2012 IL App (1st) 111598-U

Third Division
August 1, 2012

No. 1-11-1598

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD MENDOZA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	10 M1 708605
THE OUTPOST RESTAURANT, INC., NIKO KONSTANTOUDAKIS and JONATHAN J. DONNELLY,	)	
	)	Honorable
	)	Sheldon Garber,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it dismissed one of the defendants where allegations in the complaint created a material issue of fact that could provide a basis for piercing the corporate veil and holding the dismissed defendant personally liable for the corporation's debts.

¶ 2 Richard Mendoza, the plaintiff, filed a three count complaint against three defendants, Nicholas Konstantoudakis (Konstantoudakis), Jonathan Donnelly (Donnelly), and the

Outpost Restaurant (Outpost), for possession (count I), unpaid rent (count II) and disgorgement of profits (count III).[1] Mendoza sought to pierce the corporate veil of Outpost to hold Konstantoudakis personally liable for the corporation's debts. Konstantoudakis filed a motion to dismiss the action against him pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code). 735 ILCS 5/2-619(a)(9) (West 2010). The trial court granted Konstantoudakis' motion to dismiss with prejudice.

¶ 3 On appeal, we must decide whether the trial court erred when it dismissed Konstantoudakis as a defendant. We hold that the trial court erred when it dismissed Konstantoudakis. Therefore, we vacate the trial court's order and remand with directions for the trial court to conduct an evidentiary hearing to determine whether the allegations in the complaint warrant piercing the corporation's veil.

¶ 4 BACKGROUND

¶ 5 Richard Mendoza, the lessor, leased the premises at 3438 North Clark to Kevin O'Donnell

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[1] Disgorgement of profits is an equitable remedy meant to prevent a wrongdoer from enriching himself by his wrongs; thus, in general, an order for disgorgement may compel a defendant to surrender the amount by which he has been unjustly enriched through illegal profits. However, disgorgement does not aim to compensate the victim. *United States. v. Lane Labs-USA, Inc.*, 324 F. Supp. 2d 547, 575-76 (2004), *issued,* 324 F. Supp. 2d 582 (2004), *modified in part*, 328 F. Supp. 2d 520 (2004), *aff'd*, 427 F.3d 219 (2005).

and the Outpost Restaurant for the period beginning February 1, 2005, and ending January 31, 2008. In 2006, Kevin O'Donnell, in his individual capacity, and Outpost, executed an assignment and acceptance of commercial lease and assigned their rights as tenants under the lease to Outpost, Konstantoudakis, its president, and Donnelly, its secretary. The phrase "its president" was typed at the signature line of the assignment of lease where Konstantoudakis placed his signature.

¶ 6 On August 22, 2007, in a document entitled "Joint Unanimous Consent In Lieu Of A Special Meeting Of The Sole Shareholder And The Sole Director Of The Outpost Restaurant, Inc.," Konstantoudakis was named as the sole shareholder and director of Outpost and Konstantoudakis elected himself as Outpost's only president, secretary and treasurer.

¶ 7 In 2008, Outpost exercised its option under the lease and extended the lease term for an additional two years ending January 31, 2010.

¶ 8 On February 3, 2010, Mendoza and Konstantoudakis signed a lease amendment which named the Outpost Restaurant as the lessee and extended the lease for an additional month ending February 28, 2010. Konstantoudakis signed the lease amendment as Outpost's president.

¶ 9 In an amended complaint, Mendoza alleged that Konstantoudakis reopened the restaurant for business under the name Dos Gringos, but he did not sign a new lease for the premises. Mendoza also alleged that he served Konstantoudakis with a demand for immediate

possession, but Konstantoudakis remained in possession of the premises from February 28, 2010 until July 21, 2010, without paying rent.

¶ 10 Mendoza further alleged that (1) once Konstantoudakis became the sole shareholder and director of Outpost, he exercised complete dominion and control over Outpost's governance, cash management, financing, and day to day operations; (2) Outpost's 2009 statement of cash flow[2] showed that Konstantoudakis was commingling business accounts with his personal accounts; (3) Konstantoudakis moved funds between his personal accounts and that of the business without proper record keeping; (4) Konstantoudakis did not comply with corporate formalities; (5) Outpost's profit and loss statement for the period January through December 2009 depicted a net ordinary income of $259,483.92, with $240,000 of the net ordinary income distributed to Konstantoudakis as an expense; (6) despite Outpost showing sales in the amount of $1,507,752.59 on its profit and loss statement for 2009, it did not have sufficient funds to satisfy a judgment in excess of $42,900; and (7) Konstantoudakis was using Outpost's equipment for his own benefit at a different business unrelated to Outpost.

¶ 11 Finally, in the prayer for relief, Mendoza requested a judgment against Konstantoudakis and against Outpost jointly and severally for Outpost's unpaid rent, attorney fees and costs.

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[2] The amended complaint referred to Outpost's 2009 statement of cash flow, its 2009 profit and loss statement, and its December 31, 2009 balance sheet, but we note that the aforementioned documents were entitled "Houndstooth Saloon Statement of Cash Flows," "Houndstooth Saloon Profit & Loss," and "Houndstooth Saloon Balance Sheet."

¶ 12 Konstantoudakis filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code. Konstantoudakis argued that Outpost operated as a legitimate corporation because it had sales totaling $1,507,752.59 in 2009, it paid its employees, creditors, and taxes, maintained its licenses, permits, insurance, and a corporate bank account, it invested in marketing, conducted repairs, and rented trade equipment. Konstantoudakis also argued that Mendoza's amended complaint failed to allege sufficient facts to warrant piercing the corporate veil.

¶ 13 On October 5, 2010, the trial court granted Konstantoudakis' motion and dismissed Konstantoudakis as a defendant. Mendoza filed a motion and requested that the court reconsider its order dismissing Konstantoudakis as a defendant because Outpost was Konstantoudakis' alter ego.[3] In the alternative, Mendoza requested (1) leave to file a second amended complaint, or (2) a final and appealable order pursuant to Supreme Court Rule 304(a). The court denied Mendoza's motion to reconsider and his request for an order containing Rule 304(a) language.

¶ 14 On July 7, 2010, the parties entered into an agreed order regarding count I and

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[3] We note that the parties in their briefs refer to Konstantoudakis as Outpost's alter ego. However, under the alter ego doctrine, the party attempting to pierce the corporate veil must show that the corporation is the alter ego or business conduit of some person or entity. *Peetom v. Swanson*, 334 Ill. App. 3d 523, 527 (2002). Thus, the doctrine imposes liability on the person or entity that uses a corporation merely as an instrumentality to conduct that person's or entity's business. *Peetom*, 334 Ill. App. 3d at 527.

Konstantoudakis agreed to turn over possession of the premises to Mendoza.

¶ 15 On March 28, 2011, the court granted Mendoza's motion for summary judgment and entered a judgment for Mendoza and against Outpost in the amount of $42,000 for unpaid rent and $8,000 for attorney fees.

¶ 16 On May 9, 2011, the trial court granted Mendoza's motion to voluntarily dismiss count III, and the court's dismissal of count III settled all issues between the parties.

¶ 17 Mendoza appeals, pursuant to Supreme Court Rules 301 and 303 (Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008)), from the trial court's May 9, 2011 order, but on appeal he only challenges the October 5, 2010, order that dismissed Konstantoudakis as a defendant.

¶ 18 ANALYSIS

¶ 19 I. Standard of Review

¶ 20 The trial court granted Konstantoudakis' motion to dismiss pursuant to section 2-619(a)(9) of the Code. When ruling on a section 2-619 motion, the trial court must construe the pleadings and all supporting documents in the light most favorable to the nonmoving party. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). The trial court should grant the motion to dismiss, if the court finds, after construing the pleading and supporting documents, that no set of facts can be proven upon which relief could be granted. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). This court reviews an order granting a section 2-

619 motion to dismiss *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 21 II. Piercing the Corporate Veil

¶ 22 Mendoza invoked the equitable remedy of piercing the corporate veil in order to hold Konstantoudakis personally liable for the unpaid rent and attorney fees. The issue before this court is whether a genuine issue of material fact existed which should have precluded the trial court from granting Konstantoudakis' section 2-619 motion to dismiss. See *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377-78 (2003).

¶ 23 Case law make it clear that shareholders, directors, and officers of a corporation are not, as a general rule, liable for the corporation's debts and obligations, but in certain situations courts will find them personally liable for a corporation's obligations through the equitable remedy known as piercing the corporate veil. *Ted Harrison Oil Co., Inc. v. Dokka*, 247 Ill. App. 3d 791, 794-95 (1993); see also *People ex rel. Scott v. Pintozzi*, 50 Ill. 2d 115, 131 (1971). Piercing the corporate veil is a remedy that permits aggrieved plaintiffs to attach liability to the individual or entity that uses a corporation merely as an instrumentality to conduct that person's or entity's business. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 500 (2005). Therefore, a court may disregard the corporate entity and pierce the corporate veil to impose liability on the real person responsible for damages where the corporation is merely the alter ego or business conduit of that person. See *Peetom*, 334 Ill.

App. 3d at 527.

¶ 24 In order for a court to pierce the corporate veil and find a shareholder or officer liable for the corporation's obligations, a court employs a two prong test: (a) the court must find that a unity of interest and ownership causes the separate personalities of the corporation and the individual to no longer exist, and (b) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice. *Pintozzi*, 50 Ill. 2d at 128-29 (quoting 19 C.J.S. *Corporations* § 839, page 264).

¶ 25 A. Unity of Interest and Ownership

¶ 26 In order to determine whether the unity of interest and ownership prong of the piercing the corporate veil test is met, the trial court should examine the following factors: (1) inadequate capitalization; (2) failure to issue stocks; (3) failure to observe corporate formalities; (4) insolvency of the debtor corporation; (5) nonpayment of dividends; (6) absence of corporate records; (7) commingling of funds; (8) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (9) non-function of officers/directors; and (10) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Fontana*, 362 Ill. App. 3d at 503 (citing *Jacobson v. Buffalo Rock Shooters Supply, Inc.*, 278 Ill. App. 3d 1084, 1088 (1996)). It should be noted that a party seeking to pierce the corporate veil need not prevail on all factors. *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 567 (2006).

¶ 27 Here, Mendoza's amended complaint alleged that Konstantoudakis commingled private and business assets, raided corporate funds to the detriment of its creditors, and failed to follow corporate formalities.

¶ 28 In order to establish that Konstantoudakis commingled private and business assets, Mendoza appended a copy of Outpost's December 31, 2009 balance sheet to his amended complaint. Outpost's balance sheet listed the following liabilities, dark horse visa, Niko Chase visa, WaMu at home, and WaMu dark horse LOC; it also listed three loans that were suppose to be loans from Konstantoudakis to Outpost (1) a loan from the Konstantoudakis family, (2) a WaMu loan 2106 heloc, and (3) a WaMu loan 2307 heloc. We note, however, that there are no notes or other evidence of Outpost's indebtedness in the record regarding the aforementioned corporate liabilities that were listed on Outpost's balance sheet. Thus, a reasonable trier of fact could conclude that Konstantoudakis was commingling private and business assets.

¶ 29 In order to establish the transfer of funds from the corporation to a stockholder to the detriment of its creditors, Mendoza appended a copy of Outpost's profit and loss statement for the period January through December 2009 to his amended complaint. Outpost's 2009 profit and loss statement depicted a net ordinary income of $259,483.92 with $240,000 of the net ordinary income distributed to Konstantoudakis as an expense. Mendoza maintains that as a result of this excessive owner distribution, Outpost is no longer able to satisfy a

judgment against it for its unpaid rent. Therefore, the record contains evidence that could support the allegations in Mendoza's amended complaint that Konstantoudakis raided Outpost's assets to the detriment of its creditors.

¶ 30 Mendoza also alleged that Konstantoudakis did not follow corporate formalities because he did not hold an annual meeting and he did not designate one or more banks for the deposit of Outpost's funds, as required by Outpost's operating agreement. We note that the failure to hold an annual meeting might not be unusual, since Konstantoudakis was the sole shareholder. See *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 960 (2001). However, when ruling on the motion to dismiss, the trial court should have construed the pleadings and supporting documents in Mendoza's favor. See *Czarobski*, 227 Ill. 2d at 369. Thus, a reasonable trier of fact could also conclude that Konstantoudakis failed to observe corporate formalities.

¶ 31 Finally, the record contains a report prepared by a certified public accountant (CPA) who reviewed a number of Outpost's business records and documents. We note that the CPA's report was not appended to Mendoza's amended complaint, but it was appended to Mendoza's motion for summary judgment against Outpost for unpaid rent. The CPA's report pointed out that a number of important documents were missing, including Outpost's 2009 corporate tax return, formal books of record keeping, monthly journals, legal documents showing the change in the number of shareholders from two in 2007 to one in 2008, annual

reports for the years 2008 and 2009 with the Secretary of State, a list of all outstanding accounts payable, and payroll tax returns. The report also noted that a number of data entries were either inaccurately stated, incomplete or confusing. The report specifically mentioned that the $240,000 owner distribution, which was listed as an expense, was "confusing" and "troublesome." Finally, the report noted that a number of debts appeared to be personal and not business.

¶ 32 After considering the factors in the first prong of the piercing the corporate veil test, we find that the allegations in the amended complaint along with the business documents that Mendoza appended to his complaint and the motion for summary judgment raise a material issue of fact as to whether there was such a unity of interest and ownership between Outpost and Konstantoudakis that the separate personalities of Outpost and Konstantoudakis no longer existed.

¶ 33 B. Fraud, Injustice, or Inequitable Consequences

¶ 34 Next, the second prong of the test a court uses to determine if piercing the corporate veil of a corporation is appropriate is whether under the circumstances of the case, adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice. *Pintozzi*, 50 Ill. 2d at 128-29. A court usually will not pierce the corporate veil unless it finds some element of unfairness, something akin to fraud or deception, or a compelling public interest. *Fontana*, 362 Ill. App. 3d at 507 (citing *Berlinger's, Inc. v. Beef's Finest, Inc.*, 57

Ill. App. 3d 319, 324 (1978)). Case law indicates that a court may pierce the corporate veil without proof of actual fraud. *Fontana*, 362 Ill. App. 3d at 507 (citing *Central States, Southeast and Southwest Areas Pension Fund v. Gaylur Products, Inc.*, 66 Ill. App. 3d 709 (1978)).

¶ 35 Here, Mendoza alleged that Konstantoudakis reopened the restaurant with a new name and without a lease and took a $240,000 owner distribution from Outpost's income. A fact finder could reasonably conclude that Konstantoudakis engaged in the aforementioned business practices to keep Outpost's assets beyond the reach of any judgment that a creditor, including Mendoza, might secure against Outpost. See *Himmelstein v. Valenti Development Corp.*, 103 Ill. App. 3d 911, 915-16 (1982) (holding that plaintiff must allege that the corporation whose existence is sought to be disregarded is dissolved, insolvent, or otherwise unable to pay any judgment that the plaintiff might obtain).

¶ 36 Finally, Outpost's 2009 statement of cash flow and its 2009 profit and loss statement, if accurate, show that Outpost lacked sufficient funds to satisfy the $50,000 judgment for unpaid rent and attorney fees. If these documents accurately state the financial condition of Outpost, it would promote an injustice for a court to excuse Konstantoudakis from satisfying the judgment entered against Outpost.

¶ 37 After considering the factors in the second prong of the piercing the corporate veil test, we also find that the allegations in the amended complaint raise a material issue of fact as to

whether adherence to the fiction of a separate corporate existence would sanction a fraud or promote injustice.

¶ 38 Therefore, we hold that the trial court erred when it granted Konstantoudakis' section 2-619 motion to dismiss because Mendoza plead sufficient facts in his amended complaint to create a material issue of fact and justify a hearing on the issue of whether Outpost was a mere facade through which Konstantoudakis, as the dominant stockholder, conducted business.

¶ 39 Finally, because we find that the amended complaint alleged sufficient facts to support Mendoza's claim for disregarding the corporate entity under the equitable remedy of piercing the corporate veil, we need not address Mendoza's argument that the trial court erred by refusing to grant his request for leave to file a second amended complaint.

¶ 40 Accordingly, we vacate the order that dismissed Konstantoudakis as a defendant, and we direct the trial court, on remand, to hold an evidentiary hearing to determine whether Konstantoudakis was using Outpost as an instrumentality to conduct his own business. In the event the trial court finds that Outpost was the alter ego of Konstantoudakis, the court should hold Konstantoudakis personally liable for any judgment against Outpost. See *Pintozzi*, 50 Ill. 2d at 128-29.

¶ 41 CONCLUSION

¶ 42 We hold that the trial court erred when it dismissed Konstantoudakis as a defendant. Therefore, we vacate the trial court's dismissal order and remand with directions for the trial

court to conduct an evidentiary hearing to determine whether the evidence warrants piercing the corporate veil.

¶ 43 Reversed and remanded with directions.