Sellers v. Home Americair of California, No. G029299 (Cal.App. Dist.4 06/09/2003)
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE
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G029299
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2003.CA.0005473
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June 9, 2003
[5]
EDWARD M. SELLERS ET AL., PLAINTIFFS AND RESPONDENTS,
v.
HOME AMERICAIR OF CALIFORNIA, DEFENDANT AND APPELLANT.
[6]
Appeal from a judgment of the Superior Court of Orange County, William F. McDonald, Judge. Affirmed. (Super. Ct. Nos. 779740 and 790653)
[7]
Thorsnes, Bartolotta & McGuire, John F. McGuire, Karen R. Frostrom; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Defendant and Appellant.
[8]
Sheppard, Mullin, Richter & Hampton, Mark Riera and Peter A. Krause for Plaintiffs and Respondents.
[9]
The opinion of the court was delivered by: Sills, P.J.
[10]
NOT TO BE PUBLISHED IN OFFICIAL REPORTS
[11]
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 This opinion has not been certified for publication or ordered published for purposes of rule 977.
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OPINION
[13]
A group of individual corporations were the former or prospective franchisees of Home Americair of California, an oxygen equipment business. Those corporations sued Home Americair, and Home Americair filed a cross-complaint against the corporations and their shareholders. The shareholders then brought a motion for summary judgment based on the paucity of evidence on which to hold them liable on an alter ego theory. The motion was granted, resulting in an appealable judgment against Home Americair. (It is appealable because it is a final judgment as to the individual shareholders.) We now consider the appeal from that judgment.
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We affirm. Most of the record consists of Home Americair's discovery responses, which identified only three bases for alter ego liability:

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(1) a check written for one corporation's initial franchise fees before the entity was formed;
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(2) deposition testimony of one shareholder admitting she received distributions in the form of a salary during the course of the litigation even though she performed no services for the corporation; and
[17]
(3) deposition testimony of two shareholders admitting that they had contributed $1.2 million to one of the corporations.
[18]
As to (1), the check is no evidence at all supporting alter ego liability. Corporate promoters obviously have to write checks on their own accounts for expenses attendant to forming a corporation in the first place. The fact that the check makes no reference on its face as to its purpose for paying fees in regard to a corporation yet to be formed is irrelevant given that the evidence was otherwise uncontradicted that it was used for the franchise fees of a then nonexistent corporation. (This is particularly true since the check was written to "Americare," which would presumably have been easily able to show that it was written for an existing, as distinct from to-be-formed, entity.)
[19]
As to (2), the deposition testimony submitted in opposition to the motion merely established that this particular shareholder hadn't done much by way of performing services for any of the corporations though she had received a salary from the corporation. *fn1 At worst, it means that the corporation may be trying to "expense out" distributions in the form of paying shareholders a salary, but that is consistent with respecting the corporate form -- one of the great dances of corporate tax law is the tension between leaving money in a corporation and getting it to shareholders. If the corporation has resorted to paying shareholders a salary (as distinct from, say, letting them dip into the till at random), it means that the corporate form is being respected.
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As to (3), the infusion of additional capital, that is of negligible significance. If a corporation really were a shareholder's alter ego, one would expect such infusions to be done outside the corporate form, not within it. Further, as the shareholders point out in their brief, the formal infusion of new capital to a corporation belies any inference that the corporation was formed to defraud creditors.
[21]
Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-840, identified 14 factors bearing on alter ego liability. Those factors are overwhelming in showing no alter ego liability here. In sum, we have: no commingling of funds or assets; no failure to segregate individual funds from those of the corporation (even Home Americair's three items show such segregation); no unauthorized diversions; no treatment of corporate assets as the shareholder's own; no failure to seek authority to issue more stock (the conclusion to be drawn concerning the infusion of capital shows the opposite); no failure to maintain minutes or records; no intermingling of individual and corporate records; no use of a single address for the shareholder and corporation; no concealment of ownership; no disregard of formalities (again, even the evidence in opposition tends to

show the opposite); and no attempts to make the corporation liable for a shareholder's personal debts. The absolute worst there is the $1.2 million capital infusion, which might be read for the idea that original capitalization was not enough. However, as we have just pointed out, the infusion also belies any tendency to leave creditors with a corporate shell having insufficient funds to pay them, so it also counts against alter ego liability.
[22]
Under such circumstances, there was no way that Home Americair could establish alter ego liability at trial. We suspect, in fact, that the evidence was so weak that Home Americair only took this appeal in the valiant hope that it could reverse a rather large attorney fee award (some $317,000!) assessed against it in the wake of the summary judgment. We do not, however, consider the appeal to be frivolous by any means: Since alter ego is a matter of "factor jurisprudence," the evidence must necessarily be overwhelming before summary judgment would be appropriate. Be that as it may, the judgment is affirmed, and the interests of justice require that the respondents recover their costs.
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WE CONCUR:
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O'LEARY, J.
[25]
MOORE, J.

Opinion Footnotes

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*fn1 There is a photocopying error on page 33 of the augmented record submitted by Home Americair which obscures the testimony showing that the shareholder received a salary. We will take the appellant's word for it.