COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2013

Diane M. Fremgen
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. 2012AP1618 **Cir. Ct. No. 2010CV3111**

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

MICHAEL GOEBEN,

PLAINTIFF-APPELLANT,

SHANNON GOEBEN,

PLAINTIFF,

V.

DCS DEVELOPMENT, INC., DAVE C. STOCK AND STOCKS HARLEY DAVIDSON,

DEFENDANTS-RESPONDENTS,

WASH WORLD,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Goeben appeals a summary judgment dismissing his action against Dave Stock and two businesses owned or controlled by Stock. The Goebens sought to have Stock or the businesses pay a judgment he obtained against another of Stock's businesses, Premier Development of De Pere, Inc. The circuit court held that, because Stock and the businesses are separate entities from Premier, they could not be held liable for the judgment against De Pere. Goeben argues: (1) DCS Development, Inc., is a successor company of Premier; (2) Stock Harley Davidson ("SHD") is an alter ego of Premier and/or was in a joint venture with Premier; and (3) Dave Stock acted as Premier's alter ego and was individually liable for personal torts of fraud, misrepresentation, misappropriated funds, violation of the administrative code and theft. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Goeben and his wife Shannon Goeben contracted with Premier to build a customized home. During construction, several problems arose and Premier twice offered to return the Goebens' money and cancel the contract. The Goebens refused these offers. The Goebens filed multiple arbitration demands against Premier. The arbitrator ordered Premier to complete some revisions or repairs and ordered the Goebens to pay Premier $132,500. When the home was completed, the Goebens refused to close on the transaction. The court appointed an expert to determine whether the new complaints were legitimate. The court ruled that all of the Goebens' complaints had been satisfied and ordered the Goebens to close on the sale. When the Goebens again refused to close on the

transaction, the court held a hearing at Premier's request. The court ordered that $1,000 should be held in escrow pending review of the newly alleged defects and the Goebens must close on the transaction and pay $131,171. After closing, the Goebens filed yet another arbitration demand resulting in an award of $18,732. By that time, despite DCS's purchase of some lots from Premier and a cash infusion from SHD, Premier was insolvent. The present lawsuit stems from the Goebens' attempt to collect on that arbitration award from DCS, SHD or Stock.

DISCUSSION

¶3 Both parties filed motions for summary judgment. Therefore, they have stipulated that only questions of law remain to be decided. *See* ***Silverton Enters. v. General Cas.***, 143 Wis. 2d 661, 669, 422 N.W.2d 154 (Ct. App. 1988). In addition, where the circuit court's determination is based on documentary evidence, this court conducts a de novo review of the circuit court's decision. However, piercing the corporate veil is an equitable remedy, which we review for an erroneous exercise of discretion. ***Consumer's Co-op of Walworth Cnty. v. Olsen***, 142 Wis. 2d 465, 472-73, 419 N.W.2d 211 (1988).

¶4 As a matter of law, DCS is not a successor company of Premier. The general rule is that a corporation that purchases assets of another corporation does not succeed to liabilities of the selling corporation except when:

> (1) the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability;
>
> (2) ... the transaction amounts to a consolidation or merger of the purchaser and seller corporations [a *de facto* merger];
>
> (3) ... the purchaser corporation is merely a continuation of the seller corporation; or
>
> (4) ... the transaction is entered into fraudulently to escape liability for such obligations.

Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 298, 376 N.W.2d 820 (1985) (quoting ***Leannis v. Cincinnati, Inc.***, 565 F.2d 437, 439 (7th Cir. 1977)). Goeben contends the second and third factors apply. The transactions between DCS and Premier consisted of Premier selling properties to DCS. DCS did not pay cash for the properties, but instead assumed Premier's liabilities for the properties. DCS did not assume any other of Premier's liabilities. DCS and Premier were not consolidated or merged as a result of this transaction.

¶5 Regarding Goeben's contention that there was a de facto merger, four factors are generally considered determinative:

> (1) The assets of the seller corporation are acquired with shares of stock in the buyer corporation resulting in a continuity of shareholders;
>
> (2) The seller ceases operations and dissolves soon after the sale;
>
> (3) The buyer continues the enterprise of the seller corporation so there is a continuity of management, employees, business location, assets and general business operations; and
>
> (4) The buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business operations.

Sedbrook v. Zimmerman Design Group, Ltd., 190 Wis. 2d 14, 17, 526 N.W.2d 758 (Ct. App. 1994). DCS did not acquire Premier's property with share of its stock. Although Premier became insolvent, the release of Premier's debts on the property in 2006 allowed Premier to complete construction of the Goebens' home in 2008. As the circuit court explained, "[Premier] was a home building business … it fizzled out, and the successor, DCS, never built a home … DCS was not a continuation of Premier because selling lots is not like building homes and that's different." DCS did not assume Premier's liabilities.

¶6 Goeben seeks recovery from SHD, arguing that it is the alter ego of Premier or was engaged in a joint venture with it. The alter ego doctrine requires proof of three elements:

> (1) Control, not merely 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 evidence of its own;
>
> (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.

Consumer's Co-op, 142 Wis. 2d at 484. The absence of any one of these elements prevents "piercing the corporate veil." ***Id.*** Less formality in corporate procedures is required in closely held corporations like Premier. *See* ***id.*** at 488-90. The existence of inadequate capitalization is a factor relevant to whether control has been exercised in such a manner as to result in injustice, but the adequacy of capitalization *at the inception of the corporation* is the issue unless the corporation distinctly changes the nature or magnitude of its business. ***Id.*** at 485, 487. Mere infusion of capital into a corporation does not constitute an improper comingling of personal and corporate assets. ***Id.*** at 488.

¶7 Goeben fails to meet the test for piercing the corporate veil for numerous reasons. SHD merely infused money into Premier and did not improperly syphon out money or assets. Its activities did not create an injustice for the Goebens. To the contrary, the cash infusion allowed Premier to complete construction of the Goebens' home. Nothing in the record suggests Premier was undercapitalized at the time it was formed. SHD is a separate corporation and not

a shareholder of Premier with voting rights. The original contract between the Goebens and Premier was signed by Mike Trimberger, who was the co-owner and registered agent for Premier, and who controlled Premier's daily activities. Nothing in the record suggests any connection between Trimberger and SHD.

¶8 SHD is not liable for Premier's debts based on a theory of joint venture. To constitute a joint venture, the following elements must exist: (1) contribution of money or services; (2) joint or mutual control; (3) an agreement to share profits although not necessarily the losses; and (4) a contract establishing the relationship. A joint venture may exist between corporations and individuals, but there must be intent on the part of all parties to create a joint venture. ***Mortgage Assoc. Inc. v. Monona Shores Inc.***, 47 Wis. 2d 171, 183, 177 N.W.2d 340 (1970). The record contains no evidence of a profit sharing agreement or a contract establishing a joint venture between SHD and Premier. The infusion of money into Premier does not create a joint venture.

¶9 The record does not support any claim that Stock is personally liable under any theory advanced by Goeben. Most of Goeben's argument is based on misinterpretations of the law, misquotation of the parties' statements, and disregard of previous court decisions. Goeben contends he believed he was dealing with a sole proprietor, Stock, when he entered into the agreement. That statement is belied by the previous arbitration actions and the fact that Trimberger, not Stock, signed the construction contract. Goeben argues that Premier did not maintain corporate records and the business was conducted in the name of Stock and SHD. That argument is based on nothing more than emails from Stock created years after the contract was signed. At the time the construction contract was signed, Goeben and Stock had never met.

¶10 The fact that Stock infused capital into Premier cannot be considered fraud. As indicated, the cash infusion benefitted Goeben. Stock is not liable under WIS. ADMIN. CODE § ATCP 110.01(5) because that section does not apply to the construction of new homes. Goeben's claim of misrepresentation is based on Stock's failure to reveal that Premier still had some funds in a bank account sometime after closing. Goeben does not identify any duty of Stock to tell Goeben that fact. In addition, in earlier litigation the court ruled that the money in the account belonged to SHD.

¶11 Citing a transcript from a previous hearing where warranties were discussed, Goeben contends Stock voluntarily agreed to personally fulfill all of Premier's contractual warranty obligations. The quoted statements came from Premier's counsel who did not represent Stock or SHD at the time. Counsel's concession was, "Whatever the parties contracted to in the agreement we'll stipulate to." The parties to the transaction were Premier and Goeben, not Stock or any other business.

¶12 Finally, Stock is not Premier's alter ego. The record shows only that Stock contributed funds to Premier to forestall the calling of his personal guarantees on Premier's bank debt. No money or assets of any nature flowed out of Premier to Stock. The businesses and Stock maintain separate bank accounts, and Stock's contribution of money to Premier was not done to evade any obligation or commit any injustice against Goeben.

¶13 All of Goeben's claims are based in equity, and the equities weigh in favor of Stock and his other businesses. The activities Goeben complains of are the very things that enabled him to have his home completed. Goeben failed to show how the cash infusions harmed him and there is no evidence that Stock or

his businesses drained Premier's assets. Therefore, the circuit court properly exercised is discretion when it rejected the Goebens' equitable claims.

By the Court.—Judgment affirmed.

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