

Bomil, Inc. v. Hoffelder, No. D037094 (Cal.App. Dist.4 04/17/2002)

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

[2]

No. D037094

[3]

2002.CA.0003485

[4]

April 17, 2002

[5]

BOMIL, INC., PLAINTIFF AND APPELLANT,

v.

JACK HOFFELDER ET AL., DEFENDANTS AND RESPONDENTS.

[6]

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Reversed. (Super. Ct. No. 696228)

[7]

The opinion of the court was delivered by: Benke, Acting P. J.

[8]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[9]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

[10]

Defendants Jack Hoffelder and Sorrento Electric (together Hoffelder), owed plaintiff Bomil, Inc., doing business as Kearney Electric Supply (Bomil), money for electrical supplies. Bomil sued. In settlement Hoffelder transferred to Bomil its interest in a real estate limited partnership. Bomil agreed that on sale of its interest in the partnership it would pay Hoffelder any excess over the amount owed for the electrical supplies. On sale of the partnership, Hoffelder and Bomil disputed the amount of excess. The trial court enforced the settlement agreement and required Bomil pay Hoffelder \$69,176.66. This court affirmed. Bomil did not pay. Hoffelder moved for the trial court to add Glen Roberts, Bomil's president, as an additional judgment debtor on an alter ego theory. Bomil opposed, arguing Hoffelder offered no evidence it was Roberts's alter ego. The trial court granted the motion and Bomil appeals. We reverse.

[11]

1. Law

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"Amendment of a judgment to add an alter ego 'is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.]" "Such a procedure is an appropriate and complete method by which to bind new . . . defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control

of the previous litigation, and thus were virtually represented in the lawsuit." [Citations.]' [Citations.]" (Carr v. Barnabey's Hotel Corp. (1994) 23 Cal.App.4th 14, 21-22.) Such amendment, therefore, has two requirements. The defendant added to the judgment must have in fact controlled the previous litigation and must be the alter ego of the originally named corporate defendant.

[13]

"There are two general requirements for disregarding the corporate entity. First, there must be 'such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.' [Citation.] Second, it must be demonstrated that 'if the acts are treated as those of the corporation alone, an inequitable result will follow.' [Citation.] 'When considering the application of the alter ego doctrine to a particular situation, it must be remembered that it is an equitable doctrine and, though courts have justified its application through consideration of many factors, their basic motivation is to assure a just and equitable result.' [Citation.]" (NEC Electronics Inc. v. Hurt (1989) 208 Cal.App.3d 772, 777.)

[14]

"The appellate court in Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825 made the heroic effort of cataloguing the factors that courts had considered in determining whether a corporate veil was properly pierced, which we summarize in the margin (paraphrasing or skipping certain factors because that opinion involved a creditor seeking to reach another corporation rather than an individual).[*fn1] The courts have cautioned against relying too heavily in isolation on the factors of inadequate capitalization or concentration of ownership and control. [Citations.] The Associated Vendors, Inc., court also warned against stretching the concept of inequity too far: 'Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.' In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable, under the applicable rule above cited, for the equitable owner of a corporation to hide behind its corporate veil.' [Citation.]" (Mid-Century Ins. Co. v. Gardner (1992) 9 Cal.App.4th 1205, 1213; see also Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 537-539.)

[15]

"Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. [Citation.]" (Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1249.) Or as was stated in Cascade Energy and Metal Corp. v. Banks (10th Cir. 1990) 896 F.2d 1557, 1576, "Corporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities."

[16]

This being the case, the burden of pleading and establishing alter ego liability rests with the creditor. (See Minifie v. Rowley (1921) 187 Cal. 481, 488.)

[17]

It has been said: "'The law as to whether courts will pierce the corporate veil is easy to state and difficult to apply.' [Citation.]" (Las Palmas Associates v. Las Palmas Center Associates, supra, 235 Cal.App.3d at p. 1228.) Since piercing the veil is an equitable device, it does not depend on prior decisions involving seemingly similar factual situations but depends instead on the unique equities of each case. Whether the corporate veil should be ignored is primarily a factual question and the trial court decision will not be disturbed if based on substantial evidence. (Ibid.)

[18]

2. Background

[19]

Hoffelder's evidence in support of his alter ego theory was scanty. The declaration of counsel in support of the motion to add Roberts as a judgment debtor was concerned almost exclusively with the claim that Roberts controlled the underlying litigation concerning Bomil's failure to pay pursuant to the settlement agreement and that Roberts continually delayed resolution of the case.

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The declaration also stated counsel had learned that Bomil, a privately held corporation, sold its assets in the spring of 1999 to another company doing business as Kearny Electric Supply Company. Counsel added he "suspected" the funds owed Hoffelder were either transferred or spent by Roberts and that Bomil was now a "shell."

[21]

Bomil opposed the motion, arguing no evidence was presented that the corporation was Roberts's alter ego. It noted that it was not enough that Roberts was the president of Bomil, once appeared as its counsel, and, as president of the corporation, consulted with counsel about the case. Bomil argued the motivation for Hoffelder's motion to add Roberts as a judgment debtor was its speculation that it would have difficulty collecting from Bomil.

[22]

At the hearing on the matter, Hoffelder continued to base its argument that Bomil was Roberts's alter ego on the claim he controlled the settlement litigation. Hoffelder's counsel did state without evidentiary support that he did not "believe" the Bomil corporation maintained corporate records or observed corporate formalities.

[23]

The trial court held there were no particular factors or conditions that had to be proved to demonstrate an alter ego relationship. The question was an equitable one and involved whether the corporation was being used to shield an individual from what otherwise would be a personal obligation. The court stated the evidence demonstrated Roberts acted as if he were Bomil and that he continually used the corporation to avoid a personal debt. The court granted the motion to add Roberts as a judgment debtor.

[24]

3. Discussion

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The evidence was insufficient to support a finding that Bomil was Roberts's alter ego. While the alter ego doctrine is equitable in nature, its application nonetheless must be based on evidence that demonstrates an alter ego relationship and the use of the corporate entity to facilitate conduct amounting to bad faith. The only evidence Hoffelder offered

that Bomil was Roberts's alter ego was Roberts's control of the litigation between the two corporations. That the president of a closely held corporation would control such litigation seems unremarkable. While Hoffelder's counsel speculated that Roberts "raided" Bomil to make the funds owed Hoffelder unreachable, there is no evidence of such conduct. There is no evidence here of an improper diversion of funds, the treatment by Roberts of a corporate asset as his own, a failure to maintain proper corporate records, inadequate capitalization or any of those acts or conditions showing that one entity is the alter ego of another. One may not like the way Roberts directed the affairs of Bomil and it may be that Hoffelder will have difficulty collecting from Bomil, but none of this is a basis for declaring Bomil to be Roberts's alter ego.

[26]

The order amending the judgment making Glen Roberts a judgment debtor in this case is reversed. Costs on appeal are awarded to appellant.

[27]

WE CONCUR:

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HUFFMAN, J.

[29]

O'ROURKE, J.

Opinion Footnotes

[30]

*fn1 "The relevant considerations include: the commingling of funds and other assets; the failure to segregate funds of the individual and the corporation; the unauthorized diversion of corporate funds to other than corporate purposes; the treatment by an individual of corporate assets as his own; the failure to seek authority to issue stock or issue stock under existing authorization; the representation by an individual that he is personally liable for corporate debts; the failure to maintain adequate corporate minutes or records; the intermingling of the individual and corporate records; the ownership of all the stock by a single individual or family; the domination or control of the corporation by the stockholders; the use of a single address for the individual and the corporation; the inadequacy of the corporation's capitalization; the use of the corporation as a mere conduit for an individual's business; the concealment of the ownership of the corporation; the disregard of formalities and the failure to maintain arm's-length transactions with the corporation; and the attempts to segregate liabilities to the corporation. [Citation.]"