

Spieker Properties, L.P. v. Bunte, No. G029277 (Cal.App. Dist.4 11/18/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH
APPELLATE DISTRICT DIVISION THREE

[2]

G029277

[3]

2002.CA.0010444

[4]

November 18, 2002

[5]

SPIEKER PROPERTIES, L.P., PLAINTIFF AND RESPONDENT,

v.

BARBARA BUNTE, DEFENDANT AND APPELLANT.

[6]

Appeal from a judgment of the Superior Court of Orange County, John M. Watson,
Judge. Affirmed in part and reversed in part. (Super. Ct. No. 00CC05990)

[7]

Law Offices of Fred S. Pardes and Fred S. Pardes for Defendant and Appellant.

[8]

Law Offices of Thomas P. Aplin and Thomas P. Aplin for Plaintiff and Respondent.

[9]

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.

[12]

OPINION

[13]

In an action for damages for breach of lease by a corporate entity, Barbara Bunte was held liable on an alter ego theory. Ms. Bunte claims the trial court erred in applying the alter ego doctrine and in awarding attorney fees against her. We disagree, in part. There was substantial evidence to support the trial court's implied findings that Ms. Bunte remained a shareholder after the purported transfer to her son of her ownership interest in the corporation, that she had a unity of interest with the corporation, and that it would be inequitable to treat the nonpayment of rent as the action of the corporation alone. However, it was error to award attorney fees against Ms. Bunte when no formal noticed motion for fees had been filed. We affirm in part and reverse in part.

[14]

I. FACTS

[15]

Ms. Bunte obtained a real estate license in 1970 and had worked in the wholesale mortgage banking business for 31 years as of the date of trial. In 1994, she formed Trust Deed Corporation, a California corporation (the Corporation), with the help of her son, Scott Bunte, who was also in the mortgage business. Ms. Bunte was the sole shareholder, as well as the sole officer and director. She used \$10,000 of her personal funds to capitalize the Corporation, and she never contributed any additional funds. In the first half of 1995, Ms. Bunte assigned her shares in the Corporation to her son. She claims she sold the Corporation to him for \$10,000.

[16]

Spieker Properties, L.P., a California limited partnership (Landlord) leased certain office space, located in the City of Irvine, to the Corporation. Charles Ephriam, identified on the lease as the chief executive officer of the Corporation, both executed the lease and personally guaranteed it. The lease term was for a period of 60 months, commencing July 1, 1999. The Corporation ceased paying rent in November 1999.

[17]

Landlord filed a complaint against the Corporation, the Buntzes, and Charles Ephriam, seeking damages based on breach of lease, breach of guaranty, and alter ego liability. Ms. Bunte filed an attorney-prepared answer. However, she appeared in propria persona at trial. After trial, the court entered judgment in favor of Landlord, and against the Corporation, and Mr. Bunte and Ms. Bunte, as individuals, in the total amount of \$63,593.83 (i.e., \$53,526.58 in principal and \$10,067.25 in fees and costs). The judgment against the Buntzes was based on alter ego liability.

[18]

Ms. Bunte, once again represented by an attorney, filed a motion for a new trial. The court denied the motion. Again in propria persona, Ms. Bunte filed a notice of appeal from the judgment and the order denying her motion for a new trial. Neither the Corporation nor Mr. Bunte is a party to this appeal.

[19]

II. DISCUSSION

[20]

A. Introduction

[21]

Ms. Bunte makes two assertions on appeal: (1) the trial court erred in applying the alter ego theory and piercing the corporate veil to hold her liable; and (2) the trial court erred in awarding attorney fees when no Civil Code section 1717 motion had been filed. She does not raise any issue as to the denial of the new trial motion. Therefore, her appeal as to that matter is deemed waived. (See *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108 [issue not raised in opening brief deemed waived].)

[22]

"Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence. [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248.) We review the record "to determine whether the trial court's decision is supported by substantial evidence [citations], and, in doing so, we resolve all conflicts in the relevant evidence `against the appellant and in support of the order' [citation]." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 535.)

[23]

B. Alter Ego Doctrine

[24]

(1) In general

[25]

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded - the 'corporate veil' pierced - where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.]" (Sonora Diamond Corp. v. Superior Court, supra, 83 Cal.App.4th at p. 538.)

[26]

There are two requirements for the application of the alter ego doctrine. (Las Palmas Associates v. Las Palmas Center Associates, supra, 235 Cal.App.3d at p. 1249.) First, there must "be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist . . ." (Ibid.) Second, the circumstances must be such that an inequitable result will follow "if the acts are treated as those of the corporation alone . . ." (Ibid.) Ms. Bunte contends neither prong of this test is met.

[27]

(2) Unity of interest

[28]

With regard to the unity of interest prong, Ms. Bunte emphasizes that she assigned her shares in the Corporation to her son several years before the lease was signed. Inasmuch as she was not an owner of the Corporation at the relevant time, there can have been no unity of interest between it and herself. (Riddle v. Leuschner (1959) 51 Cal.2d 574, 580 [no unity of interest between defendant and corporation when defendant not a stockholder in corporation].) Ms. Bunte further explains that Landlord provided no credible evidence on the issue of unity of interest and that the trial court "was wrongfully concerned" as to the manner in which her son paid for the stock. We disagree.

[29]

The record contains a copy of a document dated March 6, 1995, evidencing an organizational action taken without a meeting of the board of directors. The document authorized the issuance of 10,000 shares of stock to Ms. Bunte for the price of \$10,000. The record also contains a copy of an April 19, 1995 assignment of stock from Ms. Bunte to her son. A copy of a stock transfer ledger, also found in the record, reflects that Ms. Bunte received her shares in April 1995 and transferred them to her son on April 19, 1995. The ledger also shows Mr. Bunte lost his stock certificate and it was reissued in July 1997. This is consistent with the minutes of a special meeting of the board of directors on July 1, 1997, stating Mr. Bunte, as sole shareholder, had lost his stock certificate and the board had authorized issuance of a new one. This documentation, standing alone, favors Ms. Bunte's position. It does not constitute the whole of the evidence before the court, however.

[30]

The judgment does not contain any findings of fact and the record contains no statement of decision. However, the reporter's transcript is elucidating. The judge made clear he was concerned as to whether the stock transfer was a sham transaction. As the judge put it, there was no showing that Mr. Bunte had made any payments for the stock from his own personal funds. Ms. Bunte's testimony on this point, as on others, was evasive and contradictory.

[31]

In her pretrial deposition, Ms. Bunte initially stated her son had not paid her anything for the Corporation, but later stated he had. At trial, she steadfastly maintained that she sold the stock to her son for \$10,000, never claiming she had made a gift. She stated that she and her son entered into a written agreement for the sale of the Corporation for \$10,000, but the record contains no copy of any such agreement.

[32]

With reference to manner of payment, Ms. Bunte first testified that her son paid her in installments, initially by personal check. She subsequently changed her story again and testified that the Corporation paid her. Ms. Bunte ultimately clarified that her son "paid [her the] \$10,000 out of the Corporation. He would give [her], like 2,000 here, 2,000 there." She further explained that she used that money to support herself.

[33]

On the first day of trial, she was unable to produce any evidence of receipt of payments from anyone and, despite having testified that she received payment from her son by personal check, also claimed she did not remember if she was paid by check or in cash, or both. The judge, making every effort to be fair to a litigant appearing in propria persona, tried to explain to Ms. Bunte the importance of supporting her position with evidence. After an exasperating colloquy in which Ms. Bunte repeatedly contradicted herself in terms of identifying the individual in possession of the documentation necessary to prove her version of the facts, Ms. Bunte finally admitted that she had documentation available at home and the judge ordered her to bring it to court the next day.

[34]

The following day, Ms. Bunte produced copies of several checks, in the amounts ranging from \$1,000 to \$2,000. *fn1 Not one of them was drawn on her son's personal checking account. Four canceled checks showed payment to Ms. Bunte from the Corporation over the period of June through September 1995, and she admitted the checks represented partial payment with respect to the sale of stock to her son. Three of the checks were signed by Mr. Bunte on behalf of the Corporation, although Ms. Bunte could provide no documentation to show he was an officer of the Corporation at the time.

[35]

One of the checks was signed by Ms. Bunte herself, because, as she testified, "I would call, and Scott wasn't there, and he hadn't paid me my money." Ms. Bunte continued: "Sometimes his secretary would type up the checks, and I'd go in and pick them up, and I'd sign them." In response to the question, "You were paying yourself out of corporate funds?", Ms. Bunte replied, "You know something, I was being reimbursed for the 10,000 I put in." The judge summed by asking, "[E]ven on your own signature, you were reimbursing yourself for the sale of your corporate stock with money from the Corporation, as evidenced by that check; true? That check is not drawn on Scott's request

or Scott's money, or anything else. It's drawn on the Corporation's." To that, Ms. Bunte replied, "True." She further stated, "the intent was that I was getting paid back. He bought the Corporation. He was the only income coming into the Corporation. . . . So, in reality, it was his assets I was drawing on at that point."

[36]

As the record shows, in an effort to bolster the proposition that she had sold her shares, Ms. Bunte testified variously that her son had paid her for the stock, and also that she had been paid for the stock from corporate funds. Yet, in testimony inconsistent with the nature of a sale, Ms. Bunte also stated that she "withdrew [her] 10,000 out of the Corporation." (Italics added.) When the Landlord's attorney commented that to make payments over time was "an odd way to purchase shares, if that's what was really going on," Ms. Bunte said, "Yeah. But in the financials, I believe it will show withdrawal of capital."

[37]

Clearly, Ms. Bunte was inconsistent in her testimony as to whether her son had paid her for the shares, whether he or she had used corporate funds to pay for the stock, or whether the money she had received from the Corporation was really in the nature of a return of capital. When all is said and done, on appeal Ms. Bunte admits that the \$10,000 she received was paid from corporate funds, but she does not see the relevance of the admission. She claims, "the trial court committed reversible and prejudicial error by finding that it was relevant and material as to whether or not Scott Bunte paid the \$10,000.00 for appellant's stock." (Original in all capital letters.)

[38]

The court did not err. There was not merely substantial evidence, but an abundance of evidence before the trial court to show, as Ms. Bunte now admits on appeal, that Mr. Bunte did not pay for the stock with his personal funds. Impliedly, the court determined the stock transfer was a sham transaction and that, therefore, the stock was never transferred and Ms. Bunte remained a shareholder in the Corporation. (See *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928 [all findings necessary to support the judgment are implied].) Ms. Bunte argues the evidence is insufficient to make this showing.

[39]

However, she cites no authority addressing the legal analysis. That is to say, she does not argue that once it was found the transaction was a sham, it was an error of law to conclude she remained a shareholder. Rather, she nearly concedes the point. In her opening brief, she states: "Assuming a worse case scenario, that the Court `properly' disregarded the Appellant's verbal testimony over the payment of money for the sale of the stock, at best it would show that Barbara Bunte was a mere shareholder of the [C]orporation." (Underscoring in original.) The burden is on appellant to show that the trial court erred in its analysis or application of the law. She has not done so.

[40]

Once the conclusion is drawn that Ms. Bunte remained a shareholder, there is but one short step to take to conclude there was a unity of interest between Ms. Bunte and the Corporation. Ms. Bunte and her son clearly used the Corporation as their personal piggy bank. They both wrote checks on the corporate account for personal purposes. There need be no determination whether the funds were used to pay for the stock sale, or whether the monthly payments made over several months in 1995 were made for Ms. Bunte's living

expenses. The purposes were personal either way. Moreover, Ms. Bunte herself testified that she viewed the monies in the corporate account as "his assets [she] was drawing on."
[41]

(3) Inequitable result

[42]

Ms. Bunte also maintains that the second prong of the test has not been met. That is to say, she asserts Landlord failed to show that an inequitable result would follow were the corporate veil not pierced to hold Ms. Bunte liable. As Ms. Bunte indicates, "society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, [so] sound public policy dictates that imposition of alter ego liability be approached with caution. [Citation.]" (Las Palmas Associates v. Las Palmas Center Associates, supra, 235 Cal.App.3d at p. 1249.) Moreover, "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.'" (Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 842.) Finally, Ms. Bunte ardently argues that the second prong of the test cannot be met because she had no dealings with Landlord.

[43]

In passing upon her arguments, an overview of her involvement with the Corporation would be helpful. Ms. Bunte testified that after she transferred the stock to her son in 1995, she remained president of the Corporation. She further stated that she remained the sole officer and director until February 1998. Ms. Bunte claimed there were corporate documents that would show that she ceased to be an officer and director at some point and that her son had come to run the company, but she did not have them available the first day of trial.

[44]

The reporter's transcript reflects that she brought some corporate minutes to court on the second day of trial, in order to prove her version of events. However, the record does not contain copies of any minutes that indicate she disengaged herself from involvement with the Corporation. The reporter's transcript does, however, contain a description of certain documents indicating Mr. Bunte was signing waivers of notices of meetings in 1996 and 1997, at the same time as Ms. Bunte was signing the minutes of those meetings as president and secretary of the Corporation. Despite the court's urging, Ms. Bunte failed to have her son testify, to shed light on the critical events.

[45]

Ms. Bunte testified that she had some continuing involvement with the Corporation after the purported stock sale because she was "the signee for HUD." She explained that she was an underwriter who could "sign on government loans." She did not spend a lot of time on corporate business in the first year or so after start-up because she was involved in a lawsuit against her former employer that was consuming most of her time. She stated that, nonetheless, she intended to become more involved after resolution of the lawsuit. At the same time, she did remain involved in underwriting government loans, inasmuch as no one else in the Corporation knew how to handle them. In her testimony, she further stressed the importance of her son's providing audited corporate financials to her, so that she could maintain her HUD underwriting eligibility. Ms. Bunte did not identify a date by which she had ceased underwriting government loans for the Corporation.

[46]

In addition, Ms. Bunte testified to having brought on board a broker friend to whom she was teaching the business. She did not articulate the time frame when this occurred.

[47]

As the foregoing shows, Ms. Bunte remained involved in the Corporation after its purported sale. She was the only one capable of underwriting the government loans and wanted to maintain her HUD underwriting eligibility. She also was involved in teaching a broker friend the business. She admits to having been an officer and director at least until February 1998 and there is no documentation in the record to show when her involvement ceased.

[48]

Landlord presented a copy of a corporate lease application completed in 1999. That lease application listed Ms. Bunte as the president and treasurer of the Corporation. It appeared on its face to have been signed on behalf of the Corporation by Ms. Bunte, her son, and others with whom Ms. Bunte said she was unfamiliar. At trial, Ms. Bunte testified she had never signed any such document and her signature must have been forged. She also claimed that the application had not been used in connection with the lease at issue.

[49]

While the lease application indicates Ms. Bunte was still the president of the Corporation in 1999, the year the lease was executed, Ms. Bunte disputes the validity of the document. It was up to the trial court to believe or disbelieve her testimony. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622 [court of appeal does not reweigh evidence or reassess the credibility of witnesses].)

[50]

As for what the trial court ultimately determined to be true, we observe there were no findings of fact. Ms. Bunte complains about this, but does not indicate that she requested a statement of decision. "Where . . . no statement of decision was requested, all intendments will favor the trial court's ruling and it will be presumed on appeal that the trial court found all facts necessary to support the judgment." [Citation.] (*Schubert v. Reynolds*, supra, 95 Cal.App.4th at p. 104.) We presume the trial court found that Ms. Bunte remained both a shareholder and a participant in corporate affairs in 1999, when the lease was executed. This being the case, piercing the corporate veil to hold Ms. Bunte liable is proper if inequity would otherwise result.

[51]

There are many factors to consider in deciding this matter. Among the pertinent factors are "commingling of funds and other assets, . . . the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; . . . the failure to adequately capitalize a corporation; . . . the use of a corporation as a mere shell, instrumentality or conduit for . . . the business of an individual . . . ; . . . the diversion of assets from a corporation by or to a stockholder . . . to the detriment of creditors" [Citation.] (*Arnold v. Browne* (1972) 27 Cal.App.3d 386, 394-395, disapproved on another ground in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.)

[52]

As we have already discussed, the Buntzes diverted corporate funds for their personal uses, whether characterized as the payment of Ms. Bunte's living expenses or as the

discharge of Mr. Bunte's personal obligation to pay for the 10,000 shares of stock. There is also evidence that the Corporation was either undercapitalized from the start, or caused to be undercapitalized on account of the payments to Ms. Bunte, or her "withdrawals," whichever characterization is employed.

[53]

Although Ms. Bunte initially started the Corporation by contributing only \$10,000 to capital, she was initially paying approximately \$350 per month in rent and bought some furniture and a copier early on. Within months after start-up, she began receiving the payments she characterized variously as either payments for her stock or return of capital. She testified that she thought the payments added up to \$10,000. This would mean that shortly after starting up the Corporation, she and Mr. Bunte drained it of its assets. Ms. Bunte expressed a belief that Mr. Bunte had contributed, to capital, some discounted promissory notes he owned. However, no evidence of the same is contained in the record and, shortly before ruling, the judge said Ms. Bunte had produced no such evidence.

[54]

Also, the minimum monthly rent for the first year of the lease at issue was \$5,286, and there is no evidence in the record as to whether the Corporation had become adequately capitalized by 1999. The fact the Corporation defaulted on the lease within a few months after the lease commencement date may be an indication of the fact that the Corporation remained undercapitalized in 1999, when the lease was signed.

[55]

It is true that undercapitalization alone does not necessarily dictate that the corporate veil should be pierced. (*Harris v. Curtis* (1970) 8 Cal.App.3d 837, 841, 843.) Yet it has also been stated that "[Citation]: [¶] `Another factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation. [Citation]: "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.'" (Temple v. Bodega Bay Fisheries, Inc. (1960) 180 Cal.App.2d 279, 283-284.)

[56]

In *NEC Electronics Inc. v Hurt* (1989) 208 Cal.App.3d 772, the court found the sole shareholder and chief executive officer of a corporation was the corporation's alter ego. The shareholder argued the evidence did not show an inequity would result if the alter ego doctrine were not applied, because the only inequity to the creditor was the inability to collect from the corporation. The court rejected the argument, saying the evidence disclosed that the shareholder had depleted the corporate assets by receiving loans and using corporate monies to pay for his personal expenses. The California Supreme Court

once put it this way: "The equitable owners of a corporation . . . are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will [citations]; . . . or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs. [Citations.]" (Minton v. Cavaney (1961) 56 Cal.2d 576, 579-580.)

[57]

The evidence of undercapitalization and of the use of corporate funds for personal purposes support the trial court's decision. Despite this, Ms. Bunte contends she should not be held liable because Landlord never dealt with her on the lease transaction, so her actions could not have been the cause of any injustice. However, assuming Landlord relied on the lease application, it may have relied on the involvement of the persons shown as officers thereon. This would have included Ms. Bunte, if the lease application was valid and her signature was not forged. Whether the lease application was a forgery or was relied upon by Landlord aside, Ms. Bunte's actions were relevant to the extent she undercapitalized the Corporation and depleted its assets, putting it in a position in which it was unlikely to be able to pay its debts as they became due.

[58]

If Ms. Bunte had additional documentation to show the stock sale was valid and/or that she had no remaining involvement with the Corporation in 1999, she should have provided it at trial. Similarly, it is her obligation on appeal to provide a record supporting her position, to cite to the relevant evidence as contained in the record, and to demonstrate trial court error. She has failed in these regards.

[59]

Moreover, the reporter's transcript is replete with instances in which Ms. Bunte contradicted her own testimony, both as given at her deposition and as given at trial. It also demonstrates several times over her unwillingness to provide documentation she said would prove her story. Bending over backwards on behalf of this litigant in propria persona, the trial judge repeatedly instructed her on the need to provide what evidence she had, even to the extent of permitting her to provide documentation on the second day of trial that she had never provided during discovery. Ms. Bunte had every opportunity to prove her version of the facts. She failed to do so, and substantial evidence supports the trial court's decision.

[60]

C. Attorney Fees Award

[61]

Ms. Bunte argues the award of attorney fees was erroneous because Landlord never filed a motion for the fixing of attorney fees. She contends Civil Code section 1717, subdivision (b)(1) requires the filing of a formal noticed motion before attorney fees may be awarded. In response, Landlord merely argues attorney fees were properly awarded because the lease at issue contains an attorney fees clause.

[62]

The lease does indeed contain a clause providing the unsuccessful party in litigation shall pay the attorney fees of the prevailing party. This is not the end of our analysis, however. Ms. Bunte is correct that a formal noticed motion is required. (Russell v. Trans Pacific Group (1993) 19 Cal.App.4th 1717, 1723-1726.) In its brief, Landlord does not contradict Ms. Bunte's assertion that no formal noticed motion was filed. *fn2 In the absence of

such a motion, fees may still be awarded against a party against whom a default judgment is taken (id. at pp. 1723-1724), such as the Corporation and Mr. Bunte. However, the fee award is improper as against Ms. Bunte, against whom judgment was entered after trial.

[63]

D. Motion for Sanctions

[64]

Landlord filed a motion for sanctions against Ms. Bunte and her appellate counsel, jointly and severally. Landlord contends that since the trial court denied the new trial motion and the appeal is based on essentially the same grounds as that motion, Ms. Bunte and her counsel should have known there was no basis for relief on appeal. In addition, Landlord's attorney declares that he warned Ms. Bunte's counsel that Landlord would seek sanctions if an appeal were filed.

[65]

The fact the trial court denied a new trial motion does not preclude this court from granting relief on appeal. Moreover, Ms. Bunte's argument that she could not properly be held liable on an alter ego theory because she did not own stock in the Corporation at the time the lease was executed, was worthy of review.

[66]

III. DISPOSITION

[67]

The judgment is affirmed as to Ms. Bunte, except for the award of attorney fees. To the extent the judgment awards attorney fees against Ms. Bunte, it is reversed. Appellant shall recover her fees on appeal. Respondent's motion for sanctions is denied.

[68]

WE CONCUR:

[69]

ARONSON, J.

[70]

FYBEL, J.

Opinion Footnotes

[71]

*fn1 The record on appeal does not contain copies of the checks. However, the reporter's transcript contains testimony describing the checks that were produced at trial.

[72]

*fn2 At oral argument, this court asked counsel for Landlord whether a motion for attorney fees had been filed. After he answered in the affirmative, we asked him to point to the portion of the record containing a copy of the motion. He was unable to do so. Following oral argument, Landlord filed copies of certain documents we decline to consider on appeal. In any event, we observe none of those documents was a formal, noticed motion for attorney fees.

