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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000139-MR

JUDY WELLS REALTOR, INC.,
D/B/A JUDY WELLS, INC., AND
JUDY WELLS, INDIVIDUALLY — APPELLANTS

v. — APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 12-CI-01661

TAMMY J. STAGGS, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT, AND MAZE, JUDGES.

ACREE, JUDGE: This is a breach of contract case. The Boone Circuit Court entered judgment against Appellants Judy Wells, individually, and Judy Wells Realtor, Inc. d/b/a Judy Wells, Inc. (collectively, Wells).[1] Wells takes issue with

[1] For convenience, we refer to these parties jointly as "Wells". Where necessary, and where the context requires, we will differentiate between the corporation and the individual.

the circuit court's damages award and argues the court erred by entering judgment against Judy Wells individually. We affirm.

I. Facts and Procedure

At all times relevant to this matter, Judy Wells was a real estate broker, licensed pursuant to KRS[2] 324.046(1). She was the sole shareholder and sole director of Judy Wells Realtor, Inc., with its principal office in Dry Ridge, Kentucky, and a satellite office in Walton, Kentucky. From a real estate licensure standpoint, Judy Wells was also her company's principal broker. A principal broker "is the single broker responsible for the operation of the company with which he or she is associated[.]" KRS 324.010(4).

Wells, the company, was also party to a franchise agreement with RE/MAX of Kentucky/Tennessee, Inc. (Franchisor) and operated that business as RMGC, LLC, d/b/a RE/MAX Advantage Group (RMGC). The franchise agreement was to expire on May 19, 2013.

Tammy Staggs was a licensed real estate sales associate. A real estate sales associate is a person licensed under KRS 324.046(2) and who "is affiliated with a Kentucky-licensed principal broker and who, when engaging in real estate brokerage, does so under the supervision of the principal broker[.]" KRS 324.010(6). Staggs was affiliated with Wells and RMGC, and worked out of the principal office in Dry Ridge.

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[2] Kentucky Revised Statute.

In April 2011, Tammy Staggs and Judy Wells discussed assignment of the rights, benefits and attendant obligations under RMGC's franchise agreement. Many of those attendant obligations were the responsibility of the business's principal broker as a matter of Kentucky licensure law. Completing the assignment, therefore, necessarily required shifting principal broker responsibility from Judy Wells to Tammy Staggs. Until that important aspect of the agreement was resolved, the Franchisor was disinclined to sign off on the assignment. The parties set about trying to solve this problem.

In late March, 2011, Staggs created Tammy J. Staggs, LLC, appellee in this case, to acquire the franchise interest in that name. Staggs was to pursue obtaining her real estate broker's license immediately. Until then, in order to maintain compliance with Kentucky licensure law, Wells would remain the principal broker and retain 51% of the rights and obligation under the franchise agreement. Wells would manage the satellite office in Walton at her own expense but was relieved of her duty to pay franchise agent fees. Staggs served as designated manager[3] of the Dry Ridge office and was responsible for all costs and expenses associated with running the business. Wells believed this temporary situation would last about ninety days. Having negotiated these points, and with a little more than two years left on the term of the franchise agreement, the parties

[3] "'Designated manager' means a licensed sales associate or broker who manages a main or branch office for the principal broker, at the principal broker's direction, and has managing authority over the activities of the sales associates at that office[.]" KRS 324.010(11).

executed the assignment agreement on April 8, 2011. The Franchisor approved of the agreement.

The consideration to be paid by Tammy J. Staggs, LLC, to RMGC, LLC and Judy Wells, Inc. was $35,000.00. RMGC, LLC and Judy Wells, Inc. were to convey a 49% interest in the franchise at the time the agreement was signed. The $35,000.00 was paid and the 49% interest was conveyed. The remaining 51% was to be conveyed upon the Franchisor's written approval of the assignment agreement. This was the only condition precedent to the conveyance of the remaining 51% interest. Nothing was mentioned in the agreement about how long Wells would continue to serve as principal broker while Staggs pursued her broker's license. However, there were other aspects of the assignment agreement.

The assignment agreement also included conveyance of title to Staggs of certain personalty, including desks, chairs, filing cabinets, and supplies, identified in an exhibit attached to the agreement. No specific value was assigned to the personalty as a group or by individual item.

Primarily because of the unavailability of required courses, it took Staggs much longer than expected to obtain her broker's license, and that delay led to some discord between the parties. The temporary relationship of the parties that Wells thought would last until July 2011 actually ran from April 2011 to July 2012. After Staggs received her broker's license in July 2012, the Franchisor approved the franchise sale. At that point, the remaining term of the franchise agreement was about ten months.

Staggs demanded that Wells perform the contract and transfer the remaining 51% interest in the franchise to Tammy J. Staggs, LLC. Wells refused. She withheld the remaining interest in the franchise and intended to do so until she received additional compensation from Staggs for having served as principal broker for longer than she anticipated. Staggs was unwilling to further compensate Wells.

Staggs filed this breach of contract action against Judy Wells, Inc., on August 21, 2012, demanding that the corporation be required to specifically perform the contract by conveying to Staggs the remainder of its interest in the franchise. While the action was pending, the parties continued to operate the business under the temporary plan but, unsurprisingly, their relationship deteriorated further. Wells caused a business checking account to be frozen, preventing Staggs from operating the Dry Ridge office. Further, Wells appears to have "turned in" Staggs's real estate license to the Kentucky Real Estate Commission (ending the principal broker – sales associate relationship), thereby preventing her from selling real estate without abandoning the company and affiliating with a different broker. *See* KRS 324.310(1); 201 KAR[4] 11:147, Section 1.

[4] Kentucky Administrative Regulation.

Staggs moved for leave to file a first amended complaint, seeking to add Judy Wells as a defendant in her individual capacity, to add a claim of fraud, and to request rescission of the contract. The court granted the motion, and the amended complaint was filed on March 19, 2013.

A bench trial was held on October 18, 2013, and a judgment entered on November 1, 2013. The Court found that Judy Wells, Inc., and Judy Wells, individually, breached their obligations to Staggs when they refused to transfer the remaining 51% interest in the franchise upon approval by the Franchisor.[5] Yet it struggled to award damages.

> While [Staggs] has established a breach, its proof of damages is lacking. The parties offered very little evidence about their income and expenses. There simply was no accounting offered to this Court for which the Court could award damages. To do so would be nothing more than speculation.

Nevertheless, the Court concluded Staggs was entitled to recover the purchase price of $35,000.00. No further damages, nor any set-off, was awarded. Judgment in the amount of $35,000.00 was entered against Judy Wells, Inc., and Judy Wells, individually, joint and severally.

Wells filed a CR[6] 59.05 motion to alter, amend, or vacate the judgment. She argued the assessment of liability against Judy Wells, individually, was in error as she was not a party to the contract, and the award of damages was in error because it amounted to a rescission yet Wells was not restored to her pre-contract position

[5] The court denied Staggs's fraud claim, finding it failed to carry its burden of proof.
[6] Kentucky Rules of Civil Procedure

or allowed an offset for any profit or benefits received by Staggs. The circuit court denied Wells' motion by order entered December 27, 2013. The circuit court explained:

> Neither party presented the Court with an accounting of the business for the period of time between the execution of the contract and the breach of the contract. The Court was not presented with competent evidence from which the Court could determine whether the business earned a profit or suffered a loss. [Wells] seeks a set off for the value of personalty but there was insufficient evidence presented to the Court from which the Court could make such an award. As the Court pointed out in the Judgment, a Court cannot speculate as to damages.
>
> The second argument of error regards the personal judgment of Judy Wells being jointly and severally liable with her corporation. . . . The Court determined that [Wells] did not carry its burden of proof on the fraud cause of action. Although Judy Wells entered into the subject contract using a nonexistent corporate name, the Court concluded Judy Wells did not intend to defraud [Staggs]. Rather, it was additional evidence that Judy Wells so disregarded the formalities of her corporation that she didn't even know the actual name of her corporation. As stated in the Judgment, Judy Wells received significant personal consideration under the contract. She refused to allow her corporation to complete its obligations under the contract unless she received additional personal consideration. She operated this business transaction as though Judy Wells, Inc. or Judy Wells Realtor Inc., whatever name she used at various times, was one and the same as herself. Whether under a breach of contract theory, or "piercing the corporate veil" the result is the same under the law. Judy Wells is obligated under the law for damages that she caused by her conduct.
>
> The Judgment of this Court conforms to the evidence. Were this Court to set aside its conclusion that Defendant Judy Wells was personally liable, [Staggs] could move to

> file a supplemental complaint and more specifically set forth a cause of action for piercing the corporate veil. The Court has already made findings that demonstrate that Judy Wells' corporation was nothing more than her instrumentality in name only, that she improperly exercised control over the corporation to harm [Staggs], and that Judy Wells by doing so subjected [Staggs] to loss.

(R. at 174-75)(internal citations omitted). Wells appealed.

II. Standard of Review

Our review of a circuit court's findings of fact following a bench trial is to determine whether those findings are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Factual findings are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is "some evidence of substance and relevant consequence, having fitness to induce conviction in the minds of reasonable people." *Abel Verdon Const. v. Riveria*, 348 S.W.3d 749, 753 (Ky. 2011). Reviewing courts are prohibited from disturbing the circuit court's factual findings that are supported by substantial evidence, despite whether a contrary conclusion might have been reached. *Moore,* 110 S.W.3d at 354.

Notwithstanding the deference due the circuit court's factual findings, its conclusions of law, reached after making its findings, are reviewed *de novo*. *Hoskins v. Beatty*, 343 S.W.3d 639, 641 (Ky. App. 2011).

III. Analysis

Wells advances the same claims of error presented to the circuit court in her post-trial motion: that (1) the circuit court's damages award offends Kentucky law because the essential elements of rescission were not met and the court failed to offset the award; and (2) the circuit court erred by entering judgment against Judy Wells individually.

A. Damages

Wells adamantly argues that, while the judgment is couched in terms of an award for breach of contract, in actuality the circuit court's judgment amounts to an improper rescission of the contract. And, so the argument goes, the court's decision cannot stand because it violates the underlying principle of rescission that the parties be restored to the *status quo ante*. *See Beattie v. Friddle*, 229 Ky. 361, 17 S.W.2d 246, 248 (1929) ("Rescission of a contract even for a substantial breach thereof may not be decreed if the position of the parties has been changed so that the former status may not be restored.").

No mention of rescission is contained in the judgment. While Staggs requested rescission as a possible remedy, she also styled her initial claim as one for breach of contract and asked for any and all appropriate relief. The circuit court found it appropriate to award Staggs damages springing from Wells' breach of the contract. He measured the damages as being equal to the price Staggs paid for an asset she never received – control of the franchise. We concur in the circuit court's decision.

When Wells refused to perform the contract as written, Staggs had the right to treat this action as a breach and demand contract damages brought about by the wrongdoing of Wells. Contract damages serve to compensate the injured party, and must always be proven with reasonable certainty. *Ford Contracting, Inc. v. Kentucky Transp. Cabinet*, 429 S.W.3d 397, 407 (Ky. App. 2014); *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985). "[U]ncertain, contingent, and speculative damages" are not recoverable. *Spencer v. Woods*, 282 S.W.2d 851, 852 (Ky. 1955). It was Staggs's burden as the one seeking contract damages to introduce sufficient proof to allow the circuit court to calculate damages without engaging in speculation. *See Barnett v. Mercy Health Partners–Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky. App. 2007) (plaintiff must demonstrate damages resulting from defendant's breach of the contract). Staggs proved that she paid $35,000.00 to acquire the franchise. She also proved that Wells failed to convey the entirety of the franchise. All remaining items of damages sought by Staggs for income retained by Wells under a franchise agreement that should have been Staggs's, as well as any offset Wells could claim for management services she performed, failed for lack of proof. We also concur in that decision.

Wells argues she submitted ample evidence establishing Staggs was not actually harmed by her breach and, at the very least, she was entitled to set off the value of the personalty included as part of the sale, all of which has remained in Staggs' possession. We are not convinced.

The parties offered into evidence various financial documents purporting to establish the success – or failure – of the business under Staggs' control along with their own (contradictory) interpretations of those documents. The circuit court was well aware of this evidence. It simply found it incompetent and unconvincing. The circuit court, in essence, found that the parties submitted partial snapshots allegedly measuring the health of the business, yet they failed to paint a coherent, complete picture from which the circuit court could determine the business's wellbeing. Many of the documents that Wells relies upon to establish that Staggs "earned considerable sums" are the same ones the circuit court found unpersuasive and unconvincing. In light of these findings, we cannot say the circuit court erred when it declined to find that Staggs suffered no harm as a result of Wells' conduct in the operation of a franchise that should have been Staggs's.

Further, Wells equally failed to adequately prove set off damages leaving the entirety of the $35,000.00 damages award intact. All damages must be proved to a reasonable degree of certainty. *Ford Contracting,* 429 S.W.3d at 407. The circuit court specifically found, acting in its capacity as the finder of fact, that Wells presented insufficient evidence to the court from which it could make a set off award. We defer to a significant degree to the findings of the circuit court operating as the fact finder, for it had the opportunity to observe, scrutinize, and assess the credibility of witnesses. CR 52.01; *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Wells has identified nothing which causes us to doubt the adequacy of the circuit court's decision. On this issue, we affirm.

B. Judgment against Judy Wells, Individually

Wells also argues the circuit court erred by entering judgment against Judy Wells personally. She correctly points out that Judy Wells, the individual, was not a party to the contract. The contract was between RMGC, LLC and Judy Wells, Inc. on one side, and Tammy J. Staggs, LLC on the other. Wells also states, correctly so, that, generally, under Kentucky law an individual shareholder is not personally liable for the debts of a corporation. KRS 271B.6-220(2). "That a corporation has a single shareholder is not a basis for setting aside the rule recited in subsection (2) of this section." KRS 271B.6-220(3).

Kentucky, like most states, recognizes an exception for setting aside the corporate shield, otherwise known as piercing the corporate veil. It is "an equitable doctrine to be applied by the courts." *Inter-Tel Technologies, Inc. v. Linn Station Properties*, LLC, 360 S.W.3d 152, 165 (Ky. 2012). Our Supreme Court recently discussed corporate veil piercing at length in *Inter-Tel Technologies*, *supra*, explaining:

> 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.

Id. at 155. Accordingly, to pierce a corporate veil a court must find two separate elements: "(1) domination of the corporation resulting in a loss of corporate separateness and (2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice." *Id.* at 165. "Courts should not pierce corporate veils lightly but neither should they hesitate in those cases where the circumstances are extreme enough to justify disregard of an allegedly separate corporate entity." *Id.* at 168.

In the case before us, the circuit court found a lack of corporate separateness between Judy Wells individually and Judy Wells, Inc. It noted that Wells, individually, so disregarded the formalities of her corporation that she did not even know the corporation's actual name, resulting in her entering into the subject contract using a nonexistent corporate name.[7] The circuit court also found that the corporation was nothing more than Wells' instrumentality in name only, and that she treated the corporation as if it was one and the same as herself. Furthermore, the circuit court opined that continued recognition of the corporation would promote an injustice. Wells individually was the only actor authorized to direct the actions of Judy Wells, Inc. She requested additional *personal* compensation stemming from her work as principal broker before she would

[7] This was the basis of Staggs's fraud claim. The subject contract was between Tammy J. Staggs, LLC and Judy Wells, Inc. But Judy Wells, Inc. is a non-entity. The legal name of the corporation is Judy Wells Realtor, Inc.

authorize the transfer of the remaining franchise interest on behalf of the corporation. Stated differently, she would not allow the corporation to act until and unless she was personally compensated for her individual efforts. This, the circuit court found, was entirely unjust and worked an unfairness to Staggs.

In sum, we cannot say the circuit court decision's offends Kentucky law regarding corporate veil piercing or is premised upon insufficient evidence. Again, we affirm.

IV. Conclusion

For the foregoing reasons, we affirm the November 1, 2013 Judgment of the Boone Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Arnold Taylor Covington, Kentucky	C. Ed Massey Erlanger, Kentucky