

NO. 22879

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

COLEMANS HAWAII, INC., a Hawaii corporation,
Plaintiff-Appellant, v.
DIANA LEILANI KEH CHING aka DINAH LEILANI KEH CHING,
ROBERT WAI KEONG CHING, Defendants-Appellees,
and
WINNIE YUN WEN CHEN, MARK MAH CHIH KEH, PING PING
HSU CHANG, JOHN DOES 1-10, JANE DOES 1-10, DOE
CORPORATIONS 1-10, and DOE PARTNERSHIPS 1-10,
Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-4222-10)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Colemans Hawaii, Inc. (Colemans) appeals the September 23, 1999, circuit court judgment that granted Defendants-Appellees Diana Leilani Keh Ching a.k.a. Dinah Leilani Keh Ching's (Diana Ching) and Robert Wai Keong Ching's (Robert Ching) "Motion to Dismiss Complaint Filed on October 15, 1977" (Motion to Dismiss).¹

Colemans contends on appeal that the circuit court erred in granting the Motion to Dismiss (which was treated as a motion for summary judgment) as to Diana Ching because there were

¹ On August 10, 1999, Defendants Diana Ching and Robert Ching filed a motion for Hawaii Rules of Civil Procedure (HRCP) Rule 54(b) certification. The motion was granted on September 15, 1999, and judgment was entered September 23, 1999. This court has jurisdiction to hear this appeal pursuant to HRS § 602-57 (1993).

genuine issues of material fact in contest, because the circuit court did not weigh the evidence in the light most favorable to the non-moving party (Colemans), and because the circuit court used the wrong standard of law in evaluating Colemans' alter ego claim.

We disagree with Colemans and affirm the September 23, 1999, judgment of the circuit court.

I. BACKGROUND

In 1988, a group of ten individuals (including Diana Ching and Mah Chih Keh a.k.a. Mark Mah Chih Keh (Mark Keh)) acquired the lease for the real property located at 1020 Keeaumoku Street, Honolulu, Hawai'i.² Great K Properties became the managing agent for the property, and Robert Ching became the property manager. Colemans was one of the commercial tenants on the property when Great K Properties became the managing agent. In October of 1989, Winnie Y.W. Chen and Mark Keh incorporated Great K Properties as Great K Properties Corp. (Great K Corp.) for the purpose of property management and leasing. Diana Ching and Mark Keh were each 50% shareholders in Great K Corp.

A dispute over the terms of Colemans' commercial lease with Great K Corp. arose, and Great K Corp., as managing agent,

² It is unclear from the record on appeal who the actual owners of the property are.

filed a complaint³ against Colemans in 1993 for amounts it claimed Colemans owed under its lease.⁴ Colemans filed a counterclaim seeking compensatory and punitive damages, alleging lost profits caused by Great K Corp.'s premature termination of Colemans' lease.⁵

The lease owners of 1020 Keeaumoku Street found they could not make a profit from the property so they did not renew their management contract with Great K Corp.

Great K Corp. filed its annual corporate registration reports with the State of Hawai'i (State) in 1989, 1990, 1991, and 1992. In 1995 the directors of Great K Corp. decided to not file the 1993 and 1994 annual registration reports and to allow the corporation to become involuntarily dissolved by the State. On October 25, 1995, the State dissolved Great K Corp. for failure to file its annual reports for the calendar years 1993 and 1994.

On January 19, 1996, after a jury-waived trial, the circuit court held in its Findings of Fact, Conclusions of Law and Order (which was amended on June 3, 1996) that Great K Corp. improperly increased Colemans' monthly base rent and improperly

³ Great K Properties Corp. v. Coleman's Hawaii, Inc. et al., Civ. No. 93-1120-03, Circuit Court of the First Circuit, State of Hawai'i.

⁴ According to Great K Corp.'s calculations, Colemans owed Great K Corp. a total of \$18,723.30 as of May 1, 1995, for unpaid rent.

⁵ At trial, Colemans' expert on economic damages testified that Colemans incurred lost profits of \$201,000 resulting from the improper termination of its lease.

billed Colemans for General Excise Tax charges Colemans was not obligated to pay under its commercial lease. On July 8, 1996, the circuit court entered a judgment in favor of Colemans and against Great K Corp. in the amount of \$7,497.40.

No payments on the judgment debt were made to Colemans by Great K Corp., and on October 15, 1997, Colemans filed a complaint against Diana Ching and Mark Keh (shareholders of Great K Corp.), Robert Ching, Winnie Yun Wen Chen (officer and director of Great K Corp.), and Ping Ping Hsu Chang (former director of Great K Corp.) (collectively "Defendants").⁶ Colemans' complaint sought to "pierce the corporate veil" based upon alter ego, breach of fiduciary duty by Defendants, and fraudulent conveyance to Defendants.

Defendants Diana Ching and Robert Ching (Ching Defendants) responded to Colemans' complaint by filing the Motion to Dismiss on October 6, 1998, which was subsequently treated as a motion for summary judgment due to the extrinsic materials attached in support of the motion. Ching Defendants argued that Colemans could not prevail on its alter ego claim because (1) Great K Corp. acted as a normal corporation that observed corporate formalities; (2) Great K Corp. was dissolved for a benign reason; and (3) shareholder status does not make one liable under an alter ego theory. Colemans responded that Ching

⁶ Colemans obtained default judgments against Defendants Winnie Yun Wen Chen, Mark Mah Chih Keh, and Ping Ping Hsu Chang on October 14, 1998.

Defendants' supporting declaration was conclusory and did not show Colemans could not prevail on its alter ego claim, but in fact supported its alter ego claim. Ching Defendants replied that they had met their Rule 56 burden of making a "prima facie" showing that Colemans could not prevail at trial on its alter ego claim because Colemans had no facts to support its legal theory.

At the hearing on the Motion to Dismiss, the circuit court excluded several documents attached as exhibits to Colemans' memorandum in opposition to the Motion to Dismiss because the documents were not sufficiently authenticated. On August 31, 1999, the circuit court granted Ching Defendants' Motion to Dismiss finding that:

5. Plaintiff is unable to produce any evidence in support of its claims against Defendants. At best, Plaintiff has documents indicating that for certain periods of time, there are no records of Great K Properties Corporation paying general excise tax, Defendant Diana L.K. Ching was a shareholder but not an officer or director of Great K Properties Corporation, and that Defendant Robert W.K. Ching opened a Great K Properties bank account. These allegations do not raise any genuine issues of material facts;

. . . .

9. Defendant Diana L.K. Ching cannot be liable for an alleged breach of fiduciary duty because she was not a director of Great K Properties Corporation and therefore, could not be the statutory liquidator in possession of any indemnity claim on behalf of Great K Properties Corporation. [Citation omitted.]

. . . .

11. Viewing the evidence and the inferences in the light most favorable to Plaintiff, the Court concludes that there are no genuine issues of material facts in dispute and that Defendants have established that they are entitled to judgment as a matter of law.

II. STANDARDS OF REVIEW

A. Summary Judgment

We review a circuit court's award of summary judgment de novo under the same standard applied by the circuit court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

74 Haw. at 104, 839 P.2d at 22 (internal quotation marks omitted); see HRCF Rule 56(c). The Hawai'i Supreme Court stated in Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982), that "[a] fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties."

The Hawai'i Supreme Court has also held that when making a summary judgment determination, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Buck v. Miles, 89 Hawai'i 244, 248, 971 P.2d 717, 721 (1999) (internal quotation marks omitted).

III. DISCUSSION

Colemans contends the circuit court erred in granting summary judgment in favor of Ching Defendants, as a matter of law, because "the materials presented by the Appellee⁷ in support of summary judgment did not satisfy the requirements of Rule 56, and in addition those materials themselves revealed the existence of a material issue of fact concerning Appellee's alter ego liability." Colemans also contends that the circuit court did not view the evidence in the light most favorable to it as the non-moving party, and that the circuit court erred in granting the motion for summary judgment as to Diana Ching because the court required improper conduct on the part of a shareholder as a prerequisite to finding alter ego liability.

"Generally speaking, a corporation will be deemed the alter ego of another 'where recognition of the corporate fiction would bring about injustice and inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim.'" Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 241-42, 982 P.2d 853, 870-71 (1999) (quoting Chung v. Animal Clinic, Inc., 63 Haw. 642, 645, 636 P.2d 721, 723 (1981)); see

⁷ Colemans states in its Opening Brief (p. 3 n.2) that "[d]ue to budgetary constraints, this appeal is limited to the propriety of the granting of summary judgment in favor of Defendant-Appellee Diana Ching on the alter ego claim."

also Kahili, Inc. v. Yamamoto, 54 Haw. 267, 271-72, 506 P.2d 9, 11-12 (1973).

The court also stated:

A claim based on the alter ego theory is not in itself a claim for substantive relief, but rather to disregard the corporation as a distinct defendant is procedural. A finding of fact of alter ego, standing alone, creates no cause of action. It merely furnishes a means for a complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation. An attempt to pierce the corporate veil is a means of imposing liability on an underlying cause of action[.]

Roberts Hawaii, 91 Hawai'i at 241, 982 P.2d at 870. The underlying causes of action in the instant matter involve claims of fraud and breach of fiduciary duties to creditors.

Although the alter ego analysis is an inquiry into fairness,

[b]efore a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, it must be made to appear that . . . the corporation is not only influenced and governed by that person, but that there is such a unity of interest . . . that the individuality, or separateness, of such person and corporation has ceased[.]

Robert's Hawaii, 91 Hawai'i at 242, 982 P.2d at 871 (quoting Associated Vendors, Inc. v. Oakland Meat Co., Inc., 210 Cal. App. 2d 825, 387, 26 Cal. Rptr. 806, 813 (1962)).

Colemans expressly limited its appeal to "the propriety of the granting of summary judgment in favor of Defendant-Appellee Diana Ching on the alter ego claim." See n.7, supra. Colemans offered no evidence to show that Diana Ching influenced, governed, or controlled Great K. Corp.; Colemans only showed that Diana Ching was a 50% shareholder. "The question is one of

control, not merely paper ownership." Robert's Hawaii, 91 Hawai'i at 243, 982 P.2d at 872 (internal quotation marks omitted). "[C]ontrol is determined by the actual relationship of the parties, formal stock ownership is not dispositive." Id.

Although a pending claim against a corporation may survive its dissolution, the proper party defendant is a statutory trustee of the corporation. Makaneole v. Pacific Insurance Co., Ltd, 77 Hawai'i 417, 421-22, 886 P.2d 754, 758-59 (1994). The statutory trustee for the corporation, if not appointed by the court, is a former director of the corporation. Id. Diana Ching was not a director of Great K. Corp. and was not a proper defendant in this post-dissolution lawsuit.

The Hawai'i Supreme Court has held:

A summary judgment motion "challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he is entitled to prevail . . . because his opponent has no valid claim for relief or defense to the action, as the case may be." 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2711, at 555-56 (1983) (footnote omitted). He thus has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense and he is entitled to judgment as a matter of law. 10A Wright, Miller & Kane, supra, § 2727, at 121.

He "may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent." Id. at 130 (footnote omitted); cf. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed. R. Civ. P. 56 need not support his motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is absence of evidence to support the opponent's claims). For "[i]f no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless" 10A Wright, Miller & Kane, supra, at 130.

First Hawaiian Bank v. Weeks, 70 Haw. 392, 396-97, 772 P.2d 1187, 1190 (1989) (footnote omitted).

There was no evidence to sustain Colemans' position that Diana Ching breached a fiduciary duty or executed a fraudulent conveyance to herself and other Defendants. There also was an absence of evidence offered by Colemans to "pierce the corporate veil" and treat Diana Ching as Great K Corp. A trial on Colemans' claims against Diana Ching would have been useless since Colemans offered no competent evidence to support a judgment on its behalf against Diana Ching.

IV. CONCLUSION

The September 23, 1999, judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2001.

On the briefs:

Richard H. Grover
for plaintiff-appellant.

Chief Judge

James A. Kawachika
Carl H. Osaki,
for defendants-appellees.

Associate Judge

Associate Judge