SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1991-15T1

TEN WEST CONDOMINIUM OWNERS' ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

LRG REALTY, LLC, and CARL CERBONE,

Defendants-Respondents.

TEN WEST CONDOMINIUM OWNERS' ASSOCIATION, INC.,

Plaintiff,

v.

LRG REALTY, LLC, its members, each Individually, and the owners of any Interest in Units CA 301-310 (Tax Lot 1.14), Units CB 101-107 (Tax Lot 2.01-2.07), Units p/o CB 110 (Tax Lot 2.10), Units CB 201-201, 212-217 (Tax Lot 2.11) and Units CB 301-317 (Tax Lot 2.28), 2740 Route 10 West, Parsippany-Troy Hills, New Jersey, and CARL CERBONE, Managing Member of LRG REALTY, LLC,

Defendants.

LRG REALTY, LLC and TEN WEST CONDOMINIUM OWNERS' ASSOCIATION, INC.,

Plaintiffs,

v.

RON REGAN, ALOK AGARWAL, NEIL BASS, FOSTER & BELL, LLC, SMARTAX, LLC, TRIAD TECHNOLOGY CORP., LLC, THE PROGRESSIVE COMPANIES, GEORGE DENMAN, OXFORD PROPERTIES, LLC, BRENT LYNCH, COVETED PROPERTIES, LLC,

Defendants.

CARL CERBONE,

Plaintiff,

v.

TEN WEST CONDOMINIUM OWNERS' ASSOCIATION, THE PROGRESSIVE COMPANIES, RON REGAN, ALOK ARAWAL, NEIL BASS, FOSTER & BELL, LLC, TRIAD TECHNOLOGY CORP., LLC, GEORGE DENMAN, OXFORD PROPERTIES, LLC, BRENT LYNCH, COVERED PROPERTIES, LLC.,

Defendants.

Argued June 1, 2017 – Decided July 17, 2017

Before Judges Fuentes, Carroll and Farrington.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1197-12.

Thomas C. Martin argued the cause for appellant (Price, Meese, Shulman & D'Arminio, P.C., attorneys; Mr. Martin, of counsel and on the brief).

Richard D. Picini argued the cause for respondents (Caruso Smith Picini, PC, attorneys; Mr. Picini, of counsel and on the brief).

PER CURIAM

This case arises out of a judgment for counsel fees entered against defendant Carl A. Cerbone (Cerbone) and LRG Realty, L.L.C. (LRG), following plaintiff's successful prosecution of an action to compel LRG to pay maintenance fees. However, an issue remained as to whether this liability was imposed against both Cerbone and LRG, or against LRG alone. The court found that any determination of this issue was subject to a piercing the corporate veil analysis. The parties filed cross-motions for summary judgment on this issue, which were denied by Judge Michael E. Hubner. A bench trial was held on this limited issue before Judge Robert J. Brennan on December 8, 2015, during which Cerbone moved for judgment pursuant to Rule 4:40-1. Judge Brennan entered judgment in favor of Cerbone, dismissing plaintiff's complaint seeking to hold Cerbone personally liable for the sum of $89,457.91. We affirm.

The Association filed a notice of appeal on January 19, 2016, and an amended notice of appeal on January 21, 2016.

On appeal, plaintiff seeks to overturn Judge Brennan's order of judgment dated January 5, 2016, arguing the trial court erred

in applying the incorrect legal standard when adjudicating Cerbone's motion for judgment. Plaintiff further seeks to overturn Judge Hubner's July 28, 2015 order denying plaintiff's motion for summary judgment. Plaintiff argues the trial court erred because the undisputed material facts proved LRG was a mere instrumentality or alter-ego of Cerbone, did not maintain corporate formalities, was undercapitalized, and financed by sham promissory notes.

Cerbone and LRG argue in response that Judge Hubner was correct in denying plaintiff's motion for summary judgment which was essentially based upon the same evidence plaintiff presented at trial. They further argue that Judge Brennan correctly directed a verdict because LRG was not a mere instrumentality or alter ego of Cerbone, there was no evidence of fraud or injustice, the promissory notes issued by LRG were not sham transactions, and the failure of LRG to maintain corporate formalities did not constitute sufficient grounds to pierce its corporate veil.

Cerbone formed LRG in August, 1995, and he has been the company's sole member and manager since that date. Through LRG, Cerbone hoped to develop, lease, and sell commercial condominiums, thereby creating a "legacy" for his children and grandchildren. LRG remained inactive until September 16, 2004, when it purchased approximately eighty percent of Ten West's units from a foreclosure

proceeding[1]. At this time, LRG assumed the role of Ten West's sponsor and responsibility for selling the Association's condominium units. LRG retained exclusive control of the Association as the majority owner. Cerbone operated LRG out of his home in Parsippany which was the company's principal place of business. Cerbone's daughter and personal accountant maintained LRG's books and records as well as the books and records of Cerbone's other companies. LRG obtained a tax identification number, filed annual income tax returns, and paid the requisite annual limited liability fee to the State of New Jersey, but held no formal meetings, kept no minutes, and observed minimal business formalities. Cerbone, in his individual capacity, owned the land upon which Ten West was located. Pursuant to an arrangement described in the parties' Ground Lease and Amended By-laws, LRG paid its share of condominium maintenance fees to Ten West and Ten West in turn paid monthly rent to Cerbone in his individual capacity.

Between 2004 and 2013, LRG renovated and "built out" three units, obtained certificates of ownership, and sold the units to their present owners. According to the record, proceeds from the three sales are the only income LRG produced.

[1] LRG financed this purchase with funds it borrowed from Valley National Bank.

In addition to the three sales, LRG built tenant "fit-outs" in the remaining space it owned in Ten West, hoping to sell or lease this space for profit. It financed the "fit-outs" with loans from Cerdel Construction, another entity wholly owned and operated by Cerbone. Although the record contains evidence of Cerbone's attempts to market these units, the trial judge found the failure to attract lessees or purchasers was due to the "downturn in the commercial real estate market." Cerbone reported LRG's losses on his personal income tax returns. Cerbone, both personally and through his other companies, loaned LRG the funds necessary to pay its condominium maintenance fees, construction expenses, and other obligations. The loans were documented by promissory notes, approximately 125 in total, in amounts ranging from $19.45 to $372,901.75. He testified he neither demanded, nor received interest or payments on these notes which lacked default terms.

Over the years, several disagreements arose between Cerbone and the other Ten West unit owners. Those disagreements caused Cerbone to resign from the Association's Board of Trustees in 2009. In 2012, LRG stopped paying its maintenance fees. Cerbone, however, demanded that the Association continue to pay him rent. When the Association refused, LRG commenced suit in a complaint

filed May 11, 2012,[2] alleging violation of the amended bylaws, misappropriation of funds, retaining and paying counsel without prior authorization, failing to properly document finances, and keeping inadequate records of meetings. LRG further alleged breach of fiduciary duty, fraud, unjust enrichment, self-dealing, criminal racketeering, negligence, breach of business judgment, conversion of assets, breach of contract, and breach of covenant of good faith and fair dealing. The complaint also alleged Ten West owed "a pro-rated share of the fixed rent, which collectively amounts to $7,975.83 per month."

The Association brought a separate action against Cerbone and LRG for the non-payment of condominium maintenance fees and sought to pierce the corporate veil, alleging Cerbone "wrongfully and fraudulently exploit[ed] the corporate form for his own personal gain to the substantial detriment of the Association and [its] owners[.]"

In its answer to LRG's Second Amended Complaint, the Association alleged LRG and/or Cerbone were "in breach of the agreement sued upon and therefore [had] no right or remedies." LRG, in its answer, denied Cerbone used the corporation to perpetuate a fraud, evade the law, or defeat the ends of justice.

[2] LRG amended its Complaint and Jury Demand on June 4, 2012 and August 29, 2012.

Both sides accused the other of filing frivolous and meritless claims. The parties' actions were consolidated and the Law Division entered a judgment against LRG for $224,997.18 in delinquent maintenance fees. LRG satisfied that judgment on May 6, 2013.

Pursuant to N.J.S.A. 46:8B-21, Sections 5.04 and 10.2 of the master deed, and provisions of the bylaws, Ten West filed a motion to compel Cerbone and/or LRG to reimburse the Association for its counsel fees and litigation costs. Judge Thomas V. Manahan granted the Association's motion for summary judgment on March 20, 2014.

Cerbone moved to dismiss himself from the case alleging LRG was a separate entity. Judge Manahan ruled the motion was premature because discovery was not complete. He specifically did not consider whether the Association was entitled to pierce LRG's corporate veil and recover from Cerbone individually. Judge Jared D. Honigfeld denied LRG's motion for reconsideration on June 11, 2014. On July 18, 2014, he entered an order setting counsel fees in the amount of $89,457.91, specifying Cerbone and LRG were "jointly and severally liable[.]" On October 2, 2014, Judge Honigfeld entered an order clarifying his previous order. He stated,

> This [c]ourt, upon a re-reading of the Statement of Reasons portion of Judge Manahan's [o]rder[,] . . . is satisfied that

> said [o]rder did not render defendant Carl Cerbone liable for counsel fees. Such liability, if any, would have to be predicated upon a piercing of the corporate veil between Cerbone and LRG Realty, a matter which Judge Manahan expressly did not adjudicate, and indicated would require the completion of discovery.

Between the dates of Judge Manahan's two orders, Cerbone convened a meeting of the Association's Board of Directors. The Association alleges, and Cerbone in his trial testimony did not materially dispute, Cerbone taunted the Board by brandishing a check for counsel fees before returning it to his pocket. He then informed the Board LRG was filing for bankruptcy, which it did on July 25, 2014. The Association filed a proof of claim in LRG's bankruptcy proceedings for $89,457.91, representing the amount of the judgment for counsel fees entered by Judge Honigfeld. The list of creditors in LRG's bankruptcy also included Cerbone, Cerdel Construction, Cerbone Enterprises and Valley National Bank. On September 23, 2014, LRG's ownership interest in Ten West was sold for $500,000. The sale proceeds were insufficient to satisfy all of the claims presented by LRG's creditors.

The parties filed cross-motions for summary judgment which were denied by Judge Hubner who found substantial issues of material fact. The matter proceeded to a bench trial before Judge Brennan on December 7 and 8, 2015. The Association called Cerbone

as a witness in its direct case, as well as Ten West President, Ronald Regan, before resting. Cerbone moved for judgment pursuant to Rule 4:40-1. Judge Brennan granted the motion finding:

> Now, ordinarily the Court is not to weigh witness credibility in determining a motion for judgment, and the motion should ordinarily be denied or a question of credibility as to a material fact has been raised, we have the slightly unusual circumstance here that, as I say, the defendant was called on -- Mr. Cerbone was called as a witness on the plaintiff's case, and we are involved in a non-jury or bench trial. And so the court has had the opportunity to consider the testimony of the two witnesses called by plaintiff, and that would be Mr. Ronald Regan, who is the president of the plaintiff association incorporated, as well as Mr. Cerbone, the individual defendant here.
>
> And so to the extent that there may be certain credibility issues, I think it would be appropriate for me to go ahead and resolve them on this motion, since the plaintiff has offered all the evidence it intends to offer, and the defense has offered more limited testimony in the form of cross-examination of Mr. Cerbone by his attorney.

Judge Brennan went on to find (referring to promissory notes):

> But I think the point is made that there is-- and of course, the [c]ourt is to view the evidence in the light most favorable to the plaintiff. But after all, this is not a jury trial, and I've heard from both sides, and I'd only be hearing -- taking more evidence from the defendant.
>
> And so it's clear to me that the notes are not supportive of the notion that the corporate veil pierced; that Mr. Cerbone did, in fact, keep his finances separate and apart

> from that of LRG. And that's reflected in the documents . . . .
> But as a general proposition I find that the notes reflect obligations of LRG to Carl Cerbone, and that's why they were done. And there was nobody else to sign o[n] behalf of LRG because Mr. Cerbone was the sole member and the sole owner.

The court noted that Cerbone testified:

> [w]ithout contradiction that LRG was -- it had expenses.
>
> . . . .
>
> So on the under-capitalization point, we have the ownership of property in this condominium association, as well as a source of funds that were advanced to LRG in the hopes of a turnaround in the real estate market . . . .
> There was testimony that eventually its space was sold for approximately $500,000, which is much less than the company's obligations.

Judge Brennan found:

> [t]here's no proof that Mr. Cerbone violated any tax laws or accounting principles in treating these losses this way. This was his company, and he took the losses on his tax returns. It's -- I think it makes the point that there is a separation here, and that he did as a taxpayer is entitled to do, which is balance what limited income he had with the losses from his investment in LRG.
>
> . . . .
>
> So I have considered all of these tax returns, but I don't find them supportive of the argument that the plaintiff makes.

The court also considered plaintiff's contentions that defendant did not observe corporate formalities, "So the formalities were not kept in their entirety. I find that the finances were kept separate. But the fact that one person -- or that an LLC owned by one person does not have minutes is not persuasive in a matter involving proof of -- clear and convincing proof." After further consideration of the certificate of formation of LRG "which goes back to 1995," the listing agreement dated June 11, 2010, the marketing brochure assignment and assumption of the ground lease agreement, the court concluded:

> [LRG] was -- it was not a shell corporation. It had an interest in this building, a considerable interest, more than half the space. And there was considerable funding, in excess of a million and a half dollars, just from Mr. Cerbone and his companies, not to mention Valley National Bank, which is also listed as a creditor in the bankruptcy proceeding, owed hundreds of thousands of dollars . . . .
>
> And Cerbone himself certainly did not derive any benefit from the failure of LRG to pay its condominium fees at all. That wasn't something that made his life or his finances any better.
>
> And certainly, the plaintiff has recourse against LRG, but it's in the Bankruptcy Court . . . .
>
> Nevertheless, there is nothing illegal about going into bankruptcy. And as much as Mr. Regan might resent it and be financially put upon by that legal action, it doesn't mean that LRG was a sham, was an instrumentality of Mr. Cerbone, or that the corporate form was ignored abused, or otherwise used fraudulently

> in an illegal way or in a way that would deprive Ten West of its rights.
>
> . . . .
>
> Even under the standard of Rule 4:40 -- and this -- there is no proof that makes out here entitlement to a piercing of the corporate veil, even giving the plaintiff the benefit of all favorable inferences and looking at the evidence in the light most favorable to the plaintiff.

In determining whether the trial judge properly granted a motion for judgment pursuant to Rule 4:40-1, this court applies the same standard of review as the trial court. Frugis v. Braciqliano, 177 N.J. 250, 269 (2003) (citing Luczak v. Twp of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998)). The standard is identical to that used to consider a motion for judgment notwithstanding the verdict, R. 4:40-2 or a motion for involuntary dismissal, R. 4:37-2(b). Rena, Inc. v. Brien, 310 N.J. Super. 304, 311 (App. Div. 1998). This court "must accept as true all evidence supporting the position of the non-moving party" and "accord[] that party the benefit of all legitimate inferences that can be deducted from such evidence." Ibid.

We will affirm the trial court's judgment only if plaintiff has shown no right to relief, R. 4:37-2(b). See R. 4:40-1, and "no rational [fact-finder] could conclude from the evidence that

an essential element of . . . plaintiff's case is present." Perez v. Professionally Green, L.L.C., 215 N.J. 388, 404 (2013) (quoting Pron v. Carlton Pools, Inc., 373 N.J Super. 103, 111 (App. Div. 2004)). If there is any legitimate view of the evidence that would sustain a judgment in plaintiff's favor, or if reasonable minds could differ, this court must reverse. Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Estate of Roach v. TRW, Inc. 164 N.J. 598, 612 (2000)); Lyons v. Hartford Ins. Grp., 125 N.J. Super. 239, 243 (App. Div. 1973).

Plaintiff asserts on appeal that Judge Brennan based his determinations in part on credibility findings. Ordinarily, credibility findings have no role in a motion for judgment pursuant to Rule 4:40. However, where, as here, the trial judge was the finder of fact, and plaintiff had rested after calling the president of the Association and Cerbone, the court was entitled to make findings of credibility and his determinations regarding same are entitled to substantial deference on appeal. "[B]ecause a trial court 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of the witnesses" and the quality of the evidence. Twp. Of W. Windsor v. Nierenberg, 150 N.J. 111, 132-33 (1997) (quoting Pascale v. Pascale, 113 N.J. 20, 33 (1998)).

As to the issue of whether the court erred in its determination that plaintiff failed to prove by clear and convincing evidence that LRG's corporate veil should be pierced on account of fraud, injustice or otherwise circumventing the law, we begin with the fundamental proposition that a corporation is a separate entity from its shareholders. Lyon v. Barrett, 89 N.J. 294, 300 (1982). A primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise. Adolf A. Berle, Jr., The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947); Note, Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 854 (1982); H. Henn, Law of Corporations § 146, at 250 (2d ed. 1961). Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated. Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950).

Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. Lyon, supra, 89 N.J. at 300. 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, Telis v. Telis, 132 N.J. Eq. 25, 26 (E. & A. 1942), to perpetrate fraud, to accomplish a crime, or otherwise to evade the law, Trachman v. Trugman, 117 N.J. Eq. 167, 170 (Ch.

1934); State, Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 500-01 (1983).

Personal liability may be imposed upon a controlling stockholder of a close corporation where the controlling stockholder disregards the corporate form and utilizes the corporation as a vehicle for committing equitable or legal fraud. Walensky v. Jonathan Royce Intern., 264 N.J. Super. 276, 283, (App. Div.), certif. denied, 134 N.J. 480 (1993); Marascio v. Campanella, 298 N.J. Super. 491, 502 (App. Div. 1997). A party seeking to pierce the corporate veil must establish: (1) that the entity was "dominated" by the individual owner, and (2) "that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006) (citing Ventron, supra, 94 N.J. at 500-01).

The first prong of the analysis, "domination" requires a showing that the closely held corporation or limited liability company had "no separate existence" from its owner, and acted merely as the owner's "conduit," "instrumentality," or "alter ego." Id. at 200 (citing Ventron, supra, 94 N.J. at 501). Relevant factors include undercapitalization, insolvency, the extent of the owner's day-to-day involvement in the entity's affairs, the

absence or presence of separate records and accounts, and the entities compliance or non-compliance with business formalities. Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 519 (App. Div. 2011) (quoting Verni, supra, 387 N.J. Super. at 200); 18 Am. Jur. 2d Corporations § 54 (2004).

To establish a fraud, an injustice, or other circumvention of the law, the party seeking to pierce the corporate veil must show the entity had "no independent business of its own," and the owner deliberately undercapitalized the entity, thereby rendering it judgment-proof. OTR Assocs. V. IBC Sec'ys, Inc., 353 N.J. Super. 48, 52 (App. Div. 2002) (citing Ventron, supra, 94 N.J. at 501). Although Cerbone was LRG's sole member and manager and retained exclusive control over its day-to-day activities, and was solely responsible for its capitalization through his personal assets and loans; and further, although he failed to hold meetings or keep minutes, the plaintiff produced no evidence upon which the fact finder could base a finding that Cerbone utilized LRG to commit fraud, cause an injustice or otherwise circumvent the law.

To the contrary, Judge Brennan found Cerbone, with the exception of failing to conform with corporate formalities, abided by the law, adequately capitalized LRG, did not personally profit and had established LRG long before the events which provoked the

litigation, having operated LRG for the purpose of developing, leasing and selling commercial real estate.

Similarly, N.J.S.A. 42:2C-30 provides that:

> [t]he debts, obligations, or other liabilities of a limited liability company . . . are solely the debts, obligations, or other liabilities of the company[,]and [they] do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.
>
> [N.J.S.A. 42:2C-30.]

Nevertheless, the power to look beyond the corporate form is well established. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 393 (App. Div. 1989). Piercing the corporate veil is a doctrine designed to address an otherwise enforceable judgment that is rendered unenforceable because the defendant is a corporate entity without sufficient assets to pay it. See Verni, supra, 387 N.J. Super. at 199. It is an equitable remedy whereby "the protections of corporate formation are lost" to eliminate the "fundamental unfairness" that would otherwise result from a "failure to disregard the corporate form." Ibid. (citations omitted). The doctrine's purpose is to prevent a corporation or limited liability company "from being used to defeat the ends of justice, . . . to perpetrate fraud, to accomplish a crime, or otherwise to evade the law[.]" Ventron, supra, 94 N.J. at 500.

We are satisfied from our careful study of this matter that there is substantial credible evidence in the record as a whole which reasonably warrants the findings and conclusions of the trial court. Therefore, we discern no sound reason or legal justification for disturbing these findings and conclusions. Leimgruber v. Claridge Associates, Ltd., 73 N.J. 450, 455-56, (1977); Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484, (1974); State v. Johnson, 42 N.J. 146, 161-62, (1964). See also R. 2:11-3(e)(1)(A).

Affirmed.