COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP165 **Cir. Ct. No. 2010CV676**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MICHELS CORPORATION,

PLAINTIFF-RESPONDENT,

V.

GARY L. HAUB,

DEFENDANT-APPELLANT,

HDD ROTARY SALES LLC AND SOONER SALES, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J. This appeal concerns the circuit court's discretionary decision to pierce Sooner Sales' corporate veil and hold its sole director, employee, and shareholder, Gary Haub, liable for contract damages. Michels Corporation and Sooner entered into a contract in which Sooner agreed to procure "drill pipe" for Michels. Sooner failed to procure all of the agreed-upon pipe and also failed to refund Michels' payment for the unfulfilled quantity. Michels sued, seeking to pierce Sooner's corporate veil and hold Haub jointly and severally liable.

¶2 The circuit court concluded that, under the circumstances, it was proper to pierce Sooner's corporate veil and hold Haub liable. Haub appeals that decision. As we explain, Haub fails to squarely address the circuit court's reasoning and, therefore, fails to persuade us that the court erred. We affirm.

Background

¶3 Sooner is a Texas corporation that distributes drilling equipment, including "drill pipe." Michels is a Wisconsin corporation that, among other things, constructs pipelines. In April 2008, Michels and Sooner entered into a contract in which Michels agreed to pay approximately $7.3 million to Sooner, and Sooner agreed to procure a specified amount of "drill pipe" for Michels. At that time, Gary Haub was the president of Sooner, as well as its sole shareholder, director, and employee.

¶4 Michels paid in full. Sooner was supposed to use payments from Michels to, in turn, pay a pipe manufacturer, which would then release the pipe to Michels. However, a significant amount of pipe that was promised, $1,674,926 worth, was not provided to Michels. When Michels sought to obtain that pipe from the manufacturer, the manufacturer told Michels that Sooner had not paid for

the pipe. Michels brought this to Haub's attention and, although Haub ultimately admitted that Sooner had failed to pay for the pipe as agreed, Sooner was unable to come up with the missing funds or otherwise fulfill its contractual obligation to Michels. Michels then directly purchased the unfulfilled quantity of pipe.

¶5 Among other claims, Michels alleged breach of contract against Sooner, seeking to recover the $1,674,926. Michels also sought to pierce Sooner's corporate veil and hold Haub jointly and severally liable. Michels alleged that Haub "exercised complete control" over Sooner and managed Sooner "without regard for its independent existence," and, while exercising that control, misappropriated the money that should have been used to procure the pipe.

¶6 Relying on undisputed facts in the parties' submissions, the circuit court exercised its discretion to pierce Sooner's corporate veil and hold Haub jointly and severally liable. We discuss additional facts as needed below.

Discussion

¶7 This case comes to us in a summary judgment posture, but we understand the parties to agree that our review is guided by a misuse of discretion standard of review. *See* ***Consumer's Co-op of Walworth Cnty. v. Olsen***, 142 Wis. 2d 465, 472, 419 N.W.2d 211 (1988) (stating that piercing the corporate veil is an equitable remedy, and that a decision in equity is reviewed for misuse of discretion). That is, the parties agreed, either explicitly or implicitly, that the circuit court should decide the piercing-the-corporate-veil issue based on summary judgment submissions, and the court did so. Our analysis is unaffected by this posture. The circuit court exercised its discretion based on undisputed facts, and

we confine our discussion to the question of whether the circuit court misused its discretion.[1]

¶8 Additionally, although the parties dispute whether the circuit court should have looked to piercing-the-corporate-veil law of Wisconsin or of Texas, where Sooner was located, we need not resolve that dispute. The circuit court concluded that it did not matter which state's law applied because Sooner's corporate veil should be pierced under either. As we explain below, Haub fails to demonstrate that the circuit court's exercise of discretion ran afoul of either Wisconsin or Texas law.

I. Arguments Relating To Wisconsin Law

¶9 As to an analysis under Wisconsin law, we understand the parties to agree that, if Wisconsin law applies, the piercing-the-corporate-veil discussion in our supreme court's ***Consumer's Co-op*** decision controls. In reaching its decision here, the circuit court relied on the ***Consumer's Co-op*** discussion.[2]

[1] In reply, and for the first time on appeal, Haub appears to assert that reversal is warranted because the circuit court improperly relied on disputed facts. We reject this line of argument because it is first raised in reply. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286 ("arguments advanced for the first time in a reply brief are waived"). Further, Haub does not show that the court relied on disputed facts. Haub complains about facts in a general "findings of fact" section in the court's decision, which encompassed cross-motions for summary judgment on multiple counts. However, where the court ruled on the piercing-the-corporate-veil topic, the court *separately* listed the particular undisputed facts it relied on. Haub does not complain that those facts were disputed.

[2] Haub makes no serious attempt to show that the circuit court applied the wrong legal standard. At one point, Haub cites a federal case for the proposition that there is a "presumption of corporate separateness," and Haub asserts that the circuit court disregarded that presumption. But this is just an assertion without analysis. Regardless, we disagree that the circuit court did not start with such an assumption. Implicit in the circuit court's piercing-the-corporate-veil analysis is the starting point that Haub was not subject to liability, unless an exception applied. (continued)

¶10 In ***Consumer's Co-op***, the supreme court repeated the general rule that "'a corporation is treated as a legal entity distinct from its members.'" ***Id.*** at 475 (citation omitted). At the same time, the court explained that there is an exception to that rule when a corporation "'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.'" ***Id.*** at 476 (citation omitted); *see also* ***id.*** at 484 (when applying this "alter ego" analysis, courts are concerned with "'reality and not form'" (citation omitted)).

A. Circuit Court's General Reasoning

¶11 Before turning to the narrower issues raised by Haub, we begin by briefly summarizing the circuit court's general view of the equities.

¶12 At the hearing on the piercing-the-corporate-veil topic, the circuit court explained its view that the undisputed facts showed that Haub had misappropriated the missing money. That is, the court explained its understanding that, "if that money [from Michels] comes in and only a portion of the [pipe] is ordered, the rest of the money that would have been spent on [the non-ordered portion of] pipe should be there, unless somebody came in and directed the money to go elsewhere, or … stole the money from the corporation or gave it away or transferred it to [another company in which Haub has an ownership interest]." The court continued: "The only person that I could see who could do that is Mr. Haub," and "he'd be the only one who knew where [that money] went." Although, at that hearing, the circuit court gave Haub the opportunity to rebut this

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Haub does not explain a difference between this framework and the "presumption" discussed in the federal case.

view of the facts, Haub did not dispute that he was the only person with meaningful control of Sooner's affairs, including the money received from Michels. And, Haub did not offer a contrary explanation of what happened to the money. For example, Haub did not suggest that the money was diverted for legitimate business reasons or, for that matter, offer any coherent explanation as to where the money went.

¶13 On appeal, Haub does not dispute the proposition that a significant portion of the Michels' payment went missing with no explanation. Rather, Haub's arguments, so far as we can discern them, are directed at narrower topics, which we discuss in the following sections.

B. Assertions Relating To The Underlying Contract

¶14 A significant portion of Haub's briefing is devoted to his theme that "a deal is a deal" and Michels was improperly permitted to avoid the consequences of its decision to enter into a contract with Sooner. Haub repeatedly asserts that "a deal is a deal" and that Michels should be limited to seeking remedies from the entity Michels made a deal with, namely Sooner. In making this argument, Haub mistakenly takes what is a starting point for a piercing-the-corporate-veil analysis—the fact that a transaction is, on its face, a transaction with a corporation—and treats it as a highly significant factor. That is, Haub contends that the mere fact that Michels contracted with Sooner and not with Haub is a key factor that should have been controlling here.

¶15 As Michels aptly responds, it is a given that Haub was not a party to the Michels-Sooner contract, and knowing this does not resolve whether it is proper to pierce Sooner's corporate veil. The fact that Haub is not a party to the contract is what makes it necessary to engage in a piercing-the-corporate-veil

analysis. Thus, what Haub treats as a significant factor is more accurately described as a starting point, not a key factor, in the analysis.[3]

¶16 We acknowledge that Haub blends into his "a deal is a deal" argument a factor that may be relevant to a piercing-the-corporate-veil analysis. He argues that, because Michels is a "big" and sophisticated company that should have known what risks it was taking, Michels should be held to its "deal." To the extent Haub argues that Michels' size or sophistication is relevant, we will accept this as true for purposes of this decision. However, Haub fails to provide an explanation of why, *under the specific circumstances here*, Michels' size and sophistication matter when the primary allegation is that Haub misappropriated payments. It is not apparent why Michels' size or sophistication means that Michels was in a better position than a smaller company to anticipate Haub's conduct. If Haub is suggesting that *all* large companies must insist on formal personal guarantees when dealing with closely held corporations, i.e., contracts with owners, or lose their right to seek a remedy under a piercing-the-corporate-veil analysis, he does not develop the argument.

C. Assertions Relating To Evidence Of Control/Separateness

¶17 Haub makes assertions relating to a "control" requirement for piercing the corporate veil. The "control" element requires proof that "the corporate entity as to [the relevant] transaction had at the time no separate mind, will or existence of its own." *See* ***Consumer's Co-op***, 142 Wis. 2d at 484 (stating

[3] Haub similarly asserts that it matters that Michels "never sought, nor does it have, a guaranty from Mr. Haub of any Sooner debt," by which we understand Haub to assert that he has provided no *contractual* guarantee. So far as we can tell, this assertion adds nothing to Haub's assertion that he was not a party to the contract.

three elements, including the "control" element).[4] Haub essentially argues that there was evidence of separateness tending to show that Haub did not "control" Sooner, and that the circuit court did not give that evidence sufficient weight.

¶18 Before addressing Haub's specific "control" assertions below, we note that his assertions all have a similar flaw—none meaningfully address the circuit court's full reasoning.

¶19 The circuit court cited undisputed facts, which included: "Haub is in control of Sooner Sales as its president, sole director, sole shareholder and only full time employee"; "Haub conducted business on behalf of Sooner Sales using a personal email address, [Haub's other company's] email address, a personal laptop and personal cell phone"; and "Haub stated in an email that he would personally pay [the pipe manufacturer] … to get the drill pipe released to Michels, in order to 'clear [Haub's] name.'" The court then cited related "control" factors, including: the shareholder "manag[es] the corporation without regard to its independent

[4] The three elements stated in ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), 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 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. To the extent Haub discusses these elements on appeal, his clear focus is on the first "control" element. He presents no clear argument with respect to the second and third elements.

existence," "treat[s] corporate assets as [the shareholder's] own," and "hold[s] [himself] out as being personally liable for the debts of the corporation." *See* ***id.*** at 490 n.10 (listing factors relevant to the control element).

¶20 Rather than address the circuit court's reasoning in a comprehensive way, Haub makes assertions about isolated facts that Haub believes support his view. That is not a developed argument explaining why, all factors considered, we should reverse the circuit court's exercise of discretion. *See* ***id.*** at 485 ("'It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors ….'" (citation omitted)).

¶21 Despite Haub's failure to provide a developed argument addressing the circuit court's multi-pronged reasoning, we choose to briefly discuss Haub's assertions that the circuit court ignored important indications of "separateness."

¶22 Haub points to a summary judgment submission from his attorney in which the attorney averred: "Part of the document production in this case has included copies of … the Articles of Incorporation of [Sooner], the Bylaws of [Sooner], Consent to Action Taken in Lieu of Organizational Meeting of Board of Directors of [Sooner], ... [and] Consent of Shareholder in Lieu of Annual Meeting[s]." However, having pointed to this affidavit, Haub fails to explain why these facts should have carried significant weight.[5]

¶23 At a minimum, shareholders and the corporations they own need to be separate on paper. However, ***Consumer's Co-op*** teaches that what matters is

[5] We question whether Haub's attorney may be a fact witness and, thus, whether it makes sense for his attorney to be the source of these factual assertions. Nonetheless, for purposes of appeal, we will treat these facts as undisputed facts.

"'reality and not form.'" *See* ***id.*** at 484 (citation omitted). At best, Haub's attorney's statement goes to show that there are some documents that exist that are consistent with some formal corporate procedures. But we are given no reason to think that this bare listing says something meaningful about Sooner's "reality."

¶24 Haub also points us to assertions in an affidavit where Haub states: "Sooner Sales prepares a tax return that is separate from [Haub's] own tax return" and "Sooner Sales had its own bank accounts that were completely separate from [Haub's] personal bank accounts." It suffices to say that these asserted facts, on their face, are also not significant statements about the "reality" of Sooner. That is, the statements in the affidavit are not detailed, and Haub does not explain why simply knowing these general things is significant, especially in light of undisputed evidence of Haub's control of Sooner's assets, which we discuss next.

¶25 Michels points out that Michels submitted evidence, based on Sooner's financial statements, of many instances of funds being transferred back and forth between Haub and Sooner, and between Sooner and a separate company partially owned by Haub. Haub does not dispute that those transfers occurred, and Haub also does not explain why, in light of all of the relevant factors, these transfers are not probative of "control." *See*, *e.g.*, ***id.*** at 490 n.10 (discussing relevant factors as including "[w]ithdrawal of capital from the corporation at will," "[m]anaging the corporation without regard to its independent existence," and "[c]o-mingling of assets").[6]

[6] Haub points out that, in an affidavit, he generally averred that there was no "co-mingling" of his assets with Sooner's assets. This argument does not help Haub for at least two reasons. First, it is nothing more than a legal conclusion, and, second, regardless whether there was no "co-mingling" in some technical sense, it would remain true that the transferring of funds could be relevant under a different factor.

¶26 For example, the court found that "Haub received payments from Sooner Sales totaling $661,000.00 within 30 days after Sooner Sales received Michels' … down payment." Haub does not deny that there were substantial transfers of money along these lines. Haub, rather, merely points out that at least some of these payments were "placed in an investment account and then [later] *returned to [Sooner]*." This assertion does not diminish the inference that there was no clear division between Sooner's assets and Haub's assets. For that matter, Haub first raised this detail *after* the piercing-the-corporate-veil hearing.

D. Ratification

¶27 Haub asserts, as if it matters, that "Haub did not ratify Sooner's obligations." Haub refers to a legal theory in which an original agreement is modified based on "a manifestation of an intent to become a party to [it]," thus "bind[ing] a party to [that] prior agreement." *See* ***Spivey v. Great Atl. & Pac. Tea Co.***, 79 Wis. 2d 58, 66, 255 N.W.2d 469 (1977). Michels responds that it is not pursuing a "ratification" theory, and that "[p]iercing the corporate veil does not depend upon the legal doctrine of ratification." Although in his reply brief Haub repeats his assertion that Haub did not ratify the contract, Haub does not address Michels' contention that this does not matter. Haub's silence on this issue constitutes a concession, and we do not address the issue further.

II. Arguments Relating To Texas Law

¶28 Haub argues in his brief-in-chief that Texas law should govern the piercing-the-corporate-veil analysis and that applying Texas law instead of Wisconsin law makes a difference here. We reject this argument because Haub fails to address the circuit court's reason for concluding that the outcome is the same.

¶29 Haub, citing a federal case, asserts that the law of the state of incorporation is the applicable piercing-the-corporate-veil law. For purposes of this portion of our discussion only, we will assume in Haub's favor that Haub is correct and that Texas law applies.

¶30 Haub's argument about Texas law does not meaningfully address the circuit court's decision. The circuit court concluded that under a particular Texas code section, TEX. BUS. ORGS. CODE § 21.225, it was proper to pierce Sooner's corporate veil. That statute states, in part, that a shareholder may be held liable when the shareholder "expressly assumes, guarantees, or agrees to be personally liable to the obligee for the obligation." ***Id.***

¶31 Even though the circuit court expressly relied on it, Haub does not address TEX. BUS. ORGS. CODE § 21.225, or the circuit court's application of it. Rather, Haub relies on a different Texas statute addressing shareholder liability based on fraud, TEX. BUS. ORGS. CODE § 21.223. Haub's only argument is directed at showing that piercing the corporate veil is not warranted under that different fraud provision. This is not a developed argument explaining why the circuit court erred. We observe that § 21.225 states on its face that, if § 21.225 applies, it applies regardless of any limit on shareholder liability found in § 21.223. *See* TEX. BUS. ORGS. CODE § 21.225. Accordingly, Haub's failure to address the circuit court's reliance on § 21.225 is fatal to Haub's reliance on § 21.223.

¶32 We further note that, in reply, Haub still does not address TEX. BUS. ORGS. CODE § 21.225 or, for that matter, mention Texas law at all. This is true even though, in its responsive brief, Michels points out that Haub has ignored the

basis for the circuit court's decision, and asserts reasons why the court's decision was sound.

Conclusion

¶33 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

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