

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2096-15T4

PORT DRIVERS FEDERATION
18, INC.,

Plaintiff-Appellant,

v.

ANTHONY M. FORTUNATO,

Defendant-Respondent.

Submitted March 21, 2017 – Decided March 31, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Docket No. L-2683-
12.

Robert J. Basil (The Basil Law Group, P.C.)
and David A. Cohen (The Basil Law Group,
P.C.), attorneys for appellant (Mr. Basil and
Mr. Cohen, on the briefs).

Craner, Satkin, Scheer, Schwartz & Hanna,
P.C., attorneys for respondent (John A.
Craner, of counsel and on the brief).

PER CURIAM

Plaintiff, a non-profit corporation organized to protect the interests of trucking owner-operator drivers, appeals from a December 17, 2015 judgment entered after a bench trial. We affirm.

We discern the following facts from the evidence adduced at trial. Defendant was the sole shareholder of All Saints Express, Inc. (All Saints), a federally registered motor carrier, and St. George Trucking and Warehouse (St. George). St. George was a bonded warehouse responsible for accepting and distributing overseas shipments from the ports of New York and New Jersey. Defendant formed All Saints to hire independent contractor owner-operator tractor-trailer drivers. The dispatch personnel at St. George would contact the owner-operators contracted by All Saints to transport freight to and from the ports and warehouse. Deposition testimony from defendant and St. George employees indicates that All Saints had no official place of business, offices, or rent, and other than defendant, All Saints had no other directors, officers, or employees.

In February 2009, plaintiff sued All Saints and St. George in federal court for violations of federal motor carrier laws. In October 2010, United States District Judge William H. Walls, granted summary judgment in favor of plaintiff and entered a permanent injunction barring All Saints from transporting goods until it complied with the federal motor carrier laws. Port

Drivers Fed'n 18, Inc. v. All Saints Express, Inc., 757 F. Supp.2d 443, 462 (D.N.J. 2010). The federal judge also granted summary judgment to St. George on plaintiff's claim that St. George was an alter ego of All Saints. Id. at 456-58.

Plaintiff moved to recover attorneys' fees from All Saints and in October 2011, the federal court judge awarded attorneys' fees and costs against All Saints in the amount of \$278,837. Plaintiff only recovered \$11,774.

In July 2012, plaintiff filed this action seeking to pierce the corporate veil of All Saints to recover \$267,063 from defendant personally. Plaintiff alleged that defendant operated All Saints as his alter ego. Defendant attempted to remove the case to federal court, but the federal judge granted plaintiff's motion to remand the matter. The federal court found that it lacked jurisdiction to hear the case.

Defendant filed an answer in the present case and asserted two affirmative defenses – the entire controversy doctrine and collateral estoppel – and counterclaimed that plaintiff initiated this lawsuit in bad faith. Plaintiff filed a motion for partial summary judgment striking defendant's affirmative defenses and dismissing his counterclaim. In June 2013, the court granted plaintiff's motion for partial summary judgment.

In January 2014, defendant moved for summary judgment asserting that no facts existed to support plaintiff's claim that All Saints was an alter ego of defendant. In April 2014, the court granted defendant's motion for summary judgment.

Plaintiff appealed the judgment and on June 4, 2015, this court reversed the order granting defendant's motion for summary judgment because there were genuine issues of material fact. Port Drivers Fed'n 18, Inc. v. Fortunato, No. A-3495-13 (App. Div. June 4, 2015) (slip op. at 6-7).

In August 2015, the judge conducted a bench trial, which consisted of defendant's testimony, and submission of exhibits into evidence. At trial, defendant admitted that All Saints owner-operators worked exclusively for St. George and that all expenses incurred were borne by St. George. However, "[e]ach owner-operator working for [All Saints] had a sign affixed to the door of his tractor stating that he was working for [All Saints]." Defendant "did not draw any salary from [All Saints]" and did not "receive any profit distributions in the form of bonuses or dividends" from All Saints.

Defendant acknowledged terminating the existence of All Saints and winding up its affairs shortly after the entry of the 2011 order. He received two checks from All Saints after entry of the 2011 order totaling over \$11,000. However, defendant

contended that "[w]hatever retained earnings [All Saints] . . . accumulated between 2004 and 2011 were used to pay its legal fees." Notwithstanding, defendant authorized a St. George's employee to write checks from All Saints' bank account directly to defendant. The Chief Financial Officer stated that there were no contracts between All Saints and St. George memorializing its relationship.

On December 17, 2015, the judge issued a comprehensive oral opinion granting judgment in favor of defendant. He stated in pertinent part that the

testimony did not elicit any facts connected with the dissolution of All Saints, save for the fact that [d]efendant testified as to receiving monies as stated around the time of the dissolution. As stated, other than the fact that the company was dissolved, and the relatively small sums sent to [d]efendant, there are no additional facts tha[t] were before Judge Walls. The court finds that the conclusions of Judge Walls are the law of the case, so far as they go.

. . . .

In the present matter, the question as to whether All Saints is the alter ego of [defendant], is identical with respect to the formation and manner in which the corporation functioned. This issue, save for the additional facts concerning the dissolution were all before Judge Walls. As Judge Walls held, "[t]he second element for veil piercing requires plaintiff to prove that the adherence to the fiction of separate corporate existence would perpetuate a fraud or injustice, or otherwise circumvent the law Plaintiffs do not make an explicit argument

regarding how St. George uses All Saints for these ends."

The difference in the current matter is the dissolution of All Saints, and whether the fact that it was dissolved and the manner in which it was dissolved cause this court to reach a separate conclusion than did Judge Walls. The court concludes that it does not.

On appeal, plaintiff argues the trial court erred by (1) applying the "law of the case" doctrine; (2) finding defendant did not dominate All Saints; and (3) determining that defendant did not use All Saints to perpetrate a fraud, accomplish an injustice, or circumvent the law.

The standard of review of judgments or orders entered after bench trials is well settled. The findings of the trial judge are binding on appeal if they are supported by "adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974). We review a "trial court's interpretation of the law and the legal consequences that flow from established facts" de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The doctrine of piercing the corporate veil is an "equitable remedy whereby 'the protections of corporate formation are lost'" to remedy the "fundamental unfairness [that] will result from a failure to disregard the corporate form." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div.

2006) (alteration in original) (citations omitted), certif. denied, 189 N.J. 429 (2007). The purpose 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[.]" Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008) (alteration in original) (quoting State, Dept. of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983)).

To pierce the corporate veil, a plaintiff must establish "1) that the subsidiary was dominated by the parent corporation, and 2) that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni, supra, 387 N.J. Super. at 199-200 (citing Ventron, supra, 94 N.J. at 500-01). Factors to consider when determining whether the parent dominated the subsidiary are "whether the subsidiary was grossly undercapitalized, the day-to-day involvement of the parent's directors, officers and personnel, and whether the subsidiary fails to observe corporate formalities, pays no dividends, is insolvent, lacks corporate records, or is merely a facade." Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 519 (App. Div. 2011) (quoting Verni, supra, 387 N.J. Super. at 200). However, "[o]wnership alone is not enough for piercing." Id. at 520.

The "law of the case" doctrine "applies only to proceedings prior to the entry of a final judgment. After that, rules of res judicata determine whether a prior determination of law or fact is binding." Lusardi v. Curtis Point Prop. Owners Ass'n, 86 N.J. 217, 226 n.2 (1981) (citing State v. Hale, 127 N.J. Super. 407, 410-11 (1974)). This state action is not a continuation of the federal court litigation; therefore, we conclude that the federal lawsuit does not constitute a proceeding "prior to the entry of final judgment" and, as a result, "law of the case" is inapplicable.

Although the court mentioned "law of the case," it correctly made independent findings of fact as to defendant when it found that defendant did not use All Saints to perpetrate a fraud. The court explained "[n]o testimony was directly elicited and presented to suggest that the dissolution was based on the fact that All Saints did not want to pay the judgment, but inferentially the [c]ourt finds that this must be wholly or partially true." Although the court inferred that All Saints did not want to pay the judgment, it found "[d]eciding that a business can no longer achieve the aims that led to its formation" was not proof that defendant sought to perpetrate a fraud or circumvent justice. Moreover, the court stated that the distribution of the \$11,000

to defendant did not prove anything other than wrapping up normal business affairs.

The court's finding that plaintiff failed to prove All Saints existed to perpetuate a fraud or injustice is supported by "adequate, substantial and credible evidence." See Rova Farms Resort, supra, 65 N.J. at 484. The court reviewed numerous exhibits and heard testimony from defendant in conducting the trial. The court was entitled to make credibility determinations of defendant. See Cesare v. Cesare, 154 N.J. 394, 412 (1998) (alteration in original) ("Because 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 witnesses.'" (quoting Pascale v. Pascale, 113 N.J. 20, 33 (1988))). Therefore, the court's finding that plaintiff did not sustain its burden to pierce the corporate veil was supported by substantial and credible evidence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION