

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2012

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. 2011AP363
STATE OF WISCONSIN**

Cir. Ct. No. 2009CV12679

**IN COURT OF APPEALS
DISTRICT I**

ASSISTED LIVING CONCEPTS, INC.,

PLAINTIFF-APPELLANT,

v.

**SIEGEL-GALLAGHER, INC. AND SIEGEL-GALLAGHER MANAGEMENT
COMPANY,**

DEFENDANTS-RESPONDENTS,

**SIEGEL-GALLAGHER CONSTRUCTION COMPANY, NOVAE,
AMLIN CHAUCER, FARADAY ATRIUM, AND OMEGA LINESLIP
PARTICIPANTS AT LLOYDS OF LONDON, ZIMMERMAN ARCHITECTURAL
STUDIOS, INC., DSI ARCHITECTS, FORTNEY & WEYGANDT, INC. AND
HOUSTON CASUALTY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County:
THOMAS R. COOPER, Judge. *Affirmed.*

Before Fine, Kessler and Reilly, JJ.

¶1 PER CURIAM. Assisted Living Concepts, Inc., appeals from a summary judgment dismissing with prejudice its claims against Siegel-Gallagher, Inc. (“SGI”), and Siegel-Gallagher Management (“Management”). Assisted Living contends that the circuit court erred in dismissing its claims for breach of contract, negligence, indemnification, and a violation of WIS. STAT. § 100.18, and that the circuit court should have pierced the corporate veil. We agree with the circuit court’s conclusion that no contract exists, a conclusion that effectively dictates the fate of the other three claims, and we agree that piercing the corporate veil was not appropriate. Therefore, we affirm the judgment.¹

BACKGROUND

¶2 Assisted Living provides assisted and independent-living facilities for senior citizens across the United States. SGI is a real estate brokerage offering property leasing services and representation to buyers and sellers of buildings and land. Management offers property management services for rental properties and condominiums. Siegel-Gallagher Construction Company (“Construction”), a defendant below but not a party to this appeal, was formed in 2006 and offers “owner’s representative services” like obtaining various permits for construction projects and coordinating subcontractors. It is not disputed that the Siegel-Gallagher companies are related, though the scope of that relationship is a point of contention between the parties.

¹ By prior orders, we allowed the parties to submit briefs and appendices both under seal and in redacted form, then asked for clarification on the need for redaction. The sealed documents are hereby deemed unsealed only to the extent that they are quoted, referenced, or described in this opinion.

¶3 Assisted Living had been contemplating a \$50 million expansion project. In late 2006 or early 2007, Assisted Living met with three “Siegel-Gallagher” representatives. Assisted Living maintains that those representatives presented “Siegel-Gallagher” as a single firm. However, each individual’s business card associated him with a separate entity: SGI, Management, or Construction.

¶4 Assisted Living contends on appeal that as a result of this meeting and other representations about “Siegel-Gallagher’s” experience and skill in managing assisted living facility projects, an oral contract was entered for owner’s representative services. Assisted Living further contends that work under the oral contract began in 2007, invoices were submitted, and Assisted Living paid those invoices. A written agreement for owner’s representative services was entered on January 2, 2008; on its face, the contract is only between Assisted Living and Construction. When a breach of this contract allegedly occurred, Assisted Living terminated its relationship with Construction and filed suit.

¶5 Assisted Living’s complaint, as relevant here, alleges the same four claims against SGI and Management: breach of contract, negligence, indemnification, and violations of WIS. STAT. § 100.18, which prohibits the unfair trade practice of deceptive and misleading representations. Additionally, Assisted Living alleged that SGI was directing SGI, Management, and Construction, so Assisted Living sought to pierce the corporate veil and hold SGI and Management responsible for Construction, which Assisted Living contends is merely a shell company set up to procure the Assisted Living contract.

¶6 In September 2010, SGI and Management moved for summary judgment. Both asserted that they had no contract with Assisted Living, and that

Assisted Living could not meet the necessary elements for piercing the corporate veil. In response, Assisted Living introduced the theory of oral contracts with SGI and Management.

¶7 Following a hearing, the circuit court found that there was no contract, written or oral, between Assisted Living and either SGI or Management. It also ruled that neither defendant had a duty to Assisted Living, thereby defeating the negligence claims, and concluded that there was no fraud relative to the WIS. STAT. § 100.18 claims.² The circuit court additionally concluded that there was no manifest injustice to warrant piercing the corporate veil. Accordingly, the circuit court granted both summary judgment motions and dismissed the claims against SGI and Management with prejudice. Assisted Living appeals.

DISCUSSION

¶8 We review the circuit court's grant of summary judgment *de novo*, owing no deference to the circuit court's decision. *Selzer v. Brunsell Brothers, Ltd.*, 2002 WI App 232, ¶10, 257 Wis. 2d 809, 819, 652 N.W.2d 806, 810. Summary judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. *Ibid.*; *see also* WIS. STAT. § 802.08(2). We reverse a grant of summary judgment if the circuit court incorrectly decided the legal issues, or if material facts are in dispute. *Selzer*, 2002 WI App 232, ¶10, 257 Wis. 2d at 819, 652 N.W.2d at 810.

² It does not appear that the circuit court expressly addressed the indemnification claims, though we note that those claims presumed the existence of a contract.

¶9 The moving party has the burden to establish the absence of genuine issues of material facts. *Strasser v. Transtech Mobile Fleet Service, Inc.*, 2000 WI 87, ¶31, 236 Wis. 2d 435, 449, 613 N.W.2d 142, 150. “If the moving party makes a prima facie case for summary judgment, the reviewing court then examines the pleadings, affidavits, and depositions to determine whether any material facts are in dispute that would entitle the opposing party to a trial.” *Id.*, 2000 WI 87, ¶31, 236 Wis. 2d at 449–450, 613 N.W.2d at 150. We view the parties’ submissions in the light most favorable to the party against whom summary judgment is sought, and all reasonable inferences are to be drawn against the party seeking summary judgment. *Novell v. Migliaccio*, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 235–236, 783 N.W.2d 897, 899. The ultimate summary-judgment burden is on the party with the burden of proof at trial to show by admissible evidence that there are genuine issues of material fact that deserve a trial. *See Transportation Insurance Co. v. Hunzinger Construction Co.*, 179 Wis. 2d 281, 291–292, 507 N.W.2d 136, 140 (Ct. App. 1993).

I. Breach of Contract Claim.

A. Written Contract

¶10 The first claim Assisted Living levels against SGI and Management is a breach of contract claim. As relevant to this claim and the appeal, Assisted Living’s amended complaint alleged as follows:

32. On or about January 2, 2008, ALC and the SG Defendants [SGI, Management, and Construction] entered into a Master Owner’s Representative Agreement (the “Agreement”)....

....

59. ALC and Siegel-Gallagher [Inc. and Management] entered into a contract for owner's representation for various sites in the expansion project.

60. Pursuant to the Agreement, Siegel-Gallagher [Inc. and Management] was required to work on behalf of ALC and in ALC's interests to provide various services....

61. Siegel-Gallagher [Inc. and Management] materially defaulted in the performance of [their] duties, and breached [their] contract with ALC.³

¶11 The "Agreement" referred to in the complaint is, clearly and unambiguously, between Assisted Living and Siegel-Gallagher Construction Company only: Assisted Living has no written contract with SGI or Management. On that basis, summary judgment dismissing the breach of contract claims premised on the "Agreement" was appropriate.

B. Oral Contract

¶12 To get around the lack of a written contract, Assisted Living attempted to convince the circuit court, and this court on appeal, that oral contracts exist. The circuit court was not convinced and neither are we: on appeal, Assisted Living fails to demonstrate even the existence of any *elements* of a contract.

¶13 A contract consists of an offer, an acceptance, and consideration. *See Gustafson v. Physicians Insurance Co. of Wisconsin, Inc.*, 223 Wis. 2d 164, 173, 588 N.W.2d 363, 367 (Ct. App. 1998). The closest that Assisted Living comes to attempting to show these elements is the following excerpt from its appellate brief:

³ Assisted Living's claims against SGI and Management are virtually identical. They are set forth separately in the complaint but have been combined here for brevity.

Based upon the representations made by the SG-Defendants, in person and on their shared website, ALC was led to believe that it was dealing with a single, full-service real estate firm that had substantial resources and the professional wherewithal to handle its \$50 million project. ALC thus agreed to have the SG-Defendants work on its project and that work began in early to mid-2007. Invoices were submitted to ALC for this work, and ALC paid them, in 2007. The basis for this relationship was an oral agreement. [Record citations omitted.]

¶14 “In evaluating the formation of a contract, this court examines whether a contractual provision is ‘definite as to the parties’ basic commitments and obligations.” *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶22, 291 Wis.2d 393, 407–408, 717 N.W.2d 58, 66 (citation omitted). “A contract must be definite and certain as to its basic terms and requirements to be enforceable.” *Id.*, 2006 WI 71, ¶22, 291 Wis. 2d at 408, 717 N.W.2d at 66.

¶15 Nothing in Assisted Living’s complaint or its appellate submissions demonstrates any sort of “definite and certain ... basic terms and requirements” such that we could even begin to consider the existence of an oral contract with SGI or Management. Further, the complaint does not even allege that there was an oral contract. Summary judgment on the contract claims was appropriate.

II. Negligence and Indemnification Claims.

¶16 Assisted Living alleged that SGI and Management “owed a duty to ALC to exercise good faith judgment and perform to a standard consistent with that of one holding itself out as an owner’s representative for construction services.” However, Assisted Living relies on the “common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done” that “accompan[ies] every contract,” such that “a negligent failure to observe any of such condition is a tort as well as a breach of contract[.]” *Racine*

County v. Oracular Milwaukee, Inc., 2010 WI 25, ¶29 n.8, 323 Wis. 2d 682, 701, 781 N.W.2d 88, 97. In other words, Assisted Living contends that SGI and Management owe it a duty stemming from their contracts. As we have seen, however, no contracts exist between Assisted Living and SGI or Management, so there can be no corresponding duty and, thus, no claim for negligence based on failure to fulfill that duty.

¶17 Likewise, the sole basis for Assisted Living’s claims for indemnification is a clause in the “Agreement”—the written contract between Assisted Living and Construction. Thus, Assisted Living has no basis for an indemnification claim against SGI or Management. Summary judgment dismissing the negligence and indemnification claims against SGI and Management was not erroneous.

III. Violations of WIS. STAT. § 100.18.

¶18 Assisted Living contends that SGI and Management made untrue, deceptive, or misleading statements about their corporate structure and the experience of their employees, which induced Assisted Living to enter a contract. Assisted Living asserts that it subsequently suffered a pecuniary loss from the alleged breach of that contract.

¶19 WISCONSIN STAT. § 100.18(1) prohibits sellers, including sellers or providers of services, from making “any assertion, representation or statement of fact which is untrue, deceptive or misleading.” A misrepresentation claim under § 100.18 has three elements: (1) the defendant made a representation to “the public” with the intent to induce an obligation; (2) the representation was untrue,

deceptive, or misleading; and (3) the representation caused the plaintiff a pecuniary loss.⁴ *K&S Tool & Die Corp. v. Perfection Macine Sales, Inc.*, 2007 WI 70, ¶19, 301 Wis. 2d 109, 121–122, 732 N.W.2d 792, 798; *see also* WIS JI—CIVIL 2418.

¶20 Given the nature of the prohibitions in WIS. STAT. § 100.18, it is logical to conclude that it necessarily prohibits sellers from making misrepresentations about their *own* products or services in an attempt to “induce an obligation” or persuade a consumer to purchase those products or services. *See* WIS JI—CIVIL 2418. Accordingly, whatever misrepresentations SGI and Management did or did not make about their services, Assisted Living could not have suffered a pecuniary loss because of those misrepresentations: Assisted Living entered into no contract or purchase relationship with either company.⁵

IV. Piercing the Corporate Veil.

¶21 Assisted Living also asserts that the “SG-Defendants have always operated as a single business enterprise, with SGI-Construction being merely a paper company. Thus, the only equitable result would be to pierce SG-Construction’s corporate veil and to hold SG-Management and SG-Inc. responsible for the very substantial damages they have caused ALC to suffer.” As part of the basis for its challenge to the circuit court’s order, Assisted Living

⁴ The circuit court here ruled that there had been no fraud. However, intent to defraud is not an element of a WIS. STAT. § 100.18 claim. *See* WIS JI—CIVIL 2418 (representations “need not be made with ... an intent to defraud or deceive”).

⁵ Assisted Living acknowledged that it was aware that its written Agreement specifies only Construction as a party. Assisted Living considered this a “non-issue” because it had been dealing with “Siegel-Gallagher” all along. However, WIS. STAT. § 100.18 does not exist to protect buyers from erroneous assumptions.

complains that the inquiry for piercing the corporate veil is fact-intensive and not amenable to summary judgment.

¶22 Piercing the corporate veil is an equitable remedy. *Consumer’s Co-Op of Walworth County v. Olsen*, 142 Wis. 2d 465, 472, 419 N.W.2d 211, 213 (1988). Thus, even though we are in the summary judgment posture, we review the circuit court’s decision for an appropriate exercise of discretion. *Ibid.*

¶23 As a general rule, we do not lightly disregard the “legal fiction” of a corporation’s existence. *Id.* at 474, 419 N.W.2d at 213. However, “corporate separateness” may be “disregarded when observing it ‘would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim.’” *Rasmussen v. General Motors Corp.*, 2011 WI 52, ¶25, 335 Wis. 2d 1, 18, 803 N.W.2d 623, 631 (citation omitted). “The rule permitting piercing of the corporate veil ... reaches wrongful actions for which no adequate remedy at law exists.” *Benjamin Plumbing, Inc. v. Barnes*, 156 Wis. 2d 276, 283, 456 N.W.2d 628, 631 (Ct. App. 1990).

¶24 Wisconsin follows the “alter ego” doctrine for determining whether to pierce the corporate veil.⁶ See *Consumer’s Co-Op*, 142 Wis. 2d at 484, 419 N.W.2d at 217. This doctrine requires proof of three elements:

(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

⁶ We decline to adopt the “single business enterprise” theory set forth as an alternative methodology by Assisted Living.

(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 plaintiffs legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id., 142 Wis. 2d at 484, 419 N.W.2d at 217–218 (quoted source omitted).

¶25 The circuit court concluded:

I am not persuaded that it's a sham ... that the Construction is just a phony corporation.... Siegel Gallagher Construction was a valid corporation. It has – It's a real company with real assets and a real insurance policy. Whether there's coverage or not remains to be seen.

And there's no manifest injustice to [ALC] to require me to feel comfortable in piercing the corporate veil.

¶26 We discern no erroneous exercise of discretion. Assisted Living has failed to present any genuine issue of material fact regarding corporate control here. The complaint alleges only that the companies “acted in concert under the direction of Siegel-Gallagher, Inc., such that ... the entities had no separate mind, will or existence of their own, Siegel-Gallagher, Inc. used that control to violate the duties owed to ALC, and this action and control harmed ALC.”

¶27 Assisted Living's assertions represent its perceptions, not specific evidentiary facts. *See* WIS. STAT. § 802.08(3). Indeed, at least one of Assisted Living's witnesses testified to uncertainty over which company—SGI or Management—might be controlling the others. To the extent that Assisted Living attempts to hold SGI or Management liable for any duties “owed” under the contract, the request to pierce the corporate veil wrongly presumes the existence of contracts between those parties. To the extent that Assisted Living contends that

Construction was formed merely to induce a contract with Assisted Living, it does not so demonstrate—as the circuit court observed, Construction was formed well in advance of conversations with Assisted Living. Like the circuit court, we do not see evidence of any fraudulent behavior we should seek to combat by piercing the corporate veil, nor are we persuaded that no other remedy at law exists. Summary judgment in favor of SGI and Management was appropriate.

By the Court.—Judgment affirmed.

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

