

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See WIS. STAT. § 808.10 and RULE 809.62.*

Appeal No. 2009AP2592

Cir. Ct. No. 2007CV1079

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DONALD L. SHINE,

PLAINTIFF-RESPONDENT,

v.

MICHAEL O. SERTICH AND MAUREEN E. SERTICH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Michael and Maureen Sertich appeal pro se from a judgment in favor of Donald Shine relating to his financial investment in the

construction of six airplane hangars by the Sertiches and Metro Hangar Partners, LLC (MHP).¹ The trial court found that the Sertiches committed fraud and breached the fiduciary duty owed to Shine. It pierced the corporate veil of MHP to render the Sertiches personally liable to Shine. The Sertiches argue that the evidence does not support the trial court's determination that a partnership existed and that the Sertiches ignored the corporate form. They also argue that the award of damages contradicts the finding of a partnership because it does not offset what would have been Shine's one-half partnership contribution and awards him an intended profit which the partnership never earned. We affirm the judgment.

¶2 Initially Michael Sertich solely owned Hangar Partners, LLC, an entity which held a lease to land on which Michael sought to construct multiple airplane hangars. The intended development plan was that the sale of four hangars would cover the cost of the development so that two hangars could be transferred free and clear of any encumbrances, one to Michael and one to Shine. Shine was to receive a hangar as consideration for his personal guarantee of the construction loan. This arrangement was not committed to writing.

¶3 Michael's background and credit rating was an impediment to obtaining financing so ownership of Hangar Partners was transferred to Maureen Sertich and the entity was renamed MHP. In 2001 Maureen and Shine personally guaranteed a \$300,000 bank loan to MHP. Shine was in charge of MHP's checking account. SKY Builders, LLC, an entity solely owned and operated by Michael, served as the general contractor. There were construction delays and consequently delays in the sale of any of the hangars. Shine made payments on

¹ MHP is not a party to this appeal.

the construction loan. In 2005 the last two hangars were transferred to Shivan Aviation, Inc., an entity solely owned by Shine, with \$180,000 applied to the construction loan.

¶4 Shine commenced this action to recover the \$19,085 that he paid to clear title to the two hangars transferred to him and for his exposure to potential liability on the construction loan. Michael denied any involvement in MHP or the construction loan. Maureen answered the complaint alleging that she and Shine were equal partners in MHP and that Shine had served as the operating manager. Her affidavit in support of a motion for summary judgment also represented that MHP was a joint venture between Shine and Maureen to construct the hangars for condominium sale and residual personal use.

¶5 Shine filed an amended complaint alleging that he entered into a partnership agreement with Michael and/or MHP for the construction of the hangars and entitlement to clear and free title to one hangar upon completion as consideration for Shine's personal guaranty of the construction loan. He alleged further that Michael had sold at least one hangar without contributing the sale proceeds to the partnership. Shine sought to recover under WIS. STAT. § 178.15 (2009-10),² for his unequal contribution to the partnership as evidenced by his payments on the construction loan not matched by Michael or MHP. Michael's answer to the amended complaint asserted that Shine was a member of MHP and that Michael was not a partner with Shine for construction of the hangars.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Maureen's answer indicated that Michael had proposed the hangar development and promised Shine free and clear title to one hangar in consideration for Shine's personal guarantee of the construction loan. More than six months after the filing of the amended complaint, Maureen brought a counterclaim against Shine alleging that as the designated manager of the disbursement of loan proceeds Shine had misappropriated MHP funds. She also alleged that Shine refused to pay her the purchase price for her one-half interest in an airplane she owned with Shine.

¶6 The case was tried to the court. At the start of the trial Shine indicated that he sought damages of \$242,000, representing \$120,000 he would advance to pay off the construction loan, some \$42,000 in interest he paid on the loan, and \$80,000 as the value of the one hangar he was supposed to receive. Maureen conceded that MHP was insolvent and that upon payment of the construction loan, Shine had a subrogated claim against MHP. Michael, representing himself, suggested that the construction project just suffered unexpected delays and that Shine abandoned the project. At the conclusion of the evidence, the trial court found that Shine and the Sertiches had a community of interest to construct the hangars and give one hangar "free and clear to each partner Michael Sertich and Donald Shine." It found Michael had breached a fiduciary duty owed to his "partner" in failing to make an accounting of where the MHP money really went. In considering an equitable remedy, the court was satisfied that

while [Shine is] not innocent or blameless because of his misplaced trust[,] that he's done nothing otherwise contrary to his fiduciary duty to this particular business venture, that ultimately Maureen and Michael are both responsible having carried on in effect a pretense or a sham of this Metro Hangars LLC and that they share equally ... in any losses or any damages that are to be ordered by this court.

After the parties filed letter briefs about damages, the court awarded Shine \$101,261.44 for the amount paid on the construction loan, \$131,456.57 for interest paid on the loan, and \$80,000 for the expected “profit” of one hangar.

¶7 The Sertiches’ appeal challenges the sufficiency of evidence to sustain the trial court’s determinations and award of damages.

In reviewing findings made by a trial court in a trial to the court, “[i]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact” because the trial court has a superior opportunity “to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” It is for the trial court, not the appellate court, to resolve conflicts in the testimony, and we review the evidence in the light most favorable to the findings made by the trial court. When more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court.

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 (quoted source and citations omitted). Here the trial court found Michael completely incredible. That is a credibility determination we must adhere to. *See Plesko v. Figgie Int’l*, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994).

¶8 We start with the finding that the Sertiches failed to observe the corporate form and were not insulated from personal liability of MHP’s obligations. The corporate entity is properly ignored where the corporation’s “affairs are organized, controlled and conducted so that the corporation has no separate existence of its own and is the mere instrumentality of the shareholder and the corporate form is used to evade an obligation, to gain an unjust advantage or to commit an injustice.” *Consumer’s Co-op of Walworth Cnty. v. Olsen*, 142

Wis. 2d 465, 476, 419 N.W.2d 211 (1988) (quoted source omitted). The elements necessary to pierce the corporate veil are:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or [a] dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 484. As to the first element, appropriate considerations include a failure to hold corporate board meetings, a failure to maintain records, inadequate capitalization at the inception of the corporation, intermingling of personal and corporate funds, shareholders' treating the corporate assets as their own, withdrawal of capital from the corporation at will, shareholders holding themselves out as being personally liable for the debts of the corporation, failure to issue stock, and managing the corporation without regard to its independent existence. *See id.* at 490 n.10.

¶9 There was no evidence that MHP observed any corporate formalities. There was no paper work when ownership was transferred to Maureen. Maureen actually had no duties and earned no salary. Maureen indicated that MHP was only a name. Michael continued to manage the affairs of MHP and his signature appears on many of the hangar sale documents. At some point Michael began to charge MHP a \$2,000 monthly management fee simply because he felt Shine had "changed the entire agreement around." MHP was only

capitalized by the construction loan. Payments totaling \$113,000 were made directly to Michael, albeit that Shine wrote those checks on MHP's account. Although Michael claimed that SKY Builders only billed MHP for construction related expenses, the trial court rejected that. In addition to large payments made directly to Michael, some money from the sale of the hangars was given directly to SKY Builders. Yet funds from SKY Builders were utilized to pay Michael's and Maureen's personal living expenses. There were also large payments to Michael and cash withdrawals from the SKY Builders account. Michael acknowledged that he did cash transactions. Additionally, although Maureen reported MHP income on her individual tax returns, the sales of the hangars were not directly traceable on her tax returns either as income or capital gains. Michael had prepared Maureen's tax returns.

¶10 The evidence is that Michael treated MHP's money as his own. He funneled money from MHP to SKY Builders and in turn used SKY Builders for his personal expenses. Maureen allowed that to happen. It was a dishonest practice that contravened Shine's right to have MHP funds used solely for the construction of the hangars and to meet its obligation to the bank. *See Jolin v. Oster*, 44 Wis. 2d 623, 632, 172 N.W.2d 12 (1969) (joint adventurers owe to one another the duty of the finest loyalty and occupy a fiduciary relationship to each other). The failure to keep MHP funding separated from the Sertiches' personal needs caused Shine's injury. The trial court's determination to pierce the corporate veil is supported by the evidence.

¶11 Turning to the Sertiches' claim that there was no evidence that a partnership existed, we question whether that determination was in fact made or necessary. The Sertiches rely on the definition of partnership found in the Uniform Partnership Act, WIS. STAT. § 178.03(1). However, the damages

awarded by the court were not consistent with the partnership concept defined by the Act. Shine was fully compensated for money he put into the construction project without regard to a contribution he would have had to make to the partnership, including partnership losses. *See* WIS. STAT. § 178.15(1) (“each partner must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to that partner’s share in the profits”). As we previously noted, even in the absence of a legal partnership, joint adventurers owe one another a fiduciary duty. *See Jolin*, 44 Wis. 2d at 632. Thus it was not necessary to construct a formal partnership to provide Shine equitable relief. Similarly, it was not necessary for a partnership to exist to compensate Shine for his personal guarantee of the construction loan. Although the trial court spoke in terms of an existing partnership, the award of damages was consistent with compensating Shine as the guarantor of the construction loan.³ “We do not necessarily review a decision based upon the legal term of art used by the circuit court to characterize its reasoning. We review the overall analysis used by the court.” *Daniel R.C. v. Waukesha Cnty.*, 181 Wis. 2d 146, 156, 510 N.W.2d 746 (Ct. App. 1993).

¶12 The evidence is undisputed that Shine had an agreement with the Sertiches to give his personal guarantee of the construction loan in exchange for

³ This case was plagued by inartful pleading, obfuscation of the issues, and Michael’s pro se interjections of contentions unsupported by citation to any legal authority. In turn this led the trial court to put its determination in the framework the parties loosely constructed. This appeal suffers the same amorphous construct. We depart from the parties’ loosely constructed structure and look to the real foundation of the trial court’s decision. *See State v. Waste Mgmt. of Wis. Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (an appellate court is not required to address an appellate argument in the manner which a party has structured the issues). To the extent that the Sertiches argue that Shine’s complaint did not state the cause of action on which relief was granted, the pleadings are deemed amended to conform to the proof at trial. WIS. STAT. § 802.09(2).

free and clear title to one hangar. It was undisputed that MHP was unable to meet its obligations on the loan. Shine performed his part of the agreement; he provided the guarantee, he paid interest on the loan, and he satisfied his obligation on the guarantee of the construction loan.⁴ Thus, Shine earned his guaranty fee—the \$80,000 value of one hangar. Shine was also entitled to reimbursement for payments made as guaranty via equitable subrogation. *See Countrywide Home Loans, Inc. v. Schmidt*, 2007 WI App 243, ¶1, 306 Wis. 2d 200, 742 N.W.2d 901 (“Equitable subrogation is a doctrine whereby one who has paid off another’s mortgage obligation is treated as the owner of that obligation” and its objective “is to do substantial justice independent of form or contract relation between the parties”); *see also Saint Paul Mercury Indem. Co. v. Somers*, 274 Wis. 221, 225, 79 N.W.2d 670 (1956) (under the doctrine of subrogation the plaintiff is the beneficiary of all the remedies which an original creditor had against the principal liable for the debt). Even if the trial court did not state its reasoning as clearly as it might have, it demonstrably weighed the equities between the parties based on findings supported by sufficient evidence; we are able to conclude from this record that the trial court properly exercised its discretion in granting Shine equitable relief. *See Countrywide*, 306 Wis. 2d 200, ¶22 (even when the trial court does not adequately explain its reasoning, we may search the record to determine if it supports the court’s discretionary decision).

⁴ The Sertiches argue that there was no evidence that Shine actually paid the loan. The bank officer testified that Shine paid interest on the loan, that Shine signed a new note and mortgage on his home to satisfy his guarantee of the MHP loan, and that the MHP note and Maureen’s guarantee were assigned to a third-person so that MHP’s debt to the bank was satisfied. Shine credited the purchase price of the last two hangars and Maureen’s one-half interest in an airplane as a reduction of MHP’s obligation to him on the construction loan. The principal and interest amounts awarded by the trial court are supported by the evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

