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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001405-MR

MIKE STETTENBENZ AND
GAIL STETTENBENZ APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-01235

BUTCH'S ROD SHOP, LLC;
KENNETH D. "BUTCH" WHITAKER;
STEPHEN L. WHITAKER; AND
KENNETH W. WHITAKER APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellants, Mike and Gail Stettenbenz, appeal from an order of the Bullitt Circuit Court awarding them a judgment against Appellee, Butch's Rod Shop, LLC, in the amount of $12,901.73, for breach of a contract to complete the

restoration and customization of their classic car. The trial court dismissed the Stettenbenzes' other claims against Butch's Rod Shop, as well as all claims against Appellees individually.

In 2003, the Stettenbenzes purchased a 1966 Chevy Nova for $16,000. In August 2005, after the engine began to fail, they decided to have extensive restoration done to the vehicle and were referred to Butch's Rod Shop by several friends in the show car community. Kenneth "Butch" D. Whitaker and his sons, Stephen and Kenneth, were each shareholders of a one-third interest in the shop, and were all involved in the vehicle work. Thereafter, the Stettenbenzes met with Butch to discuss the planned work. Butch explained that the cost would be $45 an hour for labor plus the cost of the parts. In the event cash was paid, the labor cost would be $40 an hour. The Stettenbenzes would make a payment every two weeks for the work done on the car during that time period. Finally, Butch gave them a tentative estimate of $40,000 to $60,000 to complete the requested work. The Stettenbenzes agreed to all terms and, although a written contract was not executed, a mechanics lien was signed.

During the restoration, Mike Stettenbenz stopped by the shop weekly to check on progress, as well as made the regular agreed-upon payments. During this time period additional work was required not only because the car was in worse shape than initially thought, but also because the Stettenbenzes made several additional customization requests. In October 2006, the Stettenbenzes realized that they had spent more than they originally budgeted and asked Butch how much it

would take to finish the vehicle so that they could obtain a loan for the additional funds. The Stettenbenzes were provided with an itemized list of the tasks left to be completed, but the parties agreed that a more detailed estimate would be delivered at a later date.

In March 2007, the Stettenbenzes again spoke with Butch about the cost to complete the car. Butch estimated that $14,000 would totally finish the restoration work. Mike offered to pay the $14,000 up front but Butch requested that the bi-weekly payments continue as usual. No additional changes were made to the car's design. By April 2007, the Stettenbenzes had paid about $8,000 of the $14,000 and requested a progress report on the car. They were told that the remaining $6,000 would cover the cost of the parts, and the labor required to finish the car would be free. The Stettenbenzes did agree to pay an additional $100 for a rust-proofing agent. Accordingly, Mike tendered a check for $6,100 with a notation "66 Nova-complete" in the memo field.

By April 2008, the Stettenbenzes became concerned that the car was still unassembled and Mike was given permission to come into the shop and work on the car himself. However, the following August the Stettenbenzes were informed that Butch's Rod Shop was in financial trouble and was closing. On August 22, the Stettenbenzes removed all of the car parts from the shop. They were issued a refund check of $1,198.22 for the remaining parts that had not been ordered. By the time they removed the car from the shop, the Stettenbenzes had expended a total of $96,501.78 on the restoration work.

On September 29, 2008, the Stettenbenzes filed an action in the Bullitt Circuit Court against Butch's Rod Shop, LLC, as well as the Whitakers in their individual capacity. Therein, the Stettenbenzes asserted claims for negligence, negligent misrepresentation, fraud, breach of contract, and violation of the Kentucky Consumer Protection Act. Subsequently, in February 2009, after the suit was filed and with knowledge of the Stettenbenzes' claim against the corporation, the Whitakers filed Articles of Dissolution dissolving Butch's Rod Shop, LLC, which included an affidavit stating that there were no outstanding claims against the corporation. The Stettenbenzes thereafter filed an amended complaint adding Beverly Whitaker, Butch's wife and president of the corporation, as a party and asserting that the corporation and the Whitakers individually had violated the Kentucky Consumer Protection Act by misrepresenting the status of outstanding corporate debts in the Articles of Dissolution.

On March 27 and 28, 2012, a bench trial was conducted. Therein, the Stettenbenzes called an expert witness, Rod Tichenor, who testified as to the work and money that would be necessary to complete the car. Tichenor opined that depending on the condition of the car's panels underneath the paint, the cost to complete the car was in the range of $50,000 to $55,000, which included a figure of $3,000 to $8,000 for completion of the interior.[1]

On June 1, 2012, the trial court entered its Findings of Fact and Conclusions of Law. Therein, the court first determined that the parties' dealings had resulted

[1] The Stettenbenzes had not contracted with Butch's Rod Shop to restore the interior of the car as they had intended for that work to be done by a third party.

in two separate contracts, the first being made in August 2005 and the second in March 2007, and further that the second contract had resulted in a novation of the first contract. Based upon the evidence presented, the trial court concluded that Butch's Rod Shop had fulfilled the first contract but had breached the second contract for $14,000 to complete the restoration of the car. The trial court then noted that although expectancy damages were the standard measure of damages in a breach of contract case, the Stettenbenzes had failed to prove such damages with reasonable certainty. The trial court nevertheless imposed damages in the amount of $12,901.73 against Butch's Rod Shop to restore the Stettenbenzes to the position they occupied prior to the second contract (i.e., $14,000 less the $1,198.27 that was refunded). The trial court further ruled that the Stettenbenzes failed to prove their claims for negligent and fraudulent misrepresentation, or violation of the Kentucky Consumer Protection Act. Finally, the trial court rejected the Stettenbenzes' request to impose personal liability against the Whitakers, concluding that liability could not be imposed on the basis of the representations made in the Articles of Dissolution, nor had the Stettenbenzes satisfied the criteria necessary to pierce the corporate veil. The trial court subsequently denied the Stettenbenzes' motion to alter, amend or vacate and this appeal ensued.

In this Court, the Stettenbenzes argue that the trial court erred in calculating damages to restore them to their precontract status rather than awarding expectancy damages, which are the standard measure of damages for a breach of service contract. *See Hogan v. Long*, 922 S.W.2d 368 (Ky. 1995). Appellees, on the other

hand, argue that the trial court properly found that the Stettenbenzes did not prove expectation damages with sufficient specificity because their expert was only able to state a range of damages that was dependent upon the underlying condition of the vehicle.

It is well-established that damages for breach of a contract are normally that sum which would put an injured party into the same position it would have been in had the contract been performed. *Hogan,* 922 S.W.2d at 371. However, as the trial court herein observed, "damages must always be proven with reasonable certainty[,]" *Curry v. Bennett*, 301 S.W.3d 502, 506 (Ky. App. 2009) (citing *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401-02 (Ky. 1985)), and "contingent, uncertain and speculative damages generally may not be recovered." *Id.* (Citing *Spencer v. Woods*, 282 S.W.2d 851, 852 (Ky. 1955). "But where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages." *Id.* In other words, "Kentucky law does not require [a plaintiff] to provide exact calculations of its damage -- an estimation may suffice if it proves damages with 'reasonable certainty.'" *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328 S.W.3d 195, 205 (Ky. App. 2010). *See also Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680 (Ky. App. 2009).

Herein, the fact of damage was proven with reasonable certainty as the trial court found that Butch's Rod Shop breached the March 2007 contract by failing to complete restoration of the car. As a result of that breach, the Stettenbenzes are

now required to seek the services of another body shop to complete and assemble the car. The Stettenbenzes' expert estimated that completion, including the interior, could cost anywhere from $50,000 to $55,000, depending upon the condition of the car's panels underneath the paint. In addition, Tichenor stated that the cost of the interior, which no one disputes was not included in the parties' agreement, was $3,000 to $8,000 depending on what options the Stettenbenzes chose. Although Appellees offered testimony disputing the nature of the work remaining on the car, they offered no expert testimony of their own refuting Tichenor's cost estimates.

Although the evidence presented would require the trial court to speculate to a certain extent about the cost to complete the Stettenbenzes' car, the unrefuted expert testimony was the Stettenbenzs would be required to expend a minimum of $42,000[2] to complete the exterior of the car as a direct result of the breach of contract. Thus, we are of the opinion that at least $42,000 in damages was proven with reasonable certainty. Accordingly, we reverse on this ground and remand for a determination on the issue of expectancy damages.

The Stettenbenzes next argue that the trial court erred in failing to assess damages against the Whitakers individually under a piercing the corporate veil theory and/or because of the manner in which the corporation was dissolved. Specifically, the Stettenbenzes allege that Butch's Rod Shop was a mere instrumentality of the Whitakers, that the Whitakers exercised control over the

[2] $42,000 represents Tichenor's estimate of the minimum cost of completion, $50,000 less the maximum estimate attributable to the interior, $8,000.

shop in such a manner as to harm them, and that a refusal to disregard the corporate entity would subject them to unjust loss.

It is widely accepted that a corporation should be viewed as a separate legal entity. *Dare To Be Great, Inc. v. Commonwealth ex rel. Hancock*, 511 S.W.2d 224, 227 (Ky. 1974). As a result, a court will disturb the legal fiction of corporate separateness only in the rarest of circumstances.

Morgan v. O'Neil, 652 S.W.2d 83, 85 (Ky. 1983) ("Holding a shareholder in a corporation individually liable for a corporate debt is an extraordinary procedure and should be done only when the strict requirements for imposing individual liability are met."); *Schultz v. Gen. Elec. Healthcare Fin. Servs. Inc.*, 360 S.W.3d 171, 174 (Ky. 2012). Recently, in *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, 155 (Ky. 2012), our Supreme Court explained:

> Piercing the corporate veil is an equitable doctrine invoked by courts to allow a creditor recourse against the shareholders of a corporation. In short, the limited liability which is the hallmark of a corporation is disregarded and the debt of the pierced entity becomes enforceable against those who have exercised dominion over the corporation to the point that it has no real separate existence. A successful veil-piercing claim requires both this element of domination and circumstances in which continued recognition of the corporation as a separate entity would sanction a fraud or promote injustice. The leading Kentucky case on piercing, *White v. Winchester Land Development Corp*., 584 S.W.2d 56 (Ky. App. 1979), like decisions from courts across the country, refers to this two-part test as the "alter ego" test. In recent years, courts and commentators have recognized piercing by using various tests and formulations, most commonly the "alter ego" and "instrumentality" tests, and by identifying common

> characteristics of corporations which have forfeited the right to separate legal existence . . . .

As observed in *Inter-Tel Technologies,* a Kentucky court may proceed under the traditional alter ego formulation or the instrumentality theory because the tests are essentially interchangeable. Under either approach, two elements must be met: (1) the loss of corporate or entity separateness, as established by analysis of eleven factors; and (2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice. In assessing the first element, Kentucky courts look to factors such as the following:

> (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.

Id. at 163 (citing *Judson Atkinson Candies, Inc. v. Latini–Hohberger Dihmantec*, 529 F.3d 371, 379 (7th Cir. 2008)). As to the second element, a plaintiff need not establish all the elements of a common law fraud claim, but it must show that some injustice " beyond the creditor's mere inability to collect from the corporate debtor." *Inter–Tel Technologies*, 360 S.W.3d at 164 (citing *Sea–Land Services, Inc. v. Pepper Source,* 941 F.2d 519, 522-23 (7th Cir. 1991)).

The Stettenbenzes argue that loss of corporate separateness was evidenced by the manner in which the Whitakers managed and operated Butch's Rod Shop. They point out that the Whitakers maintained a high degree of control over the day-to-day management and operation of the shop since all employees were family members, that there was no evidence of corporate meetings or minutes, and that the corporation had no assets. Moreover, the Stettenbenzes contend that the Whitakers exercised control over the corporation in such a way as to defraud or harm them, even going so far as to file false Articles of Dissolution to render any judgment against the corporation uncollectable.

We are of the opinion that the Stettenbenzes' position is over simplistic and ignores the reality of many closely held or family corporations. Clearly, because of its make-up, a family corporation inherently lacks the separation between shareholders and management seen in a large corporation. Although the Whitakers concede that they maintained a high level of control over day-to-day operations, merely exercising control is insufficient to justify imposing personal shareholder liability unless such control is calculated to defraud or harm the corporation's creditors. *Inter-Tel Technologies*, 360 S.W.3d at 167-168.

Based upon the evidence presented during the bench trial, the trial court specifically found that Butch's Rod Shop maintained its own bank account where revenues were deposited and from which corporate taxes were paid; that all employees received a salaried wage; that the corporation leased a building where the shop was located; and that the Whitakers filed annual corporate reports with the

Kentucky Secretary of State. The trial court determined that although the business closed due to financial hardship, there was no evidence that it was purposely undercapitalized, nor was there any indication of malfeasance of corporate assets in dividends or the use of corporate funds to pay some debts over others. Although the trial court noted the absence of proof concerning the occurrence of corporate meetings, it noted that the Whitakers had an understanding of the corporate structure. Finally, the trial court concluded that there was no evidence that the shop closed its doors to intentionally avoid finishing the Stettenbenzes' car or defraud them in some manner.

We agree with the trial court that there was simply "not an egregious failure to observe legal formalities and disregard distinctions between the individuals and the corporation." As previously noted, piercing the corporate veil "is an extraordinary procedure and should be done only when the strict requirements for imposing individual liability are met." *Schultz*, 360 S.W.3d at 174. The Stettenbenzes have failed to show that an injustice has occurred beyond their mere ability to collect from Butch's Rod Shop. As such, the trial court properly refused to impose individual liability upon the Whitakers.

The Stettenbenzes also contend that Kentucky Revised Statutes (KRS) 271B.14-020[3] creates personal liability for filing a false affidavit with the Secretary

[3] KRS 271B.14-020 provides:

> (1) A corporation's board of directors may propose dissolution for submission to the shareholders.
>
> (2) For a proposal to dissolve to be adopted:

of State's office. Specifically, the Stettenbenzes take issue with the fact that the affidavit in the Articles of Dissolution stated that there were no outstanding claims against Butch's Rod Shop, and that some but not all of its debts had been paid. Appellees respond that because the shop provided the Stettenbenzes with all of the parts paid for and refunded the additional monies, it no longer had an obligation or the ability to complete the car after the business closed. Further, Appellees point out that at the time the Articles of Dissolution were filed, the corporation had no outstanding liquidated debts, only the Stettenbenzes' unliquidated contingent claims that had not yet been adjudicated.

> (a) The board of directors shall recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and
>
> (b) The shareholders entitled to vote shall approve the proposal to dissolve as provided in subsection (5) of this section.
>
> (3) The board of directors may condition its submission of the proposal for dissolution on any basis.
>
> (4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with KRS 271B.7-050. The notice shall also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.
>
> (5) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (3)) of this section require a greater vote or a vote by voting groups, the proposal to dissolve to be adopted shall be approved by a majority of all votes entitled to be cast on that proposal.

We agree with the trial court that KRS 271B.14-020 merely sets forth the procedural requirements necessary to dissolve a corporation and has no provision for imposing personal liability. *See Morgan,* 652 S.W.2d at 85. As the trial court noted, the damage, if any, caused by the failure to file an accurate affidavit should be dealt with by whatever administrative remedies are available through the Secretary of State's office. Furthermore, we find no merit in the Stettenbenzes' policy argument that such a ruling would allow a corporation to dissolve at any time and avoid liability. Such ignores the plain language of KRS 271B.14-050[4] which imposes liability upon a corporation even after dissolution. If any corporate assets exist, the judgment can be collected from them.

For the reasons set forth herein, we reverse the decision of the Bullitt Circuit Court as to its determination of the amount and type of damages to be awarded to the Stettenbenzes. However, we affirm the trial court's judgment in favor of Appellees in their individual capacities

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

[4] KRS 271B.14-050 provides in relevant part that: (2) Dissolution of a corporation shall not: . . . (e) Prevent commencement of a proceeding by or against the corporation in its corporate name; (f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution;

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Although the majority's well-written opinion accurately recites the applicable law, I disagree with its conclusion that the corporate veil should not be pierced.

The Appellants waived their right to a trial by jury and submitted this action to a trial before the court. Consequently, great discretion is afforded to the trial court in making its findings of fact. However, I believe the trial court ignored certain pivotal facts establishing that this shell corporation had no assets and has not conducted as a corporation. Those facts are as follows: (1) The tools and machinery used on a day-to-day basis were allegedly personally owned by the individual Appellees; (2) There was no evidence regarding corporate meetings of the corporation; (3) There were no minutes kept by the corporation; and (4) The Appellees exercised a high degree of control over the day-to-day operation of the corporation.

I further point out that after this action was filed, Appellees falsely stated in their Articles of Dissolution there were no known outstanding claims against the corporation. The Appellees used a "pick and choose" distribution of alleged corporate funds to pay some debts and not pay others. They paid all suppliers allowing them to continue their personal credit while using this shell corporation to defeat the attempt to collect for this debt.

Piercing the corporate veil requires intentional wrongdoing and proof of lack of corporate separation. This corporation did the winding down of debt incorrectly and conveniently kept some assets in the personal names of Appellees and placed

all obligations in the shell corporate name, which was not properly documented by any corporate records.

The partial reversal of the judgment by the majority is a hollow victory since this will incur more legal fees to pursue an action against a judgment-proof debtor. Because of the injustice I perceive in the dealings of Butch's Rod Shop with the Appellants, I cannot vote with the majority.

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