

Cite as 2009 Ark. App. 851

**ARKANSAS COURT OF APPEALS**

DIVISION I

No. CA09-326

HOWE NOW, INC., ET AL.

APPELLANTS

V.

FISHING UNIVERSITY

APPELLEES

**Opinion Delivered** December 16, 2009APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT  
[NO. CV-2006-373-G]HONORABLE J. MICHAEL  
FITZHUGH, JUDGEAFFIRMED ON DIRECT APPEAL;  
CROSS-APPEAL DISMISSED**JOHN MAUZY PITTMAN, Judge**

This appeal is from an action in the Sebastian County Circuit Court to collect on a default judgment previously rendered by a federal court. The trial court held that appellant Jim Howe was personally liable for a corporate debt of Howe Now, Inc., finding that the debt was incurred while the corporate charter was revoked and that Jim Howe was actively engaged in the business during the period of revocation. Appellants argue on appeal that these findings are clearly erroneous. We affirm.

The individual appellants are Jim and Sarah Howe. They are the shareholders of Howe Now, Inc., a manufacturer of fishing lures. Howe Now contracted with Fishing University to air television endorsements of its products over a period of several years. Howe Now defaulted on its obligation to pay for the advertisements. In addition, Howe Now's corporate

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charter was revoked for failure to pay franchise taxes between January 1, 1998, and September 19, 1998. The question at trial was the liability of the individual appellants for the debt arising out of the corporate default. The trial court held that Mr. Howe was personally liable for the corporate debt in question because the debt was incurred while the corporate charter was revoked and because he had continued to be actively engaged in the business. The trial court found that Ms. Howe was not personally liable because there had been insufficient evidence to show that she had likewise been actively engaged in the business while the charter was revoked.

The law is well settled that officers and directors of a corporation who actively participate in its operation during the time when the corporate charter is revoked for failure to pay corporate franchise taxes are individually liable for debts incurred during the period of revocation. *See, e.g., Mullenax v. Edward Sheet Metal Works, Inc.*, 279 Ark. 247, 650 S.W.2d 582 (1983); *Lazelere v. Reed*, 35 Ark. App. 174, 816 S.W.2d 614 (1991). Mr. Howe does not dispute this, but simply argues that the evidence was insufficient to show that the debts in the present case were incurred during the period that the charter of Howe Now, Inc., was revoked.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but is instead whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). A finding is clearly erroneous when, although there is evidence to support it, the reviewing

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court on the entire evidence is left with a firm conviction that a mistake has been committed. *Chavers v. Epsco, Inc.*, 352 Ark. 65, 98 S.W.3d 421 (2003). Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*

Here, the parties' agreement expressly provided that the disputed debts were due and to be paid in the first two quarters of 1998. Furthermore, Bill Balsley, a partner in Fishing University, testified that the 1998 debts were incurred when the television program containing the endorsements was aired during the first two quarters of 1998. Mr. Howe testified that he informed Mr. Balsley that he was having financial problem in late 1997 that would prevent him from making the payments scheduled for 1998, and argues that this constituted an anticipatory breach on his part at a time when the corporate charter was still in force. However, Mr. Balsley characterized this discussion as negotiation for a reduced rate that ultimately resulted in failure, and the contradictions in the testimony were attributed to mistake. Given the trial judge's superior opportunity to assess the credibility of the witnesses, we cannot say that he clearly erred in finding that the debt was in fact incurred during the time that Howe Now's corporate charter was revoked. Consequently, we affirm on direct appeal.

The appellee/cross-appellant argues that appellants should have also been held liable on grounds of fraudulent conveyances of the corporate assets to relatives and insiders following their financial difficulties. We cannot address this issue because it is not properly before us. Appellee failed to file a timely notice of cross-appeal from the original judgment,

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which was entered December 16, 2008. Instead, some twenty days after the judgment, appellee filed an untimely Ark. R. Civ. P. 52(b) motion for clarification that resulted in an order that said, in essence, that the earlier order spoke for itself and that rejection of the fraudulent-conveyance claim was implicit in the amount awarded, which corresponded to the debts that came due during the revocation rather than the greater amount that would have been awarded had the fraudulent-conveyance claim been proven. Although appellee's February 20, 2009, notice of cross-appeal was filed within thirty days of the order of clarification, it was untimely with respect to the initial order, and a request for findings of fact and conclusions of law after an order has become final cannot be used as a means of resurrecting a claim already barred by finality. *Majors v. Pulaski County Election Commission*, 287 Ark. 208, 697 S.W.2d 535 (1985).

Affirmed on direct appeal; cross-appeal dismissed.

HART and GLOVER, JJ., agree.