

RENDERED: JULY 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000159-MR

ESTILL COUNTY ENERGY PARTNERS, LLC;
AND JACQUELYN D. YATES

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-02353

ROBERT F. GAMBON

APPELLEE

AND

NO. 2010-CA-000215-MR

ROBERT F. GAMBON

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-02353

FOX TROT CORPORATION; AND
CHARLES E. YATES

CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** * * * * *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Estill County Energy Partners, LLC (ECEP) and Jacquelyn Yates (Jacquelyn) appeal from a Fayette Circuit Court Order of Summary Judgment. ECEP and Jacquelyn claim the trial court erred on the following grounds: (1) summary judgment in favor of Robert Gambon (Gambon) was precluded by his breach of contract; and (2) the trial court misapplied the doctrine of piercing the corporate veil pertaining to Gambon's claims against Jacquelyn. Gambon cross-appeals from the Order claiming Charles Yates (Charles) and Fox Trot Corporation (Fox Trot) should also have been found personally liable for the damages Gambon sustained as a result of ECEP's breach of contract.

I. Factual Background

ECEP is a limited liability company that was formed on May 16, 2002, for the purpose of developing a Coal Refuse Fueled Power Station in Estill County, Kentucky. ECEP's sole member is Calla Energy Holding, LLC (Calla Energy). Jacquelyn is the sole member of Calla Energy. All of the money that

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

funded ECEP was provided by Jacquelyn and Fox Trot, a corporation wholly owned by Jacquelyn.

On May 23, 2003, Gambon entered into an employment contract with ECEP. Pursuant to the agreement, Gambon was to provide engineering services for the development of an electric power generation facility on property owned by an affiliate of ECEP. Initially, ECEP contracted for Gambon's services for a four-month period that was to end on October 31, 2005. However, Gambon and ECEP entered into four contract extensions. The contract required ECEP to pay Gambon \$12,000 per month in exchange for his services.

In January 2005, despite the contract extensions, the project was incomplete and over budget. Gambon had been paid \$240,000, and a total of \$7,000,000 had been spent on the project. Jacqueline and Fox Trot were unwilling to invest additional funds in ECEP for the project's completion.

Gambon received his last paycheck in January 2005. Nonetheless, Gambon and ECEP entered into another contract extension in May 2005. Neither party disputes that Gambon was not paid his monthly retainer for the months of February through October 2005, and was not paid project expenses in the amount of \$1,407.

The record is unclear whether Gambon fulfilled his contractual obligations.

Gambon filed suit against ECEP, Fox Trot Corporation, Jacquelyn, and Charles to recover unpaid compensation and moved the trial court for

summary judgment. On December 23, 2009, the trial court granted Gambon's motion and awarded him \$149,319.36 in damages. This amount was awarded jointly and severally against ECEP and Jacquelyn. This appeal follows.

II. Standard of Review

When reviewing a trial court's ruling on a motion for summary judgment, appellate courts must ask "whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 704 (Ky. App. 2004). In its decision, the trial court must have viewed all evidence in the light most favorable to the nonmoving party and resolve all doubts in his favor. *Id.* at 705. Appellate courts need not defer to the court's decision. *Id.* Because legal conclusions are involved and findings of fact are not at issue, appellate review shall be conducted under a *de novo* standard. *Id.*

III. Contractual Claims

ECEP and Jacquelyn claim that the trial court's summary judgment ignored their defense that Gambon breached his contractual obligation to ECEP. In its order, the trial court briefly dismissed ECEP and Jacquelyn's claim of Gambon's breach. The order provided, in part:

There is no evidence that ECEP ever gave any notice to Mr. Gambon about any potential breach of the agreement by Mr. Gambon. It is undisputed that ECEP has not paid Mr. Gambon the monthly retainer for the months of February through October 2005 and has not paid Mr. Gambon reasonable expenses in the amount of

\$1,407.00. Thus, ECEP has breached the contract in the amount of \$149,319.36

However, Gambon's alleged failure to perform his obligations under the contract creates a genuine issue of material fact. Whether Gambon actually fulfilled his contractual obligation cannot be determined on the face of the record.

The contract did not contain a notice requirement. The termination clause specifically provided that, "Consultant's engagement hereunder may be terminated by the Company at any time without notice and for any reason. Consultant may terminate his engagement hereunder at any time upon thirty (30) days written notice to the Company." Nonetheless, a breach of contract claim may be waived when a party has knowledge of the breach, accepts the circumstances, and later objects to the breach. *Shreve v. Biggerstaff*, 777 S.W.2d 616, 617 (Ky. App. 1989).

Since Gambon's alleged breach occurred prior to the parties' entering into a fourth contract extension, ECEP may have waived this defense. However, Charles' affidavit indicates that ECEP was unaware of Gambon's breach until much later. Charles, the manager of ECEP, claimed to have relied upon other employees who were instructed to supervise Gambon's work. After examining later e-mails and Gambon's work product, Charles concluded that Gambon did not generate "any substantial original engineering work during 2005 that benefited the [p]roject."

Whether ECEP breached the contract or terminated the contract is a factual question. Whether ECEP waived its defense that Gambon breached the contract is a factual question.

IV. Piercing the Corporate Veil

ECEP and Jacquelyn claim that the trial court erroneously disregarded ECEP's corporate entity to hold Jacquelyn liable for breach of contract.

Conversely, Gambon claims that the trial court misapplied the piercing doctrine by refusing to find Fox Trot Corporation and Charles also liable. Our review of the record, as developed, does not thus far support piercing.

“[D]espite the fact that a corporation is usually recognized as an entity which is distinct from its shareholders, officers, and directors, there are ‘specific, unusual circumstances’ that will prevent the rule of limited liability from applying. *White v. Winchester Land Dev. Corp.*, 584 S.W.2d 56, 61 (Ky. App. 1979) (quoting *Zubik v. Zubik*, 384 F.2d 267, 273 (3d Cir. 1967)). Kentucky courts will not impose liability on individual shareholders absent “extraordinary circumstances.” *Morgan v. O’Neil*, 652 S.W.2d 83, 85 (Ky. 1983). “[A] court will on appropriate occasions ignore the distinction between corporate entities where its recognition would operate as a shield for fraudulent or criminal acts or where subversive of the public policy of the state.” *Big Four Mills v. Commercial Credit Co.*, 307 Ky. 612, 616-17, 211 S.W.2d 831, 834 (Ky. 1948).

In *White*, this Court identified three overlapping tests used to impose liability on shareholders or “pierce the corporate veil”: the instrumentality theory,

the alter-ego theory, and the equity formulation. *White*, 584 S.W. 2d at 61.

Although there are variances among the theories, each theory requires courts to conduct a fundamental examination of whether the shareholders and officers abused the corporate form and an examination into the wrongful conduct in question. Kentucky Courts have previously identified factors bearing on the abuse of corporate form: (1) whether the corporation was undercapitalized; (2) whether it is operated under the formalities of corporate existence; (3) whether the corporation operates at a profit; (4) whether there is a comingling of corporate and personal assets; (5) whether there are nonfunctioning officers or directors; (6) whether the corporation paid or overpaid shareholders dividends; (7) whether the corporation was solvent at the time of the transaction in question; (8) whether corporate records were maintained; and (9) whether the majority of shareholders guaranteed corporate liabilities in their individual capacities. *White*, 584 S.W. 2d at 62.

In analyzing the alleged wrongful act, courts must question whether the corporate form was used to disguise the entity with whom the plaintiff dealt, to fraudulently induce him to act, or to unjustly eliminate the plaintiff's recourse for damages. *Id.* at 56.

ECEP was generously funded. Jacquelyn, individually or through Fox Trot, invested over \$7,000,000 in ECEP without seeing any returns on her investment. ECEP did not pay dividends to shareholders and no one siphoned corporate property or assets. No evidence indicates that ECEP property was ever

comingled with Jacquelyn's personal property. The record indicates that ECEP maintained corporate formalities, including record keeping procedures. Contracts were made by the corporate entity, including the contract upon which Gambon sued. Its funds were kept in its own accounts and utilized for corporate expenses. The record does not indicate that the ECEP abused its corporate status.

White instructs courts that the corporate veil should only be pierced "reluctantly and cautiously." *Id.* An unpaid debt is not *per se* fraudulent. There is no evidence that suggests that ECEP misrepresented its corporate status or financial status to Gambon in order to induce him to enter into an employment contract. Absent evidence of fraud or misconduct, the corporate entity should not be disregarded.

On the record before it, the trial court correctly denied Gambon's motions to hold Fox Trot and Charles personally liable for the contractual breach. Although Charles was married to the sole owner of ECEP and performed many managerial functions for ECEP, there is no evidence that he had a separate financial interest in ECEP. The evidence does not indicate that Charles misrepresented his stake in ECEP or the corporate status to Gambon. Neither Charles nor Fox Trot guaranteed ECEP's debts. Therefore, the trial court correctly found that neither Charles nor Fox Trot were personally liable. The court's conclusion is affirmed.

Based upon the aforementioned conclusions, the Fayette Circuit Court summary judgment order is affirmed with regard to the summary judgment in

favor of Fox Trot and Charles Yates, and is reversed and remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANTS/
CROSS-APPELLEES:

D. Duane Cook
Georgetown, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANT:

Joshua T. Rose
Louisville, Kentucky