-1402(c)(3) (West 2016). We agree on both counts.

¶ 24 The trial court found that SSG was the sole member of 3 Squared, as reflected in 3 Squared's 2015 annual report and the Illinois Secretary of State's records. Thus, according to the clear language of 3 Squared's operating agreement, upon selling the Garland condo, 3 Squared should have dissolved and distributed the sale proceeds to SSG. From there, per the charging order, any distributions that SSG would otherwise have made to O'Malley would instead go to Golfwood. But O'Malley circumvented the charging order by keeping the funds nominally under 3 Squared's control while he retained "unfettered access" to the account—essentially making a direct distribution to himself in all but name. (Indeed, as noted, 3 Squared's 2014 tax return reflects a direct distribution of the Garland sale proceeds to O'Malley.) Although 3 Squared, by O'Malley's own admission, "basically doesn't exist any longer," O'Malley spent around $80,000 of its funds for such purposes as paying off debts incurred by his other business entities, paying legal fees "possibl[y]" incurred by himself or his other business entities, and making distributions to Szekely consistent with her 10% ownership interest in SSG.

¶ 25 Under these circumstances, the turnover order was necessary under section 30-20(b)(2) to prevent O'Malley from circumventing the charging order and further dissipating the Garland sale proceeds. 805 ILCS 180/30-20(b)(2) (West 2016). As the trial court aptly stated: "Without such relief, O'Malley will have evaded the Charging Order with impunity because he will be able to

retain distributions which Golfwood would otherwise have the right to receive." [C4381] Additionally, the evidence supports the trial court's conclusion that 3 Squared was holding O'Malley's assets, as required for issuance of a turnover order under section 2-1402. 735 ILCS 5/2-1402 (West 2016).

¶ 26 O'Malley argues that 3 Squared owes "substantial amounts of money" to other entities, such that, if it dissolved, all of the Garland sale proceeds would go toward repaying its liabilities, leaving nothing to distribute to SSG. But this assertion is contradicted by O'Malley's deposition testimony, in which he stated that 3 Squared has "no direct liabilities." We find this statement to be a binding judicial admission: it was clear, unequivocal, and concerned a concrete fact within O'Malley's knowledge, since he was the person in charge of 3 Squared's management. See *Shelton v. OSF Saint Francis Medical Center*, 2013 IL App (3d) 120628, ¶¶ 24, 27 (plaintiff was bound by judicial admission in discovery deposition). Thus, O'Malley cannot now contradict this admission.

¶ 27 O'Malley next argues that the turnover order was improper because it pierced the corporate veils of 3 Squared and SSG. See *Pyshos*, 258 Ill. App. 3d at 624 ("[W]hat must be alleged to pierce the corporate veil does not fall within the scope of what may be heard in supplementary proceedings."); *Lange v. Misch*, 232 Ill. App. 3d 1077, 1081 (1992) (in supplementary proceedings, trial court erred by piercing the corporate veil to impose judgment against third party who did not possess assets of judgment debtor). Golfwood does not dispute that piercing the corporate veil would have been improper under the circumstances, but it argues that the turnover order did not accomplish that result.

¶ 28 Initially, we observe that O'Malley does not attempt to define "piercing the corporate veil" in his brief, much less provide legal support for any definition. Instead, he asserts vaguely

that the trial court "collapsed the organizational structure" of 3 Squared and SSG, which he claims is equivalent to piercing the corporate veil. This is incorrect.

¶ 29 A corporation is a distinct legal entity that exists separately from its shareholders, directors, and officers. *Buckley v. Abuzir*, 2014 IL App (1st) 130469, ¶ 12; *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 500 (2005). Under ordinary circumstances, shareholders, directors, and officers cannot be held liable for the corporation's debts. *Fontana*, 362 Ill. App. 3d at 500. But where the corporation "is merely the alter ego or business conduit of another person," such that the corporation is no more than a "dummy or sham" for that individual, the court may pierce the veil of limited liability to hold that individual liable for the corporation's debts. (Internal quotation marks omitted.) *Id.* Crucially, the 2017 turnover order does not hold O'Malley personally liable for a corporate debt, so it does not pierce the corporate veil.

¶ 30 O'Malley nevertheless argues that this case is analogous to *Lange*, 232 Ill. App. 3d 1077, in which the court held that it was improper to pierce the corporate veil in supplementary proceedings. In *Lange*, the plaintiff brought an action for fraud and breach of contract against several defendants, including Misch and USCC-Arkansas. *Id.* at 1078. USCC-Arkansas did not appear and was defaulted. In supplementary proceedings, plaintiff moved to hold Misch personally liable for the judgment, asserting that USCC-Arkansas was the alter ego of Misch. The trial court "pierced the corporate veil" and entered judgment against Misch for the full judgment amount. *Id.* at 1080.

¶ 31 The court in *Lange* reversed, explaining that section 2-1402 only permits the court to enter judgment against a third party on a showing that the third party possesses assets of the judgment debtor. *Id.* at 1081. "This record contains no evidence that Misch, individually, possessed [plaintiff's] assets so as to authorize the trial court to expand [plaintiff's] default

judgment against USCC-Arkansas to include Misch. Insofar as the record shows, Misch was a third person unrelated to USCC-Arkansas' assets." *Id.* Accordingly, relief under section 2-1402 was improper.

¶ 32 In reaching this decision, *Lange* distinguished *O'Connell v. Pharmaco, Inc.*, 143 Ill. App. 3d 1061 (1986), in which the trial court properly entered judgment against a third party at a supplementary proceeding. After plaintiffs obtained a default judgment against Pharmaco, they initiated supplementary proceedings against Larson, Pharmaco's chairman and chief executive officer. *Id.* at 1064. The evidence showed that Larson took an assignment from Pharmaco of $280,000, which he drafted himself. *Id.* at 1065. Following a hearing, the trial court determined that the $280,000 properly belonged to Pharmaco and ordered Larson to pay the judgment against Pharmaco. *Id.* at 1071. The *O'Connell* court affirmed, finding that the evidence supported the trial court's determination. *Id.*

¶ 33 This case is analogous to *O'Connell* rather than *Lange*. Just as the trial court in *O'Connell* determined that Larson possessed funds belonging to Pharmaco, the trial court in this case determined that 3 Squared possessed funds belonging to O'Malley, a conclusion amply supported by the record for reasons discussed earlier. Thus, the court was entitled under section 2-1402 to order turnover of those funds to satisfy the judgment against O'Malley.

¶ 34 O'Malley also cites *Johnson v. St. Therese Medical Center*, 296 Ill. App. 3d 341 (1998), for the proposition that assets of an entity are not available to satisfy a judgment against individual owners of the entity. This misstates the holding of *Johnson*. The *Johnson* plaintiffs obtained a $4 million judgment against Dr. Sands and Northern Illinois Emergency Physicians, a partnership to which Dr. Sands belonged. *Id.* at 342. In supplemental proceedings, the court ordered the other partners to turn over their personal assets, reasoning that the partners were

jointly and severally liable for the judgment against the partnership. *Id.* at 344. The court reversed, explaining that, under Illinois partnership law, a judgment entered against a partnership is enforceable only against property of the partnership. *Id.* at 345 (citing 735 ILCS 5/12-102 (West 1996)). Notably, *Johnson* did not concern the enforcement of a charging order, nor was there evidence that the partners possessed assets belonging to the partnership, as would justify a turnover order under section 2-1402. Thus, *Johnson* is inapposite.

¶ 35 O'Malley next argues that the turnover order improperly affords Golfwood input into or control over 3 Squared's and SSG's affairs. O'Malley's sole authority on this issue is *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 110749, in which plaintiff obtained charging orders against defendants' distributional interests in various companies. Defendants argued that the court lacked jurisdiction over those companies because they were not joined as parties to the action. *Id.* ¶ 38. *Freed* rejected that argument, explaining that charging orders "do not affect the rights or interests of the LLC to the degree necessary to require that it be made a party." *Id.* ¶ 41. A judgment creditor that obtains a charging order against a company does not have any rights as a member and, therefore, is not entitled to participate in the management or conduct of the business. *Id.*

¶ 36 O'Malley argues that, by ordering turnover of the Garland sale proceeds, the trial court exercised undue control over 3 Squared (and SSG, as 3 Squared's sole member). He posits that SSG might have wished to reinvest the Garland sale proceeds in another piece of real estate instead of distributing them to O'Malley. These claims are belied by the record. By O'Malley's own admission, 3 Squared was a defunct company that "basically doesn't exist any longer." There is no indication that O'Malley sought to reinvest the Garland sale proceeds or otherwise continue 3 Squared's business. Instead, he used the proceeds to pay the credit card bills, tax

obligations, and legal fees of his other business entities, as if they were his own personal funds—which, as noted, is consistent with 3 Squared's 2014 tax return, which reflects a distribution of the Garland sale proceeds to O'Malley. Under these facts, ordering turnover of the funds did not constitute participation in the management of 3 Squared's business, which was nonexistent for years before entry of the turnover order.

¶ 37 Finally, O'Malley seeks reversal of the court's May 11, 2017 agreed order, in which the court enjoined 3 Squared from making any distributions until the court ruled on Golfwood's turnover motion. O'Malley does not explain how he can challenge here an order to which he agreed. But, in any event, review of this injunction was rendered moot when the court granted Golfwood's motion and ordered 3 Squared to turn over its funds to Golfwood. See *Doe v. Northwestern Memorial Hospital*, 2014 IL App (1st) 140212, ¶ 47 (appeal is moot where the issues raised below have ceased to exist such that the reviewing court cannot grant relief). As a rule, courts do not consider moot questions (*In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009)), nor does O'Malley present any authority indicating that any exception to the mootness doctrine applies in this case. Accordingly, we do not consider the propriety of the May 11 agreed order.

¶ 38 CONCLUSION

¶ 39 For years, O'Malley circumvented the court's 2013 charging order by keeping the Garland sale proceeds nominally under 3 Squared's ownership while using them, in Golfwood's words, as his "personal piggy bank." Under these facts, the trial court properly exercised its authority under section 2-1402 of the Code of Civil Procedure and section 30-20 of the Limited Liability Company Act to order turnover of those funds in satisfaction of the judgment.

¶ 40 Affirmed.