

Peinado v. Barnett, No. A093923 (Cal.App. Dist.1 11/06/2001)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST
APPELLATE DISTRICT DIVISION FOUR

[2]

A093923

[3]

2001.CA.0001996

[4]

November 6, 2001

[5]

RENE ERNEST PEINADO, PLAINTIFF AND APPELLANT,

v.

C. LANCE BARNETT, AS REGISTRAR OF CONTRACTORS, ETC., DEFENDANT
AND RESPONDENT.

[6]

(San Francisco County Super. Ct. No. 314393)

[7]

The opinion of the court was delivered by: Kay, 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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.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]

Plaintiff Rene Ernest Peinado appeals from the judgment denying a petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) to overturn a civil penalty of \$5,000. We affirm.

[11]

BACKGROUND

[12]

In August of 1999 the Department of Consumer Affairs, on behalf of the Contractors State License Board, issued a "Non-Licensed Citation" to plaintiff, in which he was accused of "violating" Business and Professions Code section 7028 by "acting in the capacity of a contractor w/o license," which he was advised carried a "total civil penalty" of \$5,000. Plaintiff's administrative appeal was the subject of a hearing conducted by an administrative law judge (ALJ). Plaintiff represented himself at the hearing. During the course of the hearing questions arose as to the current status of Bridge Development LLC (Bridge), and whether it should be treated as plaintiff's alter ego. At plaintiff's request the hearing was continued in order that plaintiff could produce documentation concerning Bridge.

[13]

After plaintiff submitted that information, the ALJ issued his proposed decision of factual findings and legal conclusions. As relevant to the issues raised on the appeal, the pertinent conclusions of the ALJ were as follows:

[14]

"It is undisputed that Bridge Development LLC acted as a contractor without a license on the Polk Street project. Had that entity been cited for contracting without a license there is no question that liability would exist under [Business and Professions Code] section 7028.7. But Bridge was not cited; respondent [plaintiff] was. The Registrar argues that respondent may be held personally liable for the acts of Bridge under the alter ego doctrine.

[15]

"In California, a limited liability company is formed when one or more members file articles of organization with the Secretary of State. The formation of an LLC generally shields its members from personal liability for acts of the company. But under certain circumstances, the LLC's members may be held personally liable for the company's acts under the theory of alter ego liability. 'The essence of the alter ego doctrine is that justice be done.' Thus, the protective veil of an LLC may be pierced when 'in the particular case presented and for the purposes of such case justice and equity can best be accomplished' In order to pierce the veil, two general requirements must be met: '(1) that there be such unity of interest and ownership that the separate personalities of the [LLC] and the individual no longer exist and (2) that, if the acts are treated as those of the [LLC] alone, an inequitable result will follow.' Relevant factors to consider in determining whether to apply the alter ego doctrine include the disregard of legal formalities, the failure to maintain adequate LLC records, ownership by a single person, the domination or control of the LLC by a single person, the use of a single address for the individual and the LLC and the use of the LLC as a 'mere conduit' for an individual's business.

[16]

"Here, cause exists to pierce the LLC veil and hold respondent personally liable for the acts of Bridge since it is apparent that the LLC served as a mere conduit for respondent to conduct business and thus should be considered his alter ego. Each of the relevant factors listed above was considered in reaching this conclusion. First, the formation of Bridge Development as a California LLC did not follow the necessary legal formalities. Prior to January 1, 2000, an LLC was required to have two or more members. Since Bridge has only one member, it was not legally constituted when it was created in 1997. Second, by failing to file the required statement of information with the Secretary of State, Bridge both disregarded legal formalities and failed to maintain adequate records. Third, Bridge was solely owned and controlled by respondent. In negotiating with the owners of the Polk Street project and in entering into various construction subcontracts, respondent demonstrated a clear unity of interest between himself and the LLC. And fourth, Bridge and respondent used the same address.

[17]

"Under all the circumstances presented, it is determined that justice and equity can best be accomplished by holding respondent personally liable for the actions of Bridge in contracting without a license. Cause thereby exists, pursuant to Business and Professions Code section 7028.7, to cite respondent for contracting without a license on the Polk

Street project." (Fns. omitted.) The Registrar of Contractors adopted the ALJ's proposed decision.

[18]

Plaintiff filed a petition for administrative mandamus. The allegations relevant to the issues of this appeal were as follows:

[19]

"The citation . . . fails to mention or suggest any alter ego/veil piercing theory or facts, which violates the notice requirements of the due process clauses of the 5th Amendment to the United States Constitution, applicable to the States by the 14th Amendment to the United States Constitution. The citation also violates the corresponding provisions of the California State Constitution, Art. I, Section 7(a). These due process violations render the proceedings and trial unfair, within the meaning of CCP Section 1094.5(b.) Had Peinado known that the proceeding would have involved complex alter ego issues, he would have come to the hearing with counsel. Thus, Peinado suffered actual prejudice. [¶] The [Registrar's] attempt to avoid the due process notice issue by a mid-stream, late-hour grant of leave to file supplemental briefs, and the granting of a further extension, constitutes a violation of due process, an abuse of discretion, and conduct which rendered the proceedings and trial unfair, within the meaning of CCP Section 1094.5(b.) [¶] . . . [¶] The Respondent Registrar[] . . . acted in excess of . . . jurisdictional powers in deciding the alter ego theory. Respondent's jurisdictional powers are prescribed by B & P Code Section 7000 et seq. and do not authorize fact findings, legal conclusions, and/or administrative proceedings to determine alter ego/veil piercing theories." Plaintiff also alleged that the Registrar abused its discretion "by deciding contrary to law in finding that Bridge Development LLC was the alter ego of Rene Peinado, and/or that the corporate liability veil should be pierced."

[20]

After the trial court entered a judgment denying his petition, plaintiff filed a timely notice of appeal.

[21]

REVIEW

[22]

"If upon inspection or investigation, . . . the registrar has probable cause to believe that a person is acting in the capacity of or engaging in the business of a contractor within this state without having a license . . . the registrar shall issue a citation to the person. . . . Each citation shall be in writing and shall describe with particularity the basis of the citation. . . ." (Bus. & Prof. Code, § 7028.7.) "Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure." (Rosenblit v. Superior Court (1991) 231 Cal.App.3d 1434, 1445.) "Due process does not require any particular form of notice If the statute provides for reasonable notice . . . , that is all that is required." (Drummev v. State Bd. of Funeral Directors (1939) 13 Cal.2d 75, 80-81.) The citation issued to plaintiff clearly satisfied due process by advising him that he-not Bridge-was accused of acting in the capacity of a contractor without a license, at a specific time and place ("2652 Polk St./1299 Lombard St., S.F. On or about 04- 15-98"). It also informed him of the procedure for obtaining a hearing on the charge. The citation satisfied due process because it provided him reasonable notice of the charge and an opportunity to present his

objections. (E.g., *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314-315; *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 451.) It was in response to plaintiff's objections-that the violator was not him but Bridge-that the Registrar raised the issue of plaintiff's liability as the alter ego of Bridge. Nothing in due process requires a party to be given advance notice of how the other party may respond to an affirmative defense. We conclude that plaintiff's contention the citation itself violated due process is without merit.

[23]

Nor was due process offended once the alter ego issue was raised at the hearing. The rule in civil cases is that "The alter ego is ordinarily raised by the pleadings, either affirmatively in the complaint [citation] or negatively in the answer [citation]. Nonetheless, even when not pleaded, that issue may be resolved at trial" because it affects only a procedural tactic, not a claim for substantive relief. (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359.) Once the issue came up at the hearing, the ALJ provided plaintiff the opportunity to address it. Moreover, although acting without the benefit of counsel, plaintiff demonstrated considerable knowledge about the licensing requirements and was hardly caught unaware. *fn1 We do not see either the ALJ or the Registrar as exceeding their jurisdiction by deciding an issue thus developed at the hearing and which is not expressly and statutorily given to them for resolution. (See Gov. Code, §§ 11512, subd. (b) [ALJ "shall exercise all other powers relating to the conduct of the hearing"], 11513, subd. (c) [hearing "need not be conducted according to technical rules relating to the evidence"].)

[24]

Plaintiff next contends that the Registrar "abused its discretion by deciding alter ego theories contrary to law" and "by finding a violation of B & P Code Section 7028 contrary to law." It is unclear whether "contrary to law" as used by plaintiff means that incorrect legal standards were applied or there is not substantial supporting evidence. If plaintiff intends the former, there is nothing giving the least hint that legal standards were misapplied. The ALJ's proposed decision cited numerous authorities. We have checked those authorities and others, and we discern no point at which the governing legal standards were not followed. (See, e.g., *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300-301; *Hennessey's Tavern, Inc. v. American Air Filter Co.*, supra, 204 Cal.App.3d 1351, 1358; *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 836-840.) If plaintiff means to challenge the factual sufficiency of the findings framed by the ALJ and adopted by the Registrar, he will not prevail. Although plaintiff makes mention of selected "undisputed facts" and matters outside the record, he does not specifically challenge any particular finding. We must presume that those findings are supported by substantial evidence (e.g., *Tetra Pak, Inc. v. State Bd. of Equalization* (1991) 234 Cal.App.3d 1751, 1758) and plaintiff's failure to set forth all pertinent evidence in his brief only reinforces that presumption (e.g., *Estate of Hilton* (1996) 44 Cal.App.4th 890, 922).

[25]

The judgment is affirmed.

[26]

We concur:

[27]

Reardon, Acting P.J.
[28]
Sepulveda, J.

Opinion Footnotes

[29]

*fn1 For example, plaintiff asked Inspector Rind, who issued the citation: "Are you aware in California Business and Professions Code, Subsection 7068, subparagraph 3, which talks about qualifying entities for construction contracting?" And plaintiff testified "I consulted with my attorney at the time of negotiating this contract with the owner of 2652 Polk Street specifically in regard to . . . having a qualifying member [¶] . . . [¶] that was a licensed contractor" At another point in his testimony plaintiff spoke of Bridge and then stated that "I represent this is not a sham organization." In his closing argument plaintiff told the ALJ "it was improper for Mr. Rind to cite me individually when he knew-I even told him about the contractor and Bridge Development. I'm not trying to hide behind it, the shield of [the] corporate entity."