2019 IL App (1st) 181044-U

No. 1-18-1044

Order filed on June 25, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HECTOR LOPEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2013 CH 16400
	)	
STEVEN SHAYKIN,	)	
	)	
Defendant-Appellee,	)	
	)	
KALLIOPE SHAYKIN and ABSOLUTE TITLE SERVICES, INC.,	)	
	)	The Honorable
	)	Diane M. Shelley,
Defendants.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Mason and Hyman concurred in the judgment.

¶ 1 *Held*: The evidence supported the trial court's finding that the corporation-defendant's vice president was not personally liable for the corporation's misdeed. The court properly prohibited plaintiff from taking the evidence deposition of a witness disclosed shortly before trial.

¶ 2 In 2008, plaintiff Hector Lopez obtained refinancing through defendant Absolute Title Services, Inc. (Absolute). Defendant Kalliope Shaykin was Absolute's president and defendant Steven Shaykin was its vice president. Absolute led plaintiff to believe it was holding $115,000 of the refinancing proceeds in escrow to satisfy an obligation to plaintiff's ex-wife. Plaintiff later learned, however, that the money was unaccounted for. Plaintiff then filed this action.

¶ 3 The trial court entered a default judgment against Kalliope and, following a bench trial, entered judgment against Absolute. In contrast, the court determined that plaintiff had not proven Steven was liable. On appeal, plaintiff challenges that determination and contends that the court should have permitted him to take Kalliope's evidence deposition. We affirm the judgment.

¶ 4 Initially, we note that plaintiff's briefs suffer from numerous deficiencies. A party's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record." Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). Additionally, a party's argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Reviewing courts are entitled to clearly defined issues and cohesive arguments (*Wing v. Chicago Transit Authority*, 2016 IL App (1st) 153517, ¶ 11), and conclusory arguments are disfavored (*Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st) 141272, ¶ 43). Where a party fails to comply with our supreme court's rules, we may strike the brief, disregard improper matters or deem improper arguments forfeited. *Wing*, 2016 IL App (1st) 153517, ¶¶ 11-12.

¶ 5 Plaintiff's fact section contains misleading representations and omits pertinent facts. Similarly, his argument includes conclusory and misleading statements, unsupported by

references to the record. While we decline to strike his briefs, we admonish counsel to take greater care in the future. We will disregard any improper content that interferes with our review.

¶ 6 I. Background

¶ 7 A. Absolute

¶ 8 Absolute was a title-servicing agent. It conducted title searches, issued title commitments, closed real estate transactions and issued title policies underwritten by Stewart Title Guaranty Company (Stewart). Absolute shared a building with Steven's law practice. Steven founded Absolute with Gary Fishkin and Alexander Field in 1996. Articles of Incorporation were filed and shares were issued. According to Steven, Fishkin and Field supplied the money, while he supplied the "wherewithal, knowledge, and experience." He purchased Fishkin and Field's shares in Absolute a few years later. In 2001, Steven transferred half of his interest in Absolute to Kalliope, who was his wife and an employee of Absolute. She became Absolute's president and Steven, who had been president, became vice president. Steven was also Absolute's registered agent and, for several years, its secretary. Hector Rodriguez, a former Absolute employee, testified that Steven and Kalliope were equal partners but Rodriguez believed Steven was more involved because he saw Steven more often. Rodriguez acknowledged, however, that Steven was primarily working for his law practice when at the office.

¶ 9 Steven testified that Absolute's corporate meetings did not observe the formalities of asking for a quorum or voting. Minutes were taken but not by him. Steven did, however, maintain the corporate book, which included meeting minutes, annual franchise filings, bylaws, articles of incorporation and records of stock transfers. According to Steven, he paid Absolute's bills, participated in hiring and firing employees, kept track of how many closings Absolute did, tracked deposits into the general operating account and reconciled that account. That being said,

he never checked deposits into the escrow account or reviewed that account. He did not maintain an escrow journal and "had very little to nothing to do with the closing side of Absolute," which was operated through managers and Kalliope. Steven testified he expected the managers to do their jobs and run things correctly.

¶ 10 According to Rodriguez, prior to a closing, the lender would relay a closing package to the title company. The closer would attend the closing, notarize documents and process them. A title commitment was presented at every closing. If a title commitment contained an exception, such as a requirement in a divorce decree, the title policy would contain an exception. If the exception was resolved or waived, it would be removed from the commitment and omitted from the policy.

¶ 11 Rodriguez testified that in addition to its escrow account, Absolute used title indemnity, or "TI," accounts. Rodriguez explained that a TI agreement would be used when money was to be held in a TI account for distribution on a later date. In contrast, the escrow disbursement agreement is what would permit the title company to disburse all proceeds for a transaction at closing. While Rodriguez apparently distinguished between Absolute's escrow account and TI accounts, the witnesses did not consistently maintain such a distinction; instead, they seemed to refer to both types of accounts as escrow accounts.

¶ 12 B. The Refinancing of Ridgeland

¶ 13 In 2008, plaintiff owned 1846 South Ridgeland in Berwyn (Ridgeland). As part of a 2006 judgment dissolving his marriage to Socorro Sacarias, she would remain living there until December 1, 2013. At that time, plaintiff was to sell or refinance Ridgeland and pay Sacarias $115,000 from the proceeds.

¶ 14 In February 2008, plaintiff spoke with Anna Robles at First Suburban Mortgage about refinancing Ridgeland and other debts. Plaintiff testified that he was unable to obtain an affidavit from Sacarias, relinquishing her rights in Ridgeland, so Robles and Rodriguez told plaintiff that $115,000 would be held in escrow. Absolute's internal notes similarly showed that without the affidavit from Sacarias, Absolute would hold $115,000 of the refinancing proceeds in a TI account.

¶ 15 Rodriguez attended the closing, though he did not recall it. The settlement statement reflected the principal loan amount of $260,000 but failed to include a line item showing that $115,000 would be held in an escrow or a TI account. Rodriguez testified that a settlement statement should reflect that a title company would be holding funds to satisfy a commitment exception and it was unusual not to have a TI agreement for plaintiff's transaction. Steven similarly testified that if $115,000 was going to be held at closing, that should have been reflected in the settlement statement. It is undisputed, however, that Steven had not met plaintiff in 2008 and did not attend the closing. Three days after closing, plaintiff received a check for $65,320.46. The bottom of the check said, “Split Disbursements-115,000.” He never received anything further from Absolute and neither did Sacarias.[1]

¶ 16 C. Absolute’s Demise

¶ 17 In May 2009, Stewart’s representatives entered Absolute’s office and canceled its ability to act on Stewart’s behalf, effective immediately. Steven testified he had been unaware of any irregularities in Absolute’s business. Additionally, Stewart filed a lawsuit that essentially alleged mortgage fraud. See *Stewart Title Guarantee Co., et al. v. Absolute Title Services Inc., et al.*, No. 09 CH 17128. Subsequent court orders prohibited Absolute from conducting business and

[1]As of 2008, plaintiff and his brother Roberto Lopez owned Ridgeland as joint tenants. Roberto received nothing from the refinancing and later quit claimed his interest in the property to plaintiff.

granted Stewart possession of all of Absolute's escrow funds, electronic files and hard files. Stewart then removed Absolute's records, in Steven's absence. While Steven could not say with certainty that Stewart took Absolute's corporate book, the book was gone after Stewart removed Absolute's other records. The Secretary of State dissolved Absolute on February 11, 2011.

¶ 18 Stewart dismissed Steven from its lawsuit but obtained a judgment for approximately $11 million against Absolute, Kalliope and others. Steven testified, "there was no evidence of any kind that I was aware of or had anything to do in any way [with] what transpired." In October 2014, Kalliope pled guilty in federal court to wire fraud and was sentenced to prison. *United States v. Shaykin*, No. 11 CR 00373. Steven was criminally investigated but not charged. He and Kalliope divorced.

¶ 19 Meanwhile, in May 2011, plaintiff called Absolute and received no answer. Stewart referred him to Steven. According to plaintiff, Steven said he did not have any money. Steven did not recall speaking with plaintiff. In 2014, Sacarias filed a petition for a rule to show cause why plaintiff should not be held in contempt for failing to pay her $115,000. Plaintiff then paid her from other funds.

¶ 20 Plaintiff's expert, real estate attorney Joseph Fortunato, opined that Absolute breached its duty to safeguard the $115,000. The settlement statement was deficient because it did not include a separate line item for that sum and there should also have been a TI agreement. Fortunato further opined, "although it isn't clear how the funds came to be mishandled, they were not segregated into a separate escrow account outside of the claim[s] of creditors." Fortunato found that Absolute breached its fiduciary duty to the borrower and the mortgage lender but also clarified that he did not opine that those breaches of duty were definitely attributable to Steven. Fortunato added that Steven was "an excellent real estate attorney."

¶ 21 D. The Proceedings

¶ 22 Plaintiff commenced this action in July 2013 and ultimately filed a third-amended complaint against Steven, Kalliope and Absolute in September 2015. Plaintiff alleged counts for breach of contract (count I), breach of fiduciary duty (count II), real estate malpractice (count III), common law fraud (count IV), violation of the Consumer Fraud and Deceptive Business Practices Act (count V), civil conspiracy (count VI), negligent misrepresentation (count VII), conversion (count VIII), and violation of the Illinois Title Insurance Act (count IX). Plaintiff alleged, among other things, that Steven failed to maintain the $115,000 deposit in a separate escrow account, commingled corporate and personal assets, and failed to observe corporate formalities.

¶ 23 Shortly before trial, plaintiff moved to obtain the evidentiary deposition of Kalliope, whom plaintiff had not previously identified as a witness. Kalliope had recently been transferred from a federal correctional institute (FCI) in Kentucky to the FCI in Greenville, Illinois.

¶ 24 On October 10, 2017, the trial court entered a written order stating that Kalliope's discovery and evidence deposition would be taken at the FCI in Greenville on October 16, 2017, that the court reporter could enter the facility to conduct a videoconference deposition and that plaintiff was to arrange for defense counsel to appear via video conference at a court reporter's office in Chicago. Our record does not contain a report of the proceedings held on that date. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (stating that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant").

¶ 25 On October 12, 2017, however, plaintiff filed an emergency motion to modify that order, having learned the previous day that the FCI did not permit video conferencing. Plaintiff asked the court to permit the evidence deposition to proceed by teleconference, with Steven's attorney appearing via speaker phone. The court denied plaintiff's motion on October 13, 2017, but our record does not contain a report of the proceedings held on that date. Plaintiff then filed an emergency motion to reconsider.

¶ 26 At a hearing on October 18, 2017, the trial court explained that defense counsel previously argued that plaintiff failed to identify Kalliope as a witness in a timely manner. The court had also previously found it would be in the furtherance of justice to permit plaintiff to call Kalliope at trial, but the issue was how to procure her testimony from the FCI. The court continued:

> "At the time that I ruled you would be allowed to take the evidence deposition, I directed you to go into the hallway, call - - and I assumed I said prison to find out if they had video conferencing because counsel agreed to participate in the deposition from his office. I left the bench, and I was told that everything had been arranged, and over counsel's objection, I granted you leave to take the evidence deposition of the wife.
>
> It wasn't until the following day or -- I don't know two days later, you came in and said there was a mistake because you had only spoken to a court reporter and not the prison, *** and that the federal prison facility would not allow the video conferencing.
>
> I specifically found and I'm finding now that the prejudice to the defendants is substantially outweighed by any benefit of having [Kalliope] testify in these proceedings because in requiring the defendant to take a discovery first deposition [*sic*] and then an evidence deposition of a party by phone within days of trial and not being able to observe

her demeanor, the parties that are questioning her and the taking of the deposition, itself, especially when it's so crucial in cross-examination of a witness that was just disclosed, a key witness, and doubly important because these are issue of fraudulent misuse of funds in a case that has a criminal background and some civil litigation also, I think it would be prejudicial to force counsel to take this deposition by phone, and we are unable to make any other arrangements.

This is not due to circumstances beyond plaintiff's control. This case has been pending since 2013. You've had more than enough time to arrange for the deposition of [Kalliope]. Your motion is denied."

¶ 27 At trial, plaintiff made an informal offer of proof based on his private investigator's interview of Kalliope. She would have testified, in pertinent part, that Steven ran the escrow accounts and knew Absolute was underfunded. Additionally, Absolute regularly failed to account for all escrow funds on settlement statements. Steven was fully aware of all business transactions and knew that escrow proceeds would be used to pay third-party creditors.

¶ 28 Following trial, the court entered judgment against Absolute on all counts, finding it falsely represented to plaintiff that it had escrowed funds for future distribution. The court also found, however, that plaintiff had not provided sufficient evidence to pierce the corporate veil against Steven or otherwise find him liable. The court found it would be unjust and inequitable for plaintiff not to recover the $115,000 but "the inequity must be weighed in the context of whether the corporate entity is a fiction." The court stated:

"Absolute did thousands of transactions, and only fifteen or so have been identified as improper conveyance of escrow funds unrelated to the maintenance of Absolute's books and records. *** There is no evidence that the funds were deposited in

> Absolute's account. [Steven] testified that all corporate reports were filed with the Secretary of State. There is no evidence that the Shaykins' personal accounts were tied into Absolute's accounts. [Steven] testified that they kept the corporate records and he balanced the account on a regular basis. There is no evidence that the corporate accounts were other than separate and distinct from the individuals' accounts. [Steven] contends that Absolute maintained corporate formalities. No evidence was offered otherwise."

Moreover, there was no testimony that Steven controlled closings or directed escrow accounts.[2]

¶ 29 II. Analysis

¶ 30 A. Kalliope's Evidence Deposition

¶ 31 We first address plaintiff's contention that the trial court, to prevent defense counsel from having to travel to Greenville on short notice, erroneously conditioned permission to take Kalliope's evidence deposition on the FCI permitting videoconferencing. This issue involves the confluence of several supreme court rules.

¶ 32 Our supreme court's rules are mandatory. *Kingelhoets v.Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 38. Pursuant to Illinois Supreme Court Rule 213(f), "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial." Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). The party must also set forth the subjects a lay witness will testify about. *Id*. Additionally, parties must seasonably supplement or amend their prior answers upon learning of additional information. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007). Disclosure is necessary to prevent surprise. *Bill Market's The Competitive Edge, Inc. v. Mickelsen Group*, 346 Ill. App. 3d 996, 1007 (2004).

[2]The court also found Kalliope liable, stating that the record did not show a default judgment was previously entered against her. Our record, however, includes a default judgment entered in May 2015.

¶ 33 Moreover, Illinois Supreme Court Rule 212 authorizes the use of evidence depositions if the deponent is unable to attend trial due to imprisonment. Ill. S. Ct. R. 212(b) (Jan. 1, 2011). Even where an evidence deposition has occurred, however, there are limits on its use at trial. "Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial." Ill. S. Ct. R. 212(g) (eff. Jan. 1, 2007); see also Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007) (stating that "the information disclosed in answer to a Rule 213(f) interrogatory *** limits the testimony that can be given by a witness on direct examination at trial"). Thus, where a witness provides testimony in an evidence deposition, that witness' testimony would generally be excluded at trial if the witness had not previously been identified or provided a discovery deposition. See *id*.

¶ 34 Finally, courts may bar a witness from testifying as a sanction for unreasonably failing to comply with our supreme court's discovery rules. Ill. S. Ct. R. 219(c)(iv) (eff. July 1, 2001). To determine whether such a sanction was proper, courts consider (1) surprise to the adverse party; (2) prejudice to the adverse party; (3) the nature of the testimony; (4) the adverse party's diligence; (5) the timely objection to the testimony; and (6) the good faith of the party seeking to call the witness. *Bill Market's The Competitive Edge, Inc.*, 346 Ill. App. 3d at 1008. Reviewing courts will not interfere with the trial court's discovery rulings absent an abuse of discretion. *Ainsworth Corp. v. Cenco, Inc.*, 158 Ill. App. 3d 639, 645 (1987).

¶ 35 We find that any and all of the foregoing rules justified the trial court's determination that plaintiff was not permitted to take Kalliope's evidence deposition and admit it as evidence at trial. It is undisputed that plaintiff's initial, amended and supplemental answers to Rule 213(f) interrogatories did not identify Kalliope as a witness. On September 11, 2017, more than one

year after his initial Rule 213 disclosures and more than four years after this action was commenced, plaintiff finally moved for leave to add her as a witness.

¶ 36 According to plaintiff, Kalliope's testimony was critical. If this was the case, plaintiff should have identified her as a witness much sooner. Plaintiff has developed no argument explaining why he could not have done so or why he could not have procured Kalliope's evidence deposition in Kentucky, notwithstanding that Illinois is clearly more convenient. In addition, plaintiff did not inform the court or opposing counsel in a timely manner that he would like to disclose Kalliope as a witness and obtain her evidence deposition but was logistically prevented from doing so. See *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 621-22 (2007) (finding no abuse of discretion in barring witness testimony where the plaintiff never alerted the circuit court to her problems in complying with discovery). When plaintiff finally filed the motion to amend his Rule 213(f) disclosures to include Kalliope, the court denied it. The court was not required to find that plaintiff acted in good faith or exercised diligence. Having failed to properly disclose Kalliope as a witness, and absent good cause, plaintiff could not expect the trial court to admit any testimony from Kalliope's prospective evidence deposition at trial. See Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007); Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007); *Cf. Ainsworth Corp.*, 158 Ill. App. 3d 639, 644-45, 647 (finding the trial court abused its discretion by denying the plaintiff's emergency motion, filed a week before trial, to take the evidence deposition of a *disclosed*, crucial witness, whose wife's health required him to remain out of state, where the plaintiff assured the court that trial would not be delayed by the deposition, did not procure the witness's absence and could not have surprised anyone by using this witness).

¶ 37 Plaintiff further acknowledges it was "understandable that the trial court wanted to obviate the need for defense counsel to travel to Greenville, Illinois shortly before trial," but that

the court should have permitted the evidence deposition to proceed via telephone and/or proceed after the live testimony, which would have created only a "small delay." We disagree. The trial court expressly stated it was important that Steven's attorney be able to see the witness testify in this instance given questions about her credibility. Moreover, there was no discovery deposition taken of Kalliope. Consequently, Steven's attorney would be at a great disadvantage if he was unable to know the substance of Kalliope's testimony before examining the other witnesses. Considering the four years in which the case had already been pending, delaying trial further or otherwise inconveniencing Steven and his counsel would certainly have been prejudicial.

¶ 38 Finally, assuming, without deciding, that plaintiff made a proper offer of proof showing that Kalliope's testimony was critical to plaintiff's case, we find the same offer of proof supports the court's determination that permitting her to testify would have been extremely prejudicial at that juncture. Knowing that Kalliope was a defendant and the president of Absolute is substantially different from knowing that she would testify. We find no abuse of discretion. In light of our determination, we need not address Steven's challenge to plaintiff's offer of proof.

¶ 39 B. Steven's Liability

¶ 40 Next, we reject plaintiff's assertion that the trial court should have found Steven was personally liable. Following a bench trial, a reviewing court will not disturb the trial court's factual findings unless they are against the manifest weight of the evidence. *In re Marriage of Hundley*, 2019 IL App (4th) 180340, ¶ 48. A finding is against the manifest weight of the evidence only where the opposite conclusion is apparent or the court's findings are arbitrary, unreasonable or not based on the evidence. *Id*.

¶ 41 Generally, a corporate officer cannot be found liable for the corporation's wrongful conduct unless he actively participated in that conduct or had sufficient knowledge of it. See

Cooke v. Maxum Sports Bar & Grill, Ltd., 2018 IL App (2d) 170249, ¶ 84. The same is true with respect to directors and their coequals. See *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1017 (2010). A director's mere negligence is insufficient to impose personal liability. *Id*.

¶ 42 Here, plaintiff presented no evidence that Steven participated in plaintiff's transaction. As plaintiff also acknowledges, "the evidence does not show that any funds went directly from Absolute's escrow account to Defendant's individual account." Additionally, plaintiff presented no evidence to show that Steven even knew of any corporate misconduct. In an attempt to demonstrate that Steven was reckless, plaintiff states that Steven "operated in such a way as to allow his wife to steal more than $11,000,000.00 in the scheme for which she was indicted and pleaded guilty." Yet, this conclusory statement does not cite pages of the record showing specifically how the $115,000 was diverted, if at all, or what improper conduct on Steven's part allowed the money to be diverted. The trial court properly determined that plaintiff did not prove Steven was reckless so as to render him liable for his codefendants' misdeed. See also *Zahl*, 399 Ill. App. 3d at 1025 (finding that directors have a right to entrust corporate governance to officers and that the fraud at issue was not so openly committed so as to be easily detected).

¶ 43 We also find the trial court properly declined to pierce the corporate veil, something that courts are reluctant to do. *Pederson v. Paragon Pool Enterprises*, 214 Ill. App. 3d 815, 819 (1991). Courts will do so only where (1) there is a unity of interest and ownership such that the corporation and the parties who compose it no longer have separate personalities; and (2) adhering to the fiction of a separate corporation under the circumstances would promote injustice or lead to inequitable circumstances. *Steiner Electric Co. v. Maniscalco*, 2016 IL App (1st) 132023, ¶ 47. A party seeking to pierce the corporate veil, and have the corporate identity disregarded, must make a substantial showing that a corporation is actually a dummy for another.

Id. Factors that weigh in favor of piercing the corporate veil include the failure to comply with corporate formalities like electing officers or holding board meetings, mixing assets, undercapitalizing a corporation and permitting a corporation to act as a business conduit for a dominant party. *Pederson*, 214 Ill. App. 3d at 820. Sharing office space does not itself justify piercing the corporate veil. See *id*.

¶ 44 The record supports the trial court's determination that Absolute and Steven maintained separate identifies. Absolute maintained numerous employees and serviced a high volume of clients.[3] Steven was not involved in every aspect of the business. Additionally, Absolute had articles of incorporation, bylaws, stock transfer records, annual franchise filings, stock certificates and meeting minutes. Plaintiff disingenuously disregards testimony suggesting that Steven may have been unable to produce such materials because Stewart took them. Furthermore, there was no evidence that Steven mixed personal and corporate assets. Plaintiff has fallen woefully short of making a substantial showing that Absolute was a dummy for Steven. While it is indisputably unjust for plaintiff to suffer the loss of $115,000, it does not follow that holding Steven liable for that sum would promote justice. There was no evidence that he and Absolute were one in the same.

¶ 45 III. Conclusion

¶ 46 For the foregoing reasons, the trial court properly prohibited plaintiff from taking Kalliope's evidence deposition and correctly entered judgment in favor of Steven.

¶ 47 Affirmed.

[3]While Steven testified that Absolute had about 24 employees in 2008, Rodriguez testified that it had about 12.