

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2921-11T3

701 PENHORN AVENUE ASSOCIATES,
INC.,

Plaintiff-Respondent,

v.

J. FANOK HOLDINGS, LLC, J.
FANOK SERVICES, INC., BFM
AIR FREIGHT, a/k/a TEAM
FANOK, and JEFFREY FANOK,
individually,

Defendants-Appellants.

Argued January 23, 2013 - Decided February 28, 2013

Before Judges Reisner, Yannotti and Hoffman.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County, Docket
No. L-4858-10.

Stephen J. Edelstein argued the cause for
appellants (Schwartz Simon Edelstein &
Celso, LLC, attorneys; Douglas K. Wolfson,
of counsel and on the brief; Richard J.
Angowski, Jr. and Jennifer L. Moran, on the
brief).

Evelyn A. Donegan argued the cause for
respondent (Rubin Kaplan & Associates,
attorneys; Ms. Donegan of counsel and on the
brief).

PER CURIAM

Defendants J. Fanok Services, Inc. (Services), J. Fanok Holdings, LLC (Holdings), and Jeffrey Fanok (Fanok) appeal from a January 13, 2012 judgment entered in favor of plaintiff 701 Penhorn Avenue Associates, Inc. (Penhorn) against defendants in the amount of \$936,430.63, equaling the amount of unpaid rent remaining on four lease agreements, minus mitigated damages and a security deposit. The sole issue on appeal is whether the trial court abused its discretion when it pierced the corporate veils of Holdings and Services to hold Fanok personally liable on the debt. Based on our review of the record, we find the judge's decision is supported by substantial credible evidence and is consistent with applicable law. Accordingly, we affirm.

I.

Penhorn is in the business of renting its sole real estate asset, a warehouse facility located at 701 Penhorn Avenue in Secaucus, New Jersey, to commercial tenants. The majority of the tenants in the buildings are involved in the import and export business. One such tenant, Services, had leased space from Penhorn dating back to 1997.

Services was a custom broker providing warehouse and fulfillment services, in business since the 1960's. Panasonic represented about 80% of Services' business. Fanok, chief executive officer of Services, created Holdings in 2006 and

remained its sole shareholder. In July 2007, Penhorn and Fanok negotiated lease renewals on units one, three, and four, and a new lease on unit five. The lease terms of all units ended November 30, 2012. The lease contracts issued in July 2007 were between Penhorn and Holdings, and signed by Fanok as "President, J. Fanok Holdings, LLC." However, the units remained occupied by Services without a sublease agreement with Holdings, and Services continued to make all rental payments. Holdings had no employees, no income and no assets other than the leases.

In early 2010, Panasonic advised Fanok that it was moving its operations to Chicago and therefore would no longer be doing business with Services after May 7, 2010. Without the business of its main customer, Services could not survive and soon defaulted on lease payments amounting to approximately \$30,000 per month. In September 2010 plaintiff filed suit against Holdings and Services for breach of the commercial leases. In April 2011, plaintiff filed an amended complaint joining Fanok individually and alleging that Holdings was an under-capitalized "shell corporation," created for the purpose of defrauding plaintiff. As such, plaintiff claimed it was entitled to pierce the corporate veil of Holdings and recover against Fanok personally.

The judge found that the parties had been doing business since 1997 and that Cathy Lee, the president of Penhorn, trusted Fanok, who talked her into giving him a new lease in the name of a new holding company that had no assets, a fact he did not disclose.

Following a two-day bench trial, Judge Edward T. O'Connor, Jr., entered judgment for plaintiff in the amount of \$936,430.63 against Holdings, the tenant, and Services, the "de facto tenant," as well as Fanok, individually. With respect to piercing the corporate veil, the judge reasoned that,

Holdings had no employees and had no business of its own. All the benefit of the . . . leases went to [Services] with no exposure to the asset-less [Holdings]. It was in my opinion simply a corporate shell set up by the defendant[s'] attorney on his advice obviously to shield . . . Fanok from any exposure.

The judge found that Fanok represented to plaintiff that his business was doing well and "he was contemplating building or acquiring a building of his own[.]" He found plaintiff had no reason to believe that the new corporation defendant had created was a mere shell corporation. The benefits of the lease went to Fanok's other corporation, Services, which was the real tenant. The judge found that Fanok abused the corporate structure by setting up a shell company with no assets, which he controlled and owned. Citing OTR Associates v. IBC Services,

Inc., 353 N.J. Super. 48 (App. Div. 2002), the judge pierced the corporate veil and entered judgment against Fanok personally, along with the two corporations. The judge further found that plaintiff made reasonable efforts to mitigate damages.

II.

In reviewing a judge's determination whether to pierce the corporate veil, we are bound by the judge's factual findings so long as they are supported by substantial credible evidence. See Marioni v. Roxy Garments Delivery Co., 417 N.J. Super. 269, 275 (App. Div. 2010). We owe particular deference to a trial judge's evaluation of witness credibility. State v. Locurto, 157 N.J. 463, 471 (1999). However, We owe no deference to the trial judge's interpretation of the law. Marioni, supra, 417 N.J. Super. at 275. Moreover, we review a judge's decision whether to grant an equitable remedy for abuse of discretion so long as it is consistent with the judge's factual findings. Id. at 275-76.

Piercing the corporate veil is an equitable doctrine designed to provide a remedy for an underlying wrong, where a remedy would otherwise be unenforceable because the primary defendant is a corporation without assets to pay it. See Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006), certif. denied, 189 N.J. 429 (2007).

Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law[.]

[State v. Ventron Corp., 94 N.J. 473, 500 (1983) (citations omitted).]

In an appropriate case, the doctrine may be applied to hold an individual liable for an otherwise-uncollectible judgment against a corporation. See Marascio v. Campanella, 298 N.J. Super. 491, 502 (App. Div. 1997).

III.

The record fully supports the trial judge's decision to pierce the corporate veil to avoid an unjust result. Based on the facts that Fanok admitted Holdings was created for the sole purpose of managing the leases, that Services paid all the rent and CAM charges,¹ and that Holdings was not only under-capitalized, but completely un-capitalized, it follows that Holdings was created for the sole purpose of obtaining the benefit of the leases while shielding Services and Fanok from liability on the leases. Holdings had no assets or employees

¹ Common Area Maintenance (CAM) charges represent the tenant's proportionate share of property taxes, insurance, heating, ventilation, air conditioning maintenance, sewer and water fees, snow removal, landscaping fees, and electricity

and engaged in no separate business. Holdings allowed Services to use the leased space but Services did not pay any rent to Holdings. Moreover, Fanok owned 100 percent of the stock of Holdings and was in charge and in control of these actions. The record supports the conclusion that Fanok used Holdings for an unjust purpose, and the court's finding that the arrangement constituted "an abuse of the corporate structure."

Additionally, the trial record contains clear and convincing evidence that Fanok falsely represented to Penhorn that Holdings would be engaging in business, and concealed from Penhorn that his true intentions for Holdings was that it would only be a shell, with no assets. Furthermore, Fanok's false and misleading statements caused Penhorn to forgo Fanok's personal guarantee.

In similar circumstances, New Jersey courts have pierced the corporate veil of closely-held corporations to impose liability on the owner individually. Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216 (Ch. Div. 1972) (personal liability imposed in the wake of a fraudulent pyramid scheme); Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 396 (App. Div. 1989) (finding of fraud and personal liability against shareholder of defendant corporation sustained where shareholder purposely misled plaintiff insurance broker by

signing checks that he knew would not be honored), certif. denied, 121 N.J. 607 (1990).

"When a fraud is committed in the name, and under cover of a corporation, by persons having the right to speak for it, for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false words and their purses should pay the damages."

[Kugler, supra, 120 N.J. Super. at 257 (quoting Vreeland v. New Jersey Stone Co., 29 N.J. Eq. 188, 195 (Ch. 1878), aff'd 29 N.J. Eq. 651 (E. & A. 1878)).]

Defendants argue that the trial court erred in placing principal reliance upon our holding in IBC in reaching its decision to pierce the corporate veil. We disagree. In IBC, the owner of a parent company conceded that he formed a subsidiary for the sole purpose of holding a lease and that the subsidiary had no assets other than the lease itself, "which, in the circumstances, was not an asset at all but only a liability since [the subsidiary] had no independent right to alienate its interest therein but was subject to [the parent company's] exclusive control." Id. at 53. The subsidiary had no income, no employees, no office staff, and shared the address of the parent company. Ibid.

We held that piercing the corporate veil is warranted when a parent corporation has abused the privilege of incorporation, and "the hallmarks of that abuse are typically the engagement of

the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." Id. at 52.

Based on the circumstances that the lessor was led to believe the two entities were one and the same, we believed

the inference is ineluctable and virtually conceded . . . that [the subsidiary] was created as a judgment-proof corporation for the sole purpose of insulating [the parent corporation] from any liability on the lease in the event of the franchisee's default, a purpose found by the trial judge to have been deliberately concealed by [the parent corporation] by its conduct in creating the impression from the outset of the tenancy relationship and throughout its duration that it and [the subsidiary] were one and the same.

[Id. at 54-55.]

We do not find significant that Holdings did not execute a sub-lease agreement with Services, or that Holdings was not created by Services but rather by the 100 percent shareholder of Services. Based on the facts that Fanok admitted Holdings was created for the sole purpose of managing the leases, that Services paid all of the rent and CAM charges, and that Holdings was not only under-capitalized, but completely un-capitalized, it follows that Holdings was created solely for the purpose of shielding Services and Fanok from liability. As in IBC, that


purpose was deliberately concealed by Fanok's false and misleading statements to Penhorn.

Judge O'Connor rejected all of defendants' contentions based on the facts as he found them, including his evaluation of witness credibility. There is no basis in this record to disturb his credibility findings, to which we owe deference. See Locurto, supra, 157 N.J. at 472.

Having reviewed the record in light of these principles, we find no basis to disturb Judge O'Connor's decision that held Fanok personally liable for the monies due and owing from Services and Holdings. The record clearly establishes that, when Fanok negotiated the new leases in 2007, he intentionally made material misrepresentations to Lee about Holdings with the expectation that Penhorn would rely upon these representations. Penhorn reasonably relied on these representations and sustained damages as a result.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION