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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-0313-16T2

ALLIANCE SHIPPERS, INC.,

Plaintiff-Appellant,

v.

DEAN MENTONIS and KARI
MENTONIS,

Defendants-Respondents.

Argued December 20, 2017 — Decided March 2, 2018

Before Judges Alvarez, Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-11476-14.

Ronald Horowitz argued the cause for
appellant.

James V. Milano argued the cause for
respondents (Veitengruber Law, LLC,
attorneys; James V. Milano, on the brief).

PER CURIAM

Plaintiff Alliance Shippers, Inc., appeals from a June 29,
2016 order, dismissing its complaint following a bench trial and
a September 2, 2016 order denying reconsideration. After

considering the arguments presented in light of the record and applicable law, we affirm.

I.

We recount the pertinent facts from the trial record. Plaintiff is a freight transportation company. Prior to the initiation of this action, plaintiff had obtained judgments and an order in several related cases.

DeMar Foodservices, Inc. (DeMar) was a produce distribution business. It purchased produce at wholesale and sold it at a markup to restaurants and other food outlets. DeMar purchased produce daily from the Hunts Point Market, which had seventy-five to one hundred vendors. Spero Mentonis purchased the produce for DeMar, not Dean Mentonis.¹ DeMar paid for the produce in cash and by check. Purchases from Kris-Pak Sales Corp. (K-P) and GAF Produce were by check.

K-P obtained a June 22, 2007 consent judgment in federal court in New York against Spero and DeMar for \$427,580. Plaintiff, in turn, obtained a June 14, 2012 judgment in the amount of \$371,225.69 against K-P for unpaid freight transportation

¹ Spero Mentonis is the father of Dean Mentonis and the father-in-law of Kari Mentonis. Because these three individuals and two others share the same surname, we will refer to them by their respective given names. We mean no disrespect in doing so.

services. Plaintiff obtained a second judgment against K-P's receivables for \$34,215, which was collected.

After K-P went bankrupt, plaintiff obtained an August 24, 2012 order that released DeMar, which ceased its operations in June 2010, and Spero from payment obligations under a consent judgment in favor of K-P. The order permitted plaintiff to execute on the rights and credits owed to K-P by Spero and DeMar to the extent of \$371,225.69. On April 18, 2013, plaintiff obtained a default judgment against DeMar and the Estate of Spero W. Mentonis in the amount of \$371,225.69.

After being substituted as the creditor for K-P, plaintiff allegedly discovered defendants Dean and Kari Mentonis transferred over \$204,000 out of DeMar's bank accounts between June 28, 2006 and May 12, 2009.

On December 10, 2014, plaintiff initiated this action against Dean and Kari, alleging that during DeMar's insolvency, Dean had authorized fraudulent transfers of DeMar's assets to Dean and Kari to avoid payment of DeMar's debts. On March 4, 2015, defendants filed an answer. Following discovery, the trial court conducted a two-day bench trial. Before the trial began, defendants moved to dismiss the complaint on the basis of discovery deficiencies. The judge reserved decision.

On the first day of trial, plaintiff presented Edward Wright, its Vice President of the Protective Service Division, and Dean as witnesses. Wright verified K-P owed plaintiff approximately \$369,700 for transportation services prior to filing bankruptcy. He also testified plaintiff obtained a judgment against DeMar and the Estate of Spero W. Mentonis because they owed money to K-P.

Following Wright's brief testimony, Dean testified at length. Dean had been employed by Gargiulo Produce since March 2010. Prior to that, he had worked for DeMar, the family business founded by his father Spero, for about fifteen years. Dean stopped receiving a salary from DeMar in January 2010 when DeMar could no longer pay him. Dean left the company at that point by his own choosing. Dean's mother, Velia, and brother, Mark, also worked for DeMar.

Spero was active in running DeMar from 2006 until it closed. Despite his declining health, Spero still had full capacity to run the company from his home over the telephone, remained in charge, and made every decision.

Due to his declining health, Spero gave Dean check-writing authority on DeMmar's bank accounts with Wachovia Bank and Commerce Bank several years prior to DeMar's closing. Dean also had authority to make wire transfers and cash withdrawals using a debit card from DeMar's account. Spero, Velia, and Mark, also had authority to make wire transfers and cash withdrawals. Bank

account statements were either sent or taken by Mark to Spero's home office in Stroudsburg, Pennsylvania, where they were kept. It was not Dean's responsibility to maintain purchase receipts from vendors. The purchase receipts were kept by Spero.

For several years prior to Spero's death in 2012, DeMar was not doing well financially and had trouble paying its bills. DeMar was unable to pay its vendors, its employees, and its truck loans. Basically, the company's only assets were accounts receivable. DeMar closed in June 2010.

From 2006 to 2009, Dean's responsibilities were customer service, handling customer orders, overseeing deliveries, and setting up product. Dean did not do the bookkeeping or the accounting for DeMar and did not have possession of DeMar's books and records. DeMar did not have a bookkeeper or an accountant.

Dean testified he never held the title of president of DeMar and was neither an officer nor an owner of DeMar. A Commerce Bank signatory form listed Spero as president.

In 2003, DeMar purchased a vehicle financed by Ford Credit. On a credit application dated July 6, 2003, that he signed, Dean is identified as the president and sole owner of DeMar. Dean testified the credit application was not in his handwriting, he did not complete it, and he probably did not review the application before signing it.

In 2007, Dean leased a 2008 Ford Explorer. The credit application, dated December 28, 2007, and signed by Dean, states he had worked for DeMar for nineteen years and earned \$11,380 per month. Dean testified he did not tell the dealer the number of years he worked there. He also said he most likely did not review the application before signing it. A November 2, 2011 credit application stated Dean had worked for Gargiulo Produce for ten years.

During his last three years working for DeMar, Dean withdrew monies from DeMar's bank accounts by checks and wire transfers but denied ever receiving a cash withdrawal. He received checks and wire transfers, but Kari did not. The funds were deposited into Dean and Kari's joint account. Dean testified none of the withdrawals were turned over to Dean or Kari's personal creditors or used to pay personal expenses.

Vendors eventually stopped accepting checks from DeMar because its checks were being returned for insufficient funds. As a result, DeMar had to purchase produce in cash or with certified checks.

Dean stated he withdrew cash from DeMar's account to purchase produce from market vendors because the company could not obtain credit. When he was told to cash a check or to make a payment, he did so, but he did not act independently. Similarly, when he

was told to make out a check to cash to pay a vendor, he did so. Dean testified DeMar got better prices when it purchased produce in cash.

During plaintiff's case in chief, Dean authenticated 131 checks and wire transfers and identified four of the 131 checks as paychecks. The four paychecks totaled less than \$2000. On cross-examination, Dean stated some of the checks made out to defendants were reimbursements for DeMar's truck maintenance and repair expenses.

As to the Citibank credit card account, Dean testified it was his company expense account and was paid by DeMar. With respect to DeMar's payment of a \$472.49 Cablevision bill, Dean testified DeMar had a cable TV and internet access account for the business property.

At one point during the trial, plaintiff's counsel advised the judge he would not ask Dean about specific transactions, indicating plaintiff had other witnesses for that purpose. Plaintiff did not present those witnesses.

Notwithstanding the Ford Credit and Wachovia Bank credit applications, wherein Dean certified he was the sole owner of DeMar and held the offices of president and vice president, three different people were listed as president on documents admitted into evidence. Dean also testified he went to work for Garguilo

Produce shortly before DeMar's closing in 2010, despite certifying he had been working for Garguilo for almost eleven years on the 2011 Ford Credit loan application.

Plaintiff called Kari as its final witness. Kari was not a DeMar employee and did not receive a salary from DeMar. She testified that, although she was not an employee of DeMar, she "might have answered phones occasionally" but only if she was present. She also helped at times by inputting orders into the computer.

Defendant moved for a directed verdict at the close of plaintiff's case. The trial court rendered an oral decision, denying the motion.

Following submission of written summations, the trial court issued a June 29, 2016 oral decision in favor of defendants, finding plaintiff had failed to meet its burden of proof. The trial judge found Wright's testimony was credible, and portions of Dean's testimony were credible. The court found Dean:

established that DeMar was essentially a . . . family business. [He] established that Spero . . . was the founder of the business. . . .

[His] testimony established . . . that he was not the debtor on the judgments obtained in this matter, but he was, in fact, employed with DeMar . . . for approximately [fifteen] years. . . .

[T]he testimony clearly established that he . . . not only had financial access to the business, but was involved in the day-to-day business of this company. He was[] undoubtedly aware of the stipulation and consent judgment that was entered into by [Spero] and DeMar . . . in 2007[.]

The judge also found Dean's testimony "that much of DeMar's business was done through cash transaction [was] certainly credible to a certain extent." However, she "questioned the frequency of these transactions and the date upon which . . . the transactions occurred." The judge concluded that, "[a]lthough the transactions cited by the plaintiff look suspicious on their face, following the testimony of Dean . . . questions . . . remained unresolved."

The judge also reviewed Kari's testimony and found it "did nothing to resolve the unanswered questions . . . in determining whether or not this was a case where . . . there were, in fact, fraudulent transfers."

The trial court's examination of the documents offered by plaintiff revealed incomplete records were presented. Only selected transactions, representing selected checks on different dates, were presented. The judge then engaged in the following analysis:

These select transactions, on their face, appear perhaps to support the theory of the plaintiff's case. However, while the

transactions selected by the plaintiff were undoubtedly suspect and . . . the defendant did not, and could not fully satisfy the lingering questions posed by the number, amount, and time periods of the transactions confronted with, the [c]ourt has not been presented with the full picture.

How DeMar Food Services did business, their assets, debts, or solvency of this business at the time the plaintiff alleges the defendants were misappropriat[ing] funds all remain[] unanswered questions. The plaintiff did not employ the services perhaps of a forensic accountant, but instead relied upon the testimony of Dean Mentonis and, as such, the [c]ourt is now being asked to draw the negative inferences from a group of select transactions over a three-year period.

The negative inferences that could be drawn are that the defendant, Dean Mentonis, aware of the failing health of his father and the outstanding debts owed and the likelihood that DeMar would go out of business either with or without his father's approval and/or sanction began transferring funds to himself for his own personal needs or in order to avoid having to pay that amount of money to its outstanding creditor or creditors.

One could further infer that Dean Mentonis involved his wife to a limited extent in an effort to perhaps remove some of the suspicion that might be associated with the number, the frequency, and the amount of the transactions.

It's also plausible, however, that DeMar Food Services, who continued to do business despite the stipulation and consent judgment that was . . . entered in New York in 2007 was in trouble financially for a number of years, and as such much of their business was done in cash.

It's possible that they did much of their business in cash because that's where they got the better deals. It's plausible that some of the money withdrawn and/or transferred was, in fact, to pay vendors or, in fact, to pay back the Mentonis for money that they laid out for the business. There are, indeed, a myriad of ways to interpret the evidence.

A . . . perhaps . . . reasonable interpretation of the evidence is that . . . a combination of all of the above indicated that, in fact, some transactions cited by plaintiff were legitimate and some were not. Which were the legitimate transactions and which were not? This case remains filled with suspicion and unanswered questions.

Mere suspicion, however, is not enough.

The judge concluded plaintiff had not met its burden of proof and entered an order dismissing plaintiff's complaint. Plaintiff moved for reconsideration, which the judge denied on September 2, 2016. This appeal followed.

On appeal, plaintiff argues the trial court erred: (1) in holding plaintiff did not meet its burden of proof; (2) in not piercing the corporate veil; (3) by not holding defendants liable under the Fraudulent Transfer Act; and (4) by not imposing punitive damages.

II.

Our review of the final determinations made by the trial court sitting in a non-jury case is limited. "[W]e do not disturb the factual findings and legal conclusions of the trial judge

unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Tr. Created by Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)); see also Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974).

Review on appeal "does not consist of weighing evidence anew and making independent factual findings; rather, our function is to determine whether there is adequate evidence to support the judgment rendered at trial." Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342, 347 (App. Div. 1999) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). "An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. Nunez-Valdez, 200 N.J. 129, 141 (2009) (alteration in original) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997). However, we owe no deference to the "trial court's interpretation of the law and the legal consequences that flow

from established facts." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We review such decisions de novo. 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, 65 N.J. at 483-84).

III.

Plaintiff claims Dean is liable under the Uniform Fraudulent Transfer Act (the Act), N.J.S.A. 25:2-20 to -34, for engaging in fraudulent conveyances. Plaintiff maintains Dean placed corporate assets beyond the reach of creditors with the intent to defraud, delay, or hinder them.

Fraudulent conveyance is defined as:

A transfer made or obligation incurred by a debtor . . . whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor.

[N.J.S.A. 25:2-25(a).]

"The purpose of the Fraudulent Transfer Act . . . is to prevent a debtor from placing his or her property beyond a creditor's reach." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 475 (citing In re Wintz Cos., 230 B.R. 848, 859 (8th Cir. 1999)). "Underlying the Act is the notion that a debtor

cannot deliberately cheat a creditor by removing his property from the 'jaws of execution.' Fraudulent claims thus allow the creditor to undo the wrongful transaction so as to bring the property within the ambit of collection." Ibid. (citations omitted). In Gilchinsky, the Court adopted the following two-part test:

In determining whether a transfer constitutes a fraudulent conveyance, there are two relevant inquiries. The first is whether the debtor [or person making the conveyance] has put some asset beyond the reach of creditors which would have been available to them at some point in time but for the conveyance. The second is whether the debtor transferred property with an intent to defraud, delay, or hinder the creditor. Transfers calculated to hinder, delay, or defeat collection of a known debt are deemed fraudulent because of the debtor's intent to withdraw the assets from the reach of process. Both inquiries involve fact-specific determinations that must be resolved on a case-by-case basis. The person seeking to set aside the conveyance bears the burden of proving actual intent.

[Id. at 475-76 (alteration in original) (citations omitted).]

The Court noted courts "generally look to factors commonly referred to as 'badges of fraud'" when "determining whether the circumstances of a particular transaction give rise to the conclusion that the transferor intended to thwart or evade creditors." Id. at 476. N.J.S.A. 25:2-26 lists the badges of fraud to be "consider[ed] in determining whether a debtor conveyed

property with the actual intent to place it beyond the reach of creditors." Id. at 476-77. The relevant badges of fraud are:

a. The transfer or obligation was to an insider;

b. The debtor retained possession or control of the property transferred after the transfer;

. . . .

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. The transfer was of substantially all the debtor's assets

. . . .

g. The debtor removed or concealed assets;

h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; [and]

i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

[N.J.S.A. 25:2-26.]

"In determining actual intent to defraud, courts should balance the factors enumerated in N.J.S.A. 25:2-26, as well as any other factors relevant to the transaction." Gilchinsky, 159 N.J. at 477. "Actual intent often must be established through

inferential reasoning, deduced from the circumstances surrounding the allegedly fraudulent act." Ibid.

Plaintiff had the burden of proving its cause of action by a preponderance of the evidence. To prove an allegation by the preponderance of the evidence, plaintiff must convince the factfinder "the allegation is more likely true than not true." Model Jury Charges (Civil), 1.12(H), "Preponderance of the Evidence" (approved Nov. 1998).

Plaintiff contends it met that burden by presenting direct and circumstantial evidence of DeMar's insolvency and defendants' fraudulent transfers. The trial court disagreed, holding plaintiff did not satisfy its burden of proving actual intent to defraud since questions pertinent to a fraudulent transfer analysis remained unresolved even after consideration of the testimony and review of plaintiff's circumstantial evidence. The trial court noted plaintiff did not employ the services of a forensic accountant. Instead, plaintiff's case relied almost exclusively on Dean's testimony, and as such, the court was "being asked to draw . . . negative inferences from a group of select transactions [allegedly made by Dean] over a three-year period."

The trial court also held plaintiff did not prove defendants converted corporate assets for their own use. Recognizing negative inferences could be drawn from Dean's testimony and plaintiff's

circumstantial evidence, the court concluded there were "a myriad of ways to interpret the evidence." Although finding the case was "filled with suspicion and unanswered questions," the trial court concluded "[m]ere suspicion, however, is not enough."

While finding Dean to be an insider, the trial court noted he "was not the debtor on the judgments obtained in this matter, but he was, in fact, employed with DeMar . . . for approximately [fifteen] years." The trial court further noted the circumstantial evidence and testimony neither addressed "[h]ow DeMar . . . did business," nor sufficiently described "their assets, debts, or solvency of this business at the time the plaintiff alleges the defendants were misappropriat[ing] funds."

The court recognized that "perhaps a reasonable interpretation of the evidence" is "some transactions cited by the plaintiff were legitimate and some were not," but was unable to determine "[w]hich were the legitimate transactions and which were not[.]" The court held misappropriation had not been proven, finding only factor (a), transfer to an insider, satisfied. The trial record adequately supports these findings and conclusions.

On appeal, plaintiff reasserts facts that the trial court already weighed and attempts to have this court consider the facts de novo. Ordinarily, "[o]ur original factfinding authority must be exercised only with great frugality and in none but a clear

case free of doubt." Tomaino v. Burman, 364 N.J. Super. 224, 234-35 (App. Div. 2003) (citations omitted). We decline to do so in this case. The evidence was not "free of doubt." Rather, assessing the evidence should "be left to the trial court which has a 'feel of the case' and is in the best position to assess the evidence." Id. at 235. (citation omitted).

We next address plaintiff's contention that the trial court erred by not piercing the corporate veil. New Jersey courts have pierced the corporate veil of a closely-held corporation to impose personal liability on the owner for wrongful conduct. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 394 (App. Div. 1989) (citing Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216 (Ch. Div. 1972)). A party seeking to pierce the corporate veil bears the burden of establishing that the corporate form should be disregarded. See Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008).


Plaintiff contends since Dean certified he was an officer of DeMar on multiple banking applications, and "personally benefited himself and his wife by directing a substantial amount of DeMar funds to himself[,]" the corporate veil should be pierced. If true, that conduct would implicate defendants personally. Trustees of Structural Steel & Ornamental Iron Workers Fund v. Huber, 136 N.J. Super. 501, 505 (App. Div. 1975). For the same

reasons the trial court properly concluded plaintiff did not prove fraudulent transfers, plaintiff also failed to meet its burden of establishing the corporate veil should be pierced.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION