SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3617-21

SOMERSET HOTEL, LLC,

Plaintiff-Appellant,

v.

AVRAHAM OHAVI, THE ORGANIZATION FOR JEWISH DIRECTION, ASHER BEN-TOV, CONGREGATION NETIVOT OF NEW YORK, INC., and VICKY GRASSO,

Defendants-Respondents.

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Submitted September 28, 2023 – Decided October 13, 2023

Before Judges Mayer and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1407-18.

Rajan Legal, PC, attorneys for appellant (Eric B. Rochkind, on the briefs).

Jason J. Rebhun, attorney for respondents.

PER CURIAM

After a bench trial, plaintiff Somerset Hotel, LLC appeals from a May 10, 2022 order entering judgment in its favor against corporate defendants Avraham Ohavi (Ohavi) and the Organization for Jewish Direction (Organization). Plaintiff also appeals from a July 8, 2022 order denying its motion for reconsideration.

Although plaintiff prevailed at trial, it contends the judge erred by not also entering judgment against defendants Asher Ben-Tov (Ben-Tov) and Congregation Netivot of New York, Inc. (Netivot). Further, plaintiff asserts the judge should have granted prejudgment interest per the parties' written contract. We disagree and affirm.

We recite the facts from the testimony and evidence adduced during the two-day bench trial.[1] The judge heard testimony from Robert Lepore, who

[1] We note plaintiff's appellate briefs are replete with citations to evidence and testimony not presented during the trial. For example, plaintiff cited language from its amended complaint, but pleadings are not evidence. Also, plaintiff cited entire deposition transcripts without designating specific pages or lines in the transcripts. Rule 2:6-2 requires appellate briefs to precisely cite transcript page numbers and not the entire transcript. See Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 474-75 (App. Div. 2008) (declining to "scour sixty-one pages of [a party's] appendix . . . without [notice] of what particular pages supposedly support [the party's] argument").

worked for plaintiff starting in March 2014; Dipesh Patel, who also worked for plaintiff; and Ben-Tov.[2]

Plaintiff filed a complaint against defendants alleging breach of contract and other causes of action. On the breach of contract claim, plaintiff asserted defendants owed money for Passover programs hosted at its hotel in 2012, 2013, and 2014. Specifically, plaintiff claimed defendants owed $29,000 for the 2012 Passover program, $8,730.62 for the 2013 Passover program, and $64,234.94 for the 2014 Passover program. Plaintiff's lawsuit demanded payment "for the hotel rooms and hotel services that the . . . hotel's prior owners and . . . [p]laintiff had provided to . . . [d]efendants" for these programs.

In addition to the breach of contract claim, plaintiff asserted claims against defendants for violation of the New Jersey Racketeering Influence Corruption Act (RICO), misrepresentation, fraud, unjust enrichment, and breach of the duty of good faith and fair dealing. Plaintiff also alleged a violation of the Consumer Fraud Act (CFA) against defendant Vicky Grasso.[3] Plaintiff further claimed that Grasso, as its employee, breached her fiduciary duty and

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[2] Plaintiff called Ben-Tov as its trial witness.

[3] Grasso was plaintiff's employee. Because Grasso failed to file an answer to plaintiff's amended complaint, the trial court entered default against her.

duty of loyalty. Lastly, plaintiff asserted an alter-ego liability claim against Netivot and Ben-Tov.

Plaintiff incorporated in October 2013, after the 2012 and 2013 Passover programs. It took ownership of the hotel on July 9, 2013, pursuant to an agreement with a receiver appointed in a foreclosure action. As part of the hotel foreclosure, plaintiff purchased the hotel's receivables through a bill of sale. In the bill of sale, plaintiff claimed it was entitled to pursue collection of unpaid debts owed to the hotel's prior owner, including amounts allegedly owed for the 2012 and 2013 Passover programs.

According to plaintiff, after it acquired the hotel, defendants approached plaintiff about hosting an April 2014 Passover event at the hotel. On November 13, 2013, on behalf of Ohavi, Ben-Tov signed a contract for the 2014 Passover program.[4] It was anticipated that the 2014 Passover program would require 500 rooms at plaintiff's hotel. However, the number of participants grew, and the 2014 Passover program required 1,500 rooms. Plaintiff billed defendants

[4] Ohavi offers programs associated with the Jewish religion. As part of its educational function, Ohavi provides locations where individuals may observe and celebrate various Jewish holidays. Plaintiff contends Ohavi was not incorporated until November 18, 2014, a year after Ben-Tov signed the contract for the 2014 Passover program.

$132,319.94 for hosting the 2014 Passover program. As of July 2014, only $68,085.00 had been paid toward the outstanding invoice.

In reviewing the outstanding balance for the 2014 Passover program, plaintiff discovered Grasso fraudulently applied another client's credits to that bill. This discovery led to plaintiff's audit of the prior Passover programs, revealing additional fraudulent credits.

In an attempt to collect the outstanding balance, plaintiff approached defendants about hosting a Passover program at the hotel in 2015. Plaintiff indicated any contract for a 2015 Passover program would be conditioned upon payment of $30,000 toward the outstanding balance for the 2014 Passover program, and payment of an additional $30,000 toward the 2015 Passover program.

Ben-Tov attended a meeting with Lepore and Patel to discuss hosting a 2015 Passover program. The parties' efforts to resolve the outstanding sum owed for the prior Passover programs were unsuccessful.

After completing discovery and motion practice, the matter proceeded to trial. At trial, plaintiff did not produce the contracts for the 2012 and 2013 Passover programs but proffered the contract for the 2014 Passover program.

Plaintiff called three witnesses at trial: Lepore, Patel, and Ben-Tov. None of the witnesses were personally familiar with the invoices and payments for the Passover programs in 2012, 2013, and 2014. While Grasso may have had relevant information regarding money owed for the 2012, 2013, and 2014 Passover programs, plaintiff obtained an in limine order barring her testimony at trial.

The judge found plaintiff's witnesses, Lepore and Patel, "credible to the limits of their testimony" because "[t]here were a lot of gaps" and "a lot of unknowns," particularly as to bills, debts, and obligations that predated plaintiff's acquisition of the hotel. Regarding Ben-Tov's testimony, the judge "found his recollection of the events to be sporadic [and] convenient [with] some things he recalled [and] some things he didn't." The judge concluded Ben-Tov was not "particularly credible," but he noted plaintiff bore the burden of proving its claims at trial. While plaintiff presented multifaceted arguments that it was owed money for the 2012, 2013, and 2014 Passover programs, the judge held that, for all claims other than the 2014 Passover program breach of contract claim, plaintiff failed to proffer testimony or competent evidence satisfying its burden of proof.

Based on the proofs, the judge limited plaintiff's breach of contract claim to the unpaid amount for the 2014 Passover program. The judge found plaintiff had a valid contract with Ohavi and the Organization[5] for the 2014 Passover program, and Ohavi and the Organization breached that contract by failing to pay the full amount due under that agreement, causing plaintiff to suffer damages in the amount of $64,234.94. The judge disallowed claims related to the 2012 and 2013 Passover programs as lacking evidentiary support.

The judge also rejected plaintiff's unjust enrichment claim. In rendering that decision, the judge reiterated plaintiff never produced the contracts for the 2012 and 2013 Passover programs and, therefore, failed to prove any money was due and owing under those contracts. Further, because the judge found plaintiff was entitled to damages for breach of contract on the unpaid portion of the invoice for the 2014 Passover program, he dismissed plaintiff's unjust enrichment claim as superfluous.

Regarding plaintiff's claim for breach of the duty of good faith and fair dealing, the judge determined the duty did not apply in this case. The judge agreed plaintiff was entitled to damages against Ohavi and the Organization for

[5] Ohavi and the Organization were identified as the obligated parties under the contract for the 2014 Passover program. Ben-Tov signed that contract on behalf of Ohavi and the Organization.

breach of the 2014 contract. Thus, he did not need to consider damages under this alternate theory of liability.

Additionally, the judge dismissed plaintiff's claims for misrepresentation and fraud. The judge held plaintiff failed to proffer competent evidence to prove a misrepresentation of a past or present fact upon which plaintiff reasonably relied to sustain such a claim.

Similarly, the judge rejected plaintiff's CFA claim. While plaintiff claimed Grasso committed fraud in processing invoices for the Passover programs, the judge found plaintiff failed to provide evidence of such fraud to meet its burden on this claim.

The judge also rejected plaintiff's attempt to pierce the corporate veil and impose liability against Ben-Tov and Netivot. Plaintiff claimed Ben-Tov and Netivot financially benefitted from the 2014 Passover program and were alter egos of Ohavi and the Organization. The judge explained plaintiff's claim was "a collection argument, not a direct claim." Additionally, the judge found plaintiff presented "no proofs that would involve or that would demonstrate that [Netivot] or [] Ben-Tov was [an] alter ego of the contract [d]efendant[s]."

The judge noted plaintiff presented no evidence Ohavi was dominated by Netivot or that Ohavi was created to perpetuate a fraud or circumvent the law.

Plaintiff proffered Ben-Tov's testimony to establish a corporate fiction and demonstrate that he or Netivot used Ohavi to escape liability for money owed. However, Ben-Tov's trial testimony failed to support plaintiff's claim. Ben-Tov's trial testimony did not establish that Ohavi lacked business of its own, that it was created exclusively for Netivot's benefit, or that Ohavi was judgment proof.[6]

In rejecting plaintiff's request to assess prejudgment interest at a rate of eighteen percent under the 2014 contract, the judge found that rate "usurious" and "inappropriate." Further, the judge explained "there were some legitimate arguments concerning the due date [for the contract amount] and when . . . demands were made [for payment] and the discussions that took place [to collect the payment]." As a result, the judge concluded the "interest of justice" warranted assessment of prejudgment interest pursuant to Rule 4:42-11 rather than the contract rate.

After rendering his factual findings and legal conclusions, the judge entered judgment in the amount of $64,234.94 against Ohavi and the Organization for breach of the contract for the 2014 Passover program. The

[6] Nothing in the record evidenced plaintiff's efforts, if any, to collect the judgment against Ohavi and the Organization.

judge dismissed plaintiff's remaining claims against defendants for failure to sustain its burden of proof on those claims.

Plaintiff filed a motion for reconsideration, which the judge denied in a July 8, 2022 order.

On appeal, plaintiff argues the judge erred in denying its motion for reconsideration. Plaintiff further contends the judge erred by declining to find Ben-Tov and Netivot liable for payment of the 2014 Passover program invoice. Plaintiff also asserts the judge erred in declining to award prejudgment interest at eighteen percent as specified in the contract. We reject these arguments.

We first address plaintiff's argument that the judge erred in entering judgment against Ohavi and the Organization only. Plaintiff argues Ben-Tov was responsible for payment under the contract for the 2014 Passover program because he signed the document on Ohavi's behalf and Ohavi had not yet been incorporated on the date the contract was signed. As a result, plaintiff contends the judge erred by not finding Ben-Tov personally liable for the amount due for the 2014 Passover program. Additionally, because Ohavi existed as a "doing business as" entity of Netivot when the contract for the 2014 Passover program was signed, plaintiff asserts Netivot was liable for the debt as well.

Our standard of review of a trial judge's factual findings after a bench trial is well-settled. "Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review." D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "We may not overturn the trial court's fact[-]findings unless we conclude that those findings are 'manifestly unsupported' by the 'reasonably credible evidence' in the record." Balducci v. Cige, 240 N.J. 574, 595 (2020) (quoting Seidman, 205 N.J. at 169).

On an appeal from a bench trial, "[w]e give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017). We do "not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008). However, where the trial court's decision constitutes a legal determination, we exercise de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, the judge's fact-findings in support of awarding $64,234.94 to plaintiff were grounded in sufficient credible evidence in the trial record. The

judge heard the testimony over the course of the two-day bench trial, reviewed the documents submitted as evidence, considered the parties' post-trial briefs, and analyzed the case law applicable to each of plaintiff's claims.

The judge also rendered credibility determinations based on his ability to see and hear the witnesses testifying at trial. We defer to the trial judge's credibility decisions.

After listening to the testimony, determining the credibility of the witnesses, and reviewing the evidence, the judge rendered a twenty-nine-page oral decision. In his decision, the judge detailed his findings and explained why each of plaintiff's claims, other than the breach of contract claim for the 2014 Passover program, failed.

Here, plaintiff had the burden of proving each claim alleged in its amended complaint. Significantly, plaintiff chose to rely on the testimony of Lepore, Patel, and Ben-Tov to prove those claims. In reviewing the testimony, the judge concluded Lepore and Patel lacked personal knowledge regarding the 2012 and 2013 Passover programs. Although the judge concluded Lepore and Patel were "credible" witnesses, he emphasized their credibility was constrained by the limits of their knowledge and there were "a lot of gaps" and "a lot of unknowns," particularly as to bills, debts, and obligations that predated

plaintiff's acquisition of the hotel. It was incumbent on plaintiff to provide testimony to meet its burden of proof on each asserted claim. Plaintiff's witnesses' lack of personal knowledge regarding the 2012 and 2013 Passover programs, accompanied by the absence of any contract documents for those programs, was fatal to plaintiff's ability to meet its burden of proof on those claims.

Having reviewed the record, we are satisfied the judge did not err in denying the claims which relied upon speculation and conjecture rather than concrete evidence. The record is devoid of competent evidence to support plaintiff's claims other than breach of contract against Ohavi and the Organization for the 2014 Passover program. On this record, we discern no basis to disturb the judge's entry of the May 10, 2022 order of judgment.

We next consider plaintiff's argument that the judge erred in entering judgment against Ohavi and the Organization only. It argues the judge should have pierced the corporate veil and entered judgment against Ben-Tov and Netivot as well. We disagree.

"[A] corporation is an entity separate from its stockholders. In the absence of fraud or injustice, courts generally will not pierce the corporate veil to impose liability on the corporate principals." Lyon v. Barrett, 89 N.J. 294, 300 (1982).

"Although a corporation and its stockholders are usually treated as separate entities, 'a court of equity is always concerned with substance and not merely form, and thus, it will go behind the corporate form where necessary to do justice.'" Hartford Fire Ins. Co. v. Conestoga Title Ins. Co., 328 N.J. Super. 456, 459 (App. Div. 2000) (quoting Walensky v. Jonathan Royce Int'l, Inc., 264 N.J. Super. 276, 283 (App. Div. 1993)).

Courts may disregard the corporate entity to hold individual principals liable if the principals used the corporation as their alter ego and abuse the corporate form to advance their personal interests. Sean Wood, L.L.C. v. Hegarty Grp., Inc., 422 N.J. Super. 500, 517 (App. Div. 2011). "[W]hen the corporate fiction is a mere simulacrum, an alter ego or business conduit of an individual, it may be disregarded in the interest of securing a just determination of an action." Coppa v. Director, N.J. Div. of Taxation, 8 N.J. Tax 236, 249 (Tax 1986).

The party seeking to pierce the corporate veil bears the burden of proof. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008); Verni ex rel. Burstein v. Harry M. Stevens, Inc. of N.J., 387 N.J. Super. 160, 199 (App. Div. 2006). The burden of proof is clear and convincing evidence. See United Food & Com. Workers Union v. Fleming Foods E., Inc.,

105 F.Supp.2d 379, 388 (D.N.J. 2000). To meet this standard, a party must prove "fraud, illegality, or injustice" or demonstrate that "recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime." Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994). The collective evidence must be "sufficient to justify disregard of the corporate form." Verni, 387 N.J. Super. at 199.

We are satisfied the judge properly rejected plaintiff's argument that Ben-Tov and Netivot should be liable for payment under the contract for the 2014 Passover program because the evidence presented was insufficient to warrant piercing the corporate veil. Despite having an opportunity at trial to question Ben-Tov regarding the relationship between Ohavi and Netivot, plaintiff offered no evidence demonstrating Ohavi was Netivot's alter ego. Plaintiff merely speculated that Netivot used Ohavi to advance its interests and avoid payment for the 2014 Passover program. Absent competent evidence in the record, the judge correctly declined to pierce the corporate veil and impose liability against Netivot.

Nor did the judge err in declining to impose liability against Ben-Tov. Ben-Tov testified he received no personal or financial benefit from the Passover programs. The unrefuted testimony supported the judge's finding that Ben-Tov

merely served as a point person for communications between plaintiff's predecessor and Ohavi regarding the Passover programs.

Based on the testimony and evidence presented at trial, the judge concluded the contract for the 2014 Passover program bore Ohavi's name because Ohavi was Netivot's registered assumed name and Netivot conducted the 2012 and 2013 Passover programs at the hotel. Additionally, the judge found Ohavi had legally existed as Netivot's registered assumed name in New York since 2011.

Having reviewed the record and deferring to the judge's factual findings, we are satisfied there was sufficient credible evidence in the record to support the entry of judgment against Ohavi and the Organization. Ohavi and the Organization were the only entities that actually executed the contract for the 2014 Passover program. Plaintiff offered nothing more than speculation and conjecture supporting its request to pierce the corporate veil and impose liability against Ben-Tov and Netivot.

We next consider plaintiff's argument that the judge erred in calculating prejudgment interest under Rule 4:42-11 rather than using an interest rate of eighteen percent pursuant to the 2014 Passover program contract. We disagree.

"Our case law distinguishes between pre-judgment interest as a discretionary allowance, and post-judgment interest to which a litigant is entitled as of right." R. Jennings Mfg. Co. v. Northern Elec. Supply Co., 286 N.J. Super. 413, 416 (App. Div. 1995) (citing Bd. of Educ. of Newark v. Levitt, 197 N.J. Super. 239, 244-45 (App. Div. 1984)).

> In awarding prejudgment interest, "[t]he basic consideration is that the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled."
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> [Cnty. of Essex v. First Union Nat'l Bank, 186 N.J. 46, 61 (2006) (alteration in original) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 506 (1974)).]

A contract may provide for an award of prejudgment interest. See Van Note-Harvey Assocs., P.C. v. Twp. of E. Hanover, 175 N.J. 535, 542 (2003). However, an "award of prejudgment interest on contract . . . is based on equitable principles." First Union Nat'l Bank, 186 N.J. at 61; see also Bak-A-Lum Corp. of Am. v. Alcoa Building Prods., Inc., 69 N.J. 123, 131 (1976) (recognizing that awards of prejudgment are based on equitable principles).

An award of prejudgment interest in a contract case is left to the sound discretion of the trial judge. Litton Indus. v. IMO Indus., 200 N.J. 372, 390

(2009); see also Satellite Ent. Ctr., Inc. v. Keaton, 347 N.J. Super. 268, 278 (App. Div. 2002) (noting "a trial court is vested with substantial discretion to award or deny pre-judgment interest in contract cases"). Similarly, the "rate at which prejudgment interest is calculated is within the discretion of the court." Litton Indus., 200 N.J. at 390 (citing Musto v. Vidas, 333 N.J. Super. 52, 74-75 (App. Div. 2000)).

"Unless the allowance of prejudgment interest 'represents a manifest denial of justice, an appellate court should not interfere.'" Litton Indus., 200 N.J. at 390 (quoting Cty. of Essex, 186 N.J. at 61). An abuse of discretion may be found "if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Here, the judge considered appropriate and relevant factors in applying prejudgment interest under Rule 4:42-11 rather than the rate in the contract for the 2014 Passover program. The judge noted plaintiff dismissed without prejudice its 2015 lawsuit for breach of contract against defendants and, three years later, filed a new action against defendants for breach of contract and other relief. Under those circumstances, the judge found plaintiff bore responsibility

for the delay in collecting the outstanding debt. Additionally, the judge explained civil trials in this State were suspended due to the COVID-19 pandemic and that delay was not attributable to either party.

Having reviewed the record, we are satisfied the judge soundly and reasonably exercised his discretion in awarding prejudgment interest in accordance with Rule 4:42-11. Thus, we decline to disturb the judge's award of prejudgment interest.

Because we affirm the May 10, 2022 order, we need not address plaintiff's argument that the judge erred in denying its motion for reconsideration.

Affirmed.