IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHINSTINE/ASSOC. LLC, a Washington limited liability company, Respondent, v. SOUTH-N-ERECTORS, LLC, a Washington limited liability company, OHIP CASUALTY INSURANCE CO., Bond No. 3740456, a foreign corporation, Defendants, ROGER HICKS, individually, Appellant.	No. 39277-1-II UNPUBLISHED OPINION

Bridgewater, J. — Roger Hicks appeals from the trial court's findings of fact and conclusions of law disregarding the corporate form and the judgment holding Hicks personally liable for a judgment Shinstine/Assoc., LLC (Shinstine) obtained against South-N-Erectors, LLC. We hold that a distribution in violation of RCW 25.15.235[1] alone does not justify disregarding the

[1] RCW 25.15.235(1) prohibits a member from knowingly accepting a distribution that would leave the company insolvent.

corporate form. We remand with instructions to vacate the trial court's findings of fact, conclusions of law, and judgment as to Hicks.[2]

FACTS

Shinstine was the general contractor constructing two fire stations for the Pierce County Central Fire District. Shinstine hired South-N-Erectors as a subcontractor in April 2005 to perform certain work for $165,000. South-N-Erectors was obligated to make payments to the Pacific Northwest Ironworkers Trust Fund (Trust Fund), which provided health and welfare benefits to South-N-Erectors' employees.

In August 2005, South-N-Erectors purchased a building in Tacoma, Washington. South-N-Erectors took out a $130,900 mortgage toward the purchase. Hicks, the sole member of South-N-Erectors, personally guaranteed loans to help cover the down payment. The record does not include a sales price and does not specify what, if any, down payment South-N-Erectors paid. The excise tax affidavit shows "0" as the gross selling price. Ex. 29. In October 2006, South-N-Erectors sold the building for $311,000.

South-N-Erectors did not pay what it owed the Trust Fund, and the Trust Fund sought payment from Shinstine as the general contractor. South-N-Erectors also did not satisfy its obligations on the job site. The company understaffed the project, damaged materials both pre- and post-installation, and had trouble paying suppliers. Due to South-N-Erectors' failure to pay the Trust Fund and its poor job performance, Shinstine terminated South-N-Erectors from the job in January 2006. At the time of termination, Shinstine had paid South-N-Erectors $136,964.36.

[2] This opinion has no effect on Shinstine's judgment against South-N-Erectors.

Shinstine paid the Trust Fund for amounts South-N-Erectors owed.

In December 2006, Shinstine sued South-N-Erectors for breach of contract, arguing that South-N-Erectors failed to (1) perform work required by contract, (2) make required payments to the Trust Fund, and (3) make payments to the Department of Labor and Industries (L&I). As the general contractor, Shinstine was responsible for these payments and sought reimbursement for amounts it paid on South-N-Erectors' behalf. Shinstine also sought to hold Hicks personally liable because he allegedly diverted South-N-Erector funds. South-N-Erectors and Hicks answered and preserved unspecified counterclaims and affirmative defenses.

Because South-N-Erectors was in the process of dissolving at the time of trial, it elected not to contest Shinstine's claims and stipulated to liability. South-N-Erectors also stipulated that Shinstine had sufficient evidence to show that it owed Shinstine $96,146.08, plus $31,704.50 in prejudgment interest. Only the issue of whether Shinstine could hold Hicks personally liable for the judgment against South-N-Erectors remained.

At trial, Hicks testified that he purchased the building in Tacoma secured by a mortgage and that he paid a down payment. He claimed that he received the down payment money from "investors," who loaned money to help with the purchase. 1 VRP at 45-46. Hicks claimed that some investors documented their loans, but some did not. Hicks stated that South-N-Erectors made no profit on the sale and that the money "[w]ent back to the mortgage lender and the investors who invested in the building." 1 VRP at 47. Trying to get a specific answer as to who was liable to the investors, the following exchange occurred between Hicks and Shinstine's counsel:

> Q . . . Were any of those investors—were you personally obligated to any of those investors?
> A Yes, we were.
> Q So your family was personally obligated to those investors?
> A Not family.
> Q You personally?
> A Me.
> Q And the money from the building was used to pay those investors?
> A Yes.

1 VRP at 54.

Hicks admitted that he was aware in 2006, that South-N-Erectors owed money to the Trust Fund, for equipment rentals, and to L&I. Hicks first stated that these bills remained outstanding but later claimed that South-N-Erectors no longer owed money to L&I or for rental equipment.

Shinstine argued that Hicks was personally liable for its judgment against South-N-Erectors because South-N-Erectors made an improper distribution prohibited by RCW 25.15.235 that essentially rendered it insolvent. Shinstine contended that Hicks improperly used limited liability company (LLC) money from the sale of the building to pay his personal debts when he was aware that South-N-Erectors owed money to both Shinstine and the Trust Fund. Shinstine argued that under RCW 25.15.235, Hicks was liable back to the LLC for the amounts improperly distributed, though Shinstine did not know how much was distributed or how much profit South-N-Erectors made on the property sale.

Hicks argued that (1) there was no distribution; and (2) even if a distribution was made, RCW 25.15.235(2) provides a remedy to the LLC only for the amount of the distribution. Hicks

also argued that the parties both used personal pronouns throughout the case when they were in fact referring to actions taken by South-N-Erectors, not Hicks. Hicks argued that when he said he was personally liable to the investors, he meant South-N-Erectors was personally liable to the investors. Hicks also argued that South-N-Erectors did not owe money to Shinstine when it paid the investors because no judgment had been entered at that time and because South-N-Erectors had counterclaims against Shinstine. Shinstine's claim was, Hicks asserted, a "contingent claim at best." 2 VRP at 116. Hicks also insisted that under Washington law, insolvency and undercapitalization are not sufficient bases to disregard the corporate form. Finally, Hicks argued that Shinstine cannot reach back to money South-N-Erectors may have had two-and-a-half years ago to satisfy a judgment Shinstine just obtained.

Shinstine argued in response that South-N-Erectors bought the property for $131,000, sold it for $311,000, and had $180,000 profit. Shinstine speculated that if South-N-Erectors had 10 percent in sale costs, it still likely netted $150,000.

The trial court entered judgment against South-N-Erectors for $93,146.08, plus prejudgment interest, attorney fees and costs. The trial court also found that South-N-Erectors paid Hicks's personal debts from the sale proceeds, that it knew claims were pending against it, and that doing so constituted a distribution to Hicks that left South-N-Erectors insolvent. The trial court found that this violated RCW 25.15.235. The trial court pierced the corporate veil and held Hicks personally liable for Shinstine's judgment against South-N-Erectors.

ANALYSIS

I. Disregarding the Corporate Form

Hicks argues that the trial court erred by disregarding the corporate form and holding him personally liable for Shinstine's judgment against South-N-Erectors. We agree.

A. Standard of Review

Whether the corporate form should be disregarded is a question of fact. *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 643, 618 P.2d 1017 (1980). We review the facts underlying corporate disregard for substantial evidence. *Truckweld*, 26 Wn. App. at 643. We review de novo the legal conclusions that support corporate disregard. *Rogerson Hiller Corp. v. Port of Port Angeles,* 96 Wn. App. 918, 924, 982 P.2d 131 (1999), *review denied,* 140 Wn.2d 1010 (2000).

B. Corporate Disregard

In general, members and managers of an LLC are not personally liable for the company's debts, obligations, and liabilities. RCW 25.15.125(1). There are exceptions to this general rule. Under RCW 25.15.060, a court may pierce the veil of an LLC and hold a member personally liable if respecting the LLC form would work injustice, in the same way that an individual may be personally liable under the theory of piercing the corporate veil.[3] In general, to pierce the corporate veil the plaintiff must show that (1) the corporate form was used to violate or evade a duty and (2) the corporate veil must be disregarded in order to prevent loss to an innocent party. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 503, 90 P.3d 42 (2004), *cert. denied*, 543 U.S. 1120 (2005); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403,

[3] RCW 25.15.060 authorizes piercing the veil of an LLC and provides that individual members of the company may be liable "to the extent" that shareholders in a corporation may be subject to personal liability under established case law (with exceptions that are not relevant here).

410, 645 P.2d 689 (1982).

With regard to the first element, the trial court must find an abuse of the corporate form. *Meisel*, 97 Wn.2d at 410. Such abuse typically involves fraud, misrepresentation, or some form of manipulation of the company to the member's benefit and creditor's detriment. *Meisel*, 97 Wn.2d at 410. With regard to the second element, wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary. *Meisel*, 97 Wn.2d at 410. Intentional misconduct must be the cause of the harm that disregarding the corporate form seeks to prevent. *Meisel*, 97 Wn.2d at 410. Harm alone does not create corporate misconduct subject to corporate disregard. *Meisel*, 97 Wn.2d at 410-11. Corporate entities should not be disregarded solely because the company cannot meet its obligations. *Meisel*, 97 Wn.2d at 411.

Here, the trial court found in findings of fact IX and X that Hicks used proceeds from the sale of the property to pay his personal debts. Substantial evidence supports this. South-N-Erectors sold the building for $311,000 and the only evidence of indebtedness was the $130,900 mortgage. While Hicks denied having any money left over because he paid the investors, this is a matter of credibility we leave to the trial court. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In addition, Hicks admitted that he was personally obligated to the investors. While his counsel argued that Hicks misspoke and meant South-N-Erectors was liable to the investors, the trial court rejected this argument. Again, we defer to the fact-finder on matters of conflicting testimony and credibility. *Thomas*, 150 Wn.2d at 874. Substantial evidence supports findings of fact IX and X.

The trial court concluded that by using the proceeds of the property sale to pay Hicks's

personal debts, South-N-Erectors made a distribution to Hicks while it was unable to pay its LLC obligations in violation of RCW 25.15.235. The trial court concluded that Hicks was liable to the LLC for the amount distributed to him. According to the trial court, South-N-Erectors violated its duties to its creditors by paying Hicks rather than preserving those funds to pay contingent claims. The trial court found it necessary to pierce the corporate veil to prevent a loss to an injured party and held Hicks personally liable for Shinstine's judgment against South-N-Erectors.

In unchallenged finding of fact XI, the trial court found that at the time of sale, Hicks was aware of claims against South-N-Erectors, including claims by the Trust Fund and Shinstine. The trial court also found that South-N-Erectors had no funds to pay its obligations at the time of trial.

RCW 25.15.235(1) prohibits an LLC from making a distribution to a member if, at the time of distribution, the LLC would not be able to pay its debts as they became due in the usual course of business or the LLC's liabilities exceed the fair value of the LLC's assets. A member who receives a distribution in violation of RCW 25.15.235(1) and who knew at the time of distribution that it was prohibited, shall be liable to the LLC for the amount of the distribution. RCW 25.15.235(2).

But a member's acceptance of a preferential transfer from his insolvent company standing alone does not compel disregarding the corporate form. *Block v. Olympic Health Spa, Inc.*, 24 Wn. App. 938, 947, 604 P.2d 1317 (1979), *review denied*, 93 Wn.2d 1025 (1980). In *Block*, Lane, the sole stockholder and president, loaned the company $50,000 and personally guaranteed bank loans of $60,000 when the company, Olympic Health Spa, Inc. (Olympic), was in financial trouble. *Block*, 24 Wn. App. at 940-41. The company's finances did not improve and Lane

arranged to sell the company's assets to U.S.C.C., Inc. (USCC). *Block*, 24 Wn. App. at 941. As consideration, USCC agreed to assume Olympic's lease, assume the $60,000 bank loan, and pay $35,000 cash represented by a promissory note. *Block*, 24 Wn. App. at 941. Lane assigned the $35,000 note to himself, used $10,000 to pay Olympic's creditors, and paid himself the balance of $25,000 in full satisfaction of the $50,000 loan. *Block*, 24 Wn. App. at 941. This transfer left Olympic "a hollow shell without assets." *Block*, 24 Wn. App. at 941. Block, Olympic's creditor, tried to pierce the corporate veil and hold Lane personally liable for the preferential transfer of $25,000. *Block*, 24 Wn. App. at 942.

On appeal, we rejected piercing the corporate veil despite the fact that Lane "completely controlled and directed Olympic's business affairs[,] he was aware the corporation was insolvent[,] and he intended to secure a personal advantage over other creditors." *Block*, 24 Wn. App. at 949. We held that "the mere fact that a corporate officer may have received an improper preference does not mean that the corporate entity must be disregarded so as to render him liable directly to all corporate creditors." *Block*, 24 Wn. App. at 950. To hold otherwise would permit creditors to get a preference over other creditors otherwise prohibited by law. *Block*, 24 Wn. App. at 950.

Similarly, Hicks personally guaranteed loans that helped secure assets for South-N-Erectors. South-N-Erectors made a distribution to Hicks to pay those loans after selling the property. Even if we accept Shinstine's argument that this distribution left South-N-Erectors insolvent[4] and thus the distribution violated RCW 25.15.235(1), this is not the basis for piercing

[4] As discussed below, it is not clear whether South-N-Erectors was insolvent after the distribution. The record does not show whether South-N-Erectors *chose not* to pay certain bills,

the corporate veil. That Hicks received an improper preferential distribution does not justify piercing the corporate veil. *Block*, 24 Wn. App. at 947. Instead, as RCW 25.15.235(2) illustrates, the proper remedy is that Hicks is liable to South-N-Erectors for the amount of the distribution.[5] The trial court erred by concluding that RCW 25.15.235 provides a basis for disregarding the corporate form and by holding Hicks personally liable for Shinstine's judgment against South-N-Erectors.

Even if the distribution was improper and did provide a basis for disregarding the corporate form, the second element of the corporate disregard test is not met. Shinstine failed to prove that the distribution left South-N-Erectors insolvent and that this insolvency caused Shinstine's harm. South-N-Erectors did not pay some of its bills, but Shinstine did not demonstrate whether the failure occurred because South-N-Erectors chose not to pay its bills or whether it could not pay them because of the distribution. For example, South-N-Erectors was paying on a $14,000 judgment after it sold the property and remained in business until the time of trial in 2009. It would appear, then, that South-N-Erectors remained able to pay some bills after the distribution. It is unclear why South-N-Erectors did not timely pay L&I and the Trust Fund. In addition, in finding of fact XII, the trial court found that South-N-Erectors was insolvent at the time of trial. RCW 25.15.235(1) requires that the distribution make the company insolvent at that

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or *could not* pay certain bills. Shinstine did not produce any evidence showing what assets South-N-Erectors had at the time the L&I and Trust Fund amounts were due.

[5] Shinstine was not without remedy. Without disregard Shinstine could have had a receiver appointed pursuant to RCW 7.60.025(1)(c), which permits any party to request appointment of a receiver after a judgment in order to give effect to the judgment. The receiver could have sought reimbursement from Hicks on South-N-Erectors' behalf if the distribution was in violation of RCW 25.15.235(1), and then pay those funds to Shinstine.

time, not many years later. Finding of fact XII does not support the trial court's conclusion of law III that the distribution violated RCW 25.15.235.

We reject Shinstine's argument raised at oral argument that we should forgive its evidentiary failure because of the costs of discovery. Shinstine contends that its lack of discovery, hence lack of evidence, in this case was because the amount of money was so small, and costs of discovery so large. While we are sympathetic to the burdens of litigation, Shinstine still had the burden of proof and failed to meet that burden. There is a paucity of information regarding Hicks's receipt of money, expenditures, or payment to other creditors. Shinstine did not meet its burden of proof.

Further, if we allowed this disregard of the corporate form as Shinstine requests, it would eviscerate the LLC form and destroy its usefulness. Small LLCs sometimes go out of business and cannot meet their obligations through no wrongdoing of its members. This is a risk taken by businesses and individuals who do business with LLCs and any other LLC.

Shinstine also argues that the Uniform Fraudulent Transfer Act, chapter 19.40 RCW, provides another basis for piercing the corporate veil. Shinstine did not raise this argument below, it is not a manifest error affecting a constitutional right, and accordingly Shinstine cannot raise it for the first time on appeal. RAP 2.5(a).

II. Attorney Fees

Hicks requests attorney fees under RCW 4.84.010(6) and RCW 4.84.080 as the prevailing party.[6] Hicks substantially prevailed; he is entitled to $200 in statutory attorney fees.

[6] RCW 4.84.010(6) permits statutory attorney fees to the prevailing party upon judgment. RCW 4.84.080(2) permits $200 in statutory attorney fees following oral argument before this court.

In conclusion, we hold that making an improper distribution under RCW 25.15.235(1) alone does not provide a basis for disregarding the corporate form. We vacate the order disregarding the corporate form and holding Hicks personally liable.

We remand with instructions to vacate the trial court's findings of fact, conclusions of law, and judgment as to Hicks.

A majority of the panel has determined this opinion will not be published in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, P.J.

We concur:

Hunt, J.

Van Deren, J.