RENDERED: August 3, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001650-MR

C & B, INC., NOW M & H, INC.;
BOBBY MATTHEWS AND CHARLES HUNTER — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01758

WMC CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: M & H, Inc.,[1] Bobby Matthews and Charles Hunter have appealed from a summary judgment wherein the Franklin Circuit Court on June 26, 2000, ruled in favor of WMC Corporation and allowed WMC to pierce M & H's corporate veil. M & H argues (1) that the trial court erred by failing to dismiss WMC's action for improper venue; (2) that the trial court erred by allowing

[1]M & H, Inc. was formerly known as C & B, Inc. For the purposes of this opinion all appellants will be referred to collectively as M & H. This case has been heard with C & B, Inc., now M & H, Inc. v. WMC Corporation, 1999-CA-000705-MR.

WMC to amend its complaint after a judgment had been entered; and (3) that the trial court improperly allowed WMC to pierce the corporate veil and to hold Bobby Matthews and Charles Hunter personally liable on the judgment. Having concluded that there is no genuine issue as to any material and that WMC was entitled to a judgment as a matter of law, we affirm.

On July 21, 1997, WMC and M & H entered into a real estate sales and purchase agreement whereby WMC agreed to purchase for the sum of $500,000.00 a 1.851-acre tract of land located in Franklin County, Kentucky at the intersection of US 60 and Chenault Road. WMC intended to develop a Microtel Hotel on the property. WMC refused to close the sale when Frankfort Inn Associates threatened to assert an interest in an option it claimed to hold in the property from a 1985 contract. On November 26, 1997, WMC filed suit against M & H for breach of contract and claimed that M & H was unable to provide it with a marketable title. WMC also sued Frankfort Inn Associates based on the interest it claimed in the property.

On December 24, 1997, M & H sold the subject property to MLRD, Inc. for $680,000.00.[2] In recognition of the litigation initiated by WMC, M & H and MLRD entered into a separate agreement wherein they attempted to protect themselves in the event WMC obtained a favorable judgment in its lawsuit against M & H. In essence, the agreement provided for $180,000.00 of the sale proceeds to be placed in an escrow account and that amount

[2]MLRD, Inc. was formerly known as Frankfort Inn Associates.

would not be payable to M & H, until WMC's claim against the property was resolved. Upon resolution of the litigation, the funds were to be paid to M & H.

On May 6, 1998, the Franklin Circuit Court granted summary judgment in favor of WMC against M & H on the issue of liability for breach of the sales and purchase agreement. On August 5, 1998, the Franklin Circuit Court ruled that WMC was not entitled to relief in the form of specific performance consisting of the transfer of the property because it had an adequate remedy at law for recovery of any damages. The circuit court also ordered that MLRD's motion for summary judgment be granted and that WMC release the notice of lis pendens it had filed against the subject property. Since specific performance of the real estate sale was no longer an option, this ruling by the circuit court left WMC to pursue monetary damages as its exclusive remedy against M & H. At this point, M & H and MLRD agreed to pay the escrowed funds to M & H's only shareholders, Matthews and Hunter.

WMC, unaware that the money had already been transferred to Matthews and Hunter, on September 24, 1998, filed a motion with the Franklin Circuit Court requesting that M & H be prohibited from liquidating or otherwise disposing of the $180,000.00 that was being held in escrow and for the imposition of a constructive trust over the proceeds in favor of WMC. On October 23, 1998, the trial court denied the motion as moot since Matthews and Hunter had already removed the funds from the escrow account and distributed the funds to themselves.

On December 15, 1998, a jury awarded WMC damages against M & H in the amount of $75,000.00. On March 1, 1999, a final judgment was entered by the trial court in favor of WMC awarding it $75,000.00 in damages plus $30,000.00 for costs and attorney's fees, for a total judgment against M & H of $105,000.00.[3]

On May 20, 1999, WMC filed a motion for leave to amend its complaint to add Matthews and Hunter as defendants. M & H responded and objected to the motion arguing that CR[4] 15.01 does not permit the amendment of a complaint after final judgment has been entered and that the Franklin Circuit Court had lost jurisdiction of the case. The defendants also asserted improper venue as a defense pursuant to CR 12.02(c). On June 15, 1999, the trial court entered an order granting WMC's motion to amend its complaint. The trial court stated that since it "retains jurisdiction to enforce a judgment even though it has been appealed to the Court of Appeals, this Court also retains jurisdiction to determine whether the Plaintiff's Amended Complaint may be filed." On March 20, 2000, WMC filed its motion for summary judgment and argued that the August 1998 transfer of M & H's corporate funds to its shareholders, Matthews and Hunter, was a prohibited distribution and that it constituted a fraudulent conveyance.

---

[3]The March 1, 1999, judgment was appealed in 1999-CA-000705-MR, which is being heard with the case sub judice. This Court has affirmed the judgment in 1999-CA-000705-MR also.

[4]Kentucky Rules of Civil Procedure.

The Franklin Circuit Court heard oral arguments on WMC's motion for summary judgment on May 18, 2000. M & H argued that summary judgment should not be granted because there were disputed facts concerning the elements of the claim which WMC was required to prove for the trial court to make a determination of liability under the Kentucky Business Corporation Act and Kentucky case law pertaining to piercing M & H's corporate veil. On June 26, 2000, the trial court ruled that M & H and Matthews and Hunter had violated KRS[5] 271B.6-400(3)(via KRS 446.070), and entered summary judgment against Matthews and Hunter jointly and severally for $105,000.00, the same amount as the original judgment against M & H. This appeal followed.

M & H first claims the Franklin Circuit Court failed to follow the applicable venue statutes and improperly permitted WMC to assert its cause of action against Matthews and Hunter. When the action against them was filed, Matthews and Hunter were residents of Woodford County and Fayette County, respectively; and the principle place of business for M & H was Woodford County. However, since the original cause of action pertained to real property located in Franklin County, that action had been brought in the Franklin Circuit Court.

M & H argues that the case sub judice is a transitory action governed by KRS 452.480, which states:

> An action which is not required by the foregoing provisions of KRS 452.400 to 452.475 to be brought in some other county

[5]Kentucky Revised Statutes.

> may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned [emphases added].

M & H argues that pursuant to KRS 452.480 the proper venue for the lawsuit against Matthews and Hunter was either Woodford County or Fayette County. WMC argues to the contrary that pursuant to KRS 452.450[6] or 452.460[7], venue was in Franklin

---

[6]KRS 452.450 provides:

> Excepting the actions mentioned in KRS 452.400 to 452.420 both inclusive, and in KRS 452.430, 452.440, 452.445, 452.455, 452.465, and 452.475, an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed [emphasis added].

[7]KRS 452.460 provides:

> (1) Every other action for an injury to the person or property of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done. Provided, that in actions for libel the action shall be brought in the county in which the plaintiff resides or in the county in which the newspaper or publication is printed or published, or in the county in which the transaction or act or declaration to which the publication relates is stated, or purported to have been done or taken place.

(continued...)

County.

While neither party cited Ford Motor Credit Co. v. Blackjack Coal Co.,[8] we believe that case properly addresses the venue issue that is before us. Ford Motor Company filed a suit in the Jefferson Circuit Court against Blackjack Coal for the deficiency on a promissory note which remained after the repossession of mining equipment that was subject to a security agreement. This Court reversed the circuit court's dismissal which had been based on improper venue. Similar to the case sub judice, Ford, the plaintiff, argued the applicability of KRS 452.450 on the grounds that the contract was to be performed in Jefferson County; Blackjack, the defendant, argued the applicability of KRS 452.480 on the grounds that the action was transitory and had to be brought in the county in which the defendant resided. In discussing KRS 452.450 and KRS 452.480, this Court stated:

> The courts of Kentucky have long held that these two sections must be construed together. It is obvious that KRS 452.480 applies only when those sections enumerated therein do not require the action to be brought in some other county. The court set out the applicable standard in Trinity

---

[7](...continued)

> (2) If an injury occurs on a river or stream dividing two or more counties, any county bounding the river at the point the injury occurred may be considered the county in which the injury is done for purposes of bringing the action.

[8]Ky.App., 609 S.W.2d 698 (1980).

Universal Ins. Co. v. Mills, 293 Ky. 463, 468; 169 S.W.2d 311, 314 (1943), as follows:

> [I]t is argued, that under Section 78 (KRS 452.480) of the Civil Code of Practice, this is a transitory action . . . since that section excludes from its provisions an action which is required to be brought in some other county by a foregoing section of the article of which it is a part; and, since Section 72 (KRS 452.450), which covers actions of this sort, is one of the foregoing sections of that article, it is patent that the provisions of Section 78 (452.480) cannot be relied on. . . .
>
> . . .
>
> [W]here the action is founded in contract, it may be brought in the county in which the contract is to be performed provided it is to be performed wholly or in all its essential parts in that county.[9]

Clearly, WMC's claims against M & H and Matthews and Hunter, individually, arose out of the contract concerning the sale of real estate located in Franklin County and that contract was to be performed in Franklin County. Accordingly, the Franklin Circuit Court was correct in ruling that it had venue of this action.

M & H also claims the trial court erred when it allowed WMC to amend its complaint to add Matthews and Hunter as defendants. M & H argues that an amendment to a complaint is only permitted during the pendency of an action and that in the present case the complaint was amended after a final judgment had

[9]Ford Motor Co., supra at 700-01.

been entered and after the trial court had lost jurisdiction.

In allowing the amendment to the complaint, the Franklin Circuit Court stated:

> The Plaintiff is attempting to amend the complaint in order to enforce a judgment rendered by this Court on March 1, 1999. Since this Court retains jurisdiction to enforce a judgment even though it has been appealed to the Court of Appeals this Court also retains jurisdiction to determine whether the Plaintiff's Amended Complaint may be filed.

In the case sub judice, the amendment to the complaint was sought solely for the purpose of enforcing the judgment rendered on March 1, 1999. CR 15.01 states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In the present case, we do not believe that the trial court abused its discretion by allowing WMC to amend its complaint.[10]

M & H also claims the trial court erred by granting a summary judgment against Matthews and Hunter that improperly pierced the corporate veil of M & H. The trial court's ruling was premised upon violations of KRS 271B.6-400(3) via KRS 446.070.[11] KRS 217B.6-400(1) and (3) state:

---

[10]Graves v. Winer, Ky., 351 S.W.2d 193 (1961); Givens v. Boutwell, Ky.App., 701 S.W.2d 146 (1985).

[11]KRS 446.070 reads: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

(continued...)

> (1) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (3) of this section.
>
> . . .
>
> (3) No distribution shall be made if, after giving it effect:
>
> (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or
>
> (b) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

Matthews and Hunter have consistently argued that there was no evidence that M & H was unable to pay its debts in the usual course of business or that the sum total of its liabilities exceeded the sum total of its assets. We find this argument unpersuasive and disingenuous. It is abundantly clear from reading the depositions of Matthews and Hunter that the distribution of the $180,000.00 in the escrow account to them as sole shareholders left the corporation unable to pay WMC's judgment. Moreover, it is abundantly clear from the record that M & H had no intention of ever satisfying WMC's judgment. In his

---

(...continued)
The focus of this opinion will be on whether M & H violated KRS 271B.6-400(3), and if so, whether the violation was sufficient to allow the corporate veil to be pierced.

deposition, Matthews was asked whether M & H ever had any intention of generating funds to pay the WMC judgment. Matthews responded, "No, I'm hoping we win on appeal and don't have to pay anything."

This Court recognizes that one of the main purposes of corporate formation is the exemption of corporate shareholders from individual liability in tort or contract beyond their agreed investments. This Court also recognizes that it is permissible to form a corporation with the avowed purpose of avoiding personal liability.[12] However, Kentucky law recognizes that under certain circumstances the corporate veil may be pierced. The three theories for piercing the corporate veil are the equity theory, the alter ego theory and the instrumentality theory.[13]

In WRW, the United States Court of Appeals for the Sixth Circuit affirmed a decision by the United States District Court for the Eastern District of Kentucky which had allowed the United States to pierce the corporate veil of WRW, a Kentucky mining corporation. WRW had been assessed civil liability for violations of the Federal Mine Safety and Health Act which had caused the deaths of two miners. Three individual defendants were the sole shareholders, officers, and directors of WRW. The Court in WRW pierced the corporate veil under the equity theory and the alter ego theory.

---

[12]18 Am.Jur.2d Corporations §51 (1985).

[13]United States v. WRW Corp., 778 F.Supp. 919 (E.D.Ky. 1991) (aff'd United States v. WRW Corp., 986 F.2d 138 (6th Cir. 1993)).

The leading case in Kentucky on shareholder liability is White v. Winchester Land Development Corp.,[14] where this Court addressed the alter ego theory as follows:

> As regards the alter ego formulation, the elements thereof have defined as follows: (1) that the corporation is not only influenced by the owners, but also that there is such unity of ownership and interest that their separateness has ceased; and (2) that the facts are such that an adherence to the normal attributes, viz, treatment as a separate entity, of separate corporate existence would sanction a fraud or promote injustice [citations omitted].[15]

In the case sub judice, we believe the undisputed facts establish that M & H did not have a separate identity from Matthews and Hunter. Matthews and Hunter were the sole shareholders and directors of M & H and the corporation's only business was the sale of the subject property. As stated in WRW, "[t]here was a complete merger of ownership and control of [the corporation] with the Individual Defendants."[16]

From the undisputed facts in the record, it is also clear that the second element of the alter ego test was satisfied. Matthews' and Hunter's distribution of the $180,000.00 in the escrow account in effect left M & H as a defunct corporation. The trial court referred to this by stating that Matthews and Hunter "looted" the corporate assets. From reading their depositions, it is also clear that Matthews and

---

[14]Ky.App., 584 S.W.2d 56 (1979).

[15]Id. at 61-62.

[16]WRW, supra at 924.

Hunter were fully aware that this distribution would leave M & H with no assets to pay the WMC judgment and that the corporation had no intention of ever generating funds to pay the judgment. This distribution of funds was in clear violation of KRS 271B.6-400(3)(a) and (b).

Matthews and Hunter argue that summary judgment was improper because there is a genuine issue as to a material fact surrounding the transfer to them of the $180,000.00 from the escrow account. Matthews and Hunter state in their brief that "[t]here was no evidence whatsoever that M & H was unable to pay its debts in the ordinary course of business." However, as discussed previously, it was clearly established by the testimony of Matthews and Hunter and by corporate documents that M & H was an insolvent corporation. It had a judgment against it for $180,000.00, and assets of approximately $1,885.00. We are not persuaded by Matthews' and Hunter's arguments that the debt owed to WMC did not arise in the ususal course of business nor that the determination of the insolvency of the corporation must be limited to the date the dividend was declared. The debt to WMC arose from a sales and purchase agreement involving the same property that M & H sold to MLRD that generated the $180,000.00 that was transferred to Matthews and Hunter. Furthermore, the transfer of the $180,000.00 from the escrow account to Matthews and Hunter is the very transaction which caused M & H to become insolvent and unable to satisfy the debt to WMC. To defeat the motion for summary judgment, Matthews and Hunter were required to

present at least some affirmative evidence demonstrating that M & H was not insolvent.[17] They have continued to fail in this regard.

We hold that there is no genuine issue as to any material fact concerning M & H's insolvency and its inability to pay its debts, that M & H had ceased to exist as a separate entity, and that to treat M & H as a separate entity would promote injustice. We further hold that based on the undisputed material facts of record WMC was entitled to personal judgments against Matthews and Hunter as a matter of law. Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Robert W. Kellerman
Frankfort, KY

BRIEF FOR APPELLEE:

Brent L. Caldwell
Stephen G. Amato
Melinda G. Wilson
Lexington, KY

ORAL ARGUMENT FOR APPELLEE:

Stephen G. Amato
Lexington, KY

[17] Lucchese v. Sparks-Malone P.L.L.C., Ky.App., 44 S.W.3d 816, 817 (2001).