

RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000468-MR

RIGGS GUNS, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-CI-04885

WINFIELD C. UNDERWOOD, D/B/A BLUEGRASS
INDOOR RANGE; GREENWOOD HOLDINGS, LLC,
D/B/A BLUEGRASS INDOOR RANGE; LOST LODGE
PROPERTIES, LLC, D/B/A BLUEGRASS INDOOR
RANGE; LOST LODGE HOLDINGS, LLC, D/B/A/
BLUEGRASS INDOOR RANGE; AND PATRICIA
HAFERS

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, NICKELL AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Riggs Guns, Inc. appeals from findings of fact,
conclusions of law and judgment rendered by the Fayette Circuit Court dismissing

its claims against Winfield C. Underwood, d/b/a/ Bluegrass Indoor Range and other Defendants, arguing that the court erred in failing to properly apply the factors for piercing the corporate veil to the evidence. We find no error and AFFIRM the judgment on appeal.

In 2001, Winfield Underwood incorporated Greenwood Holdings, LLC and Greenwood Lodge, LLC. The companies were formed for the purpose of operating an indoor shooting range in Lexington, Kentucky. Greenwood Holdings, LLC was created to hold title to certain real property, with Greenwood Lodge, LLC formed to operate the retail business.

Sometime thereafter, Underwood - in his capacity as member of Greenwood Lodge, LLC - signed a written agreement to purchase inventory and equipment from Riggs Guns. The agreement was not signed and accepted by Riggs Guns. Nevertheless, the inventory and equipment were delivered and received by Greenwood Lodge, LLC. After an initial payment of \$75,000 to Riggs Guns was made, a dispute arose between the parties as to whether Greenwood Lodge, LLC had been overcharged. Greg Riggs, corporate representative of Riggs Guns, engaged in unsuccessful negotiations with Underwood to resolve the matter. Underwood's attorney then sent Riggs Guns a dispute letter, and Underwood would later testify that he packed up all of the inventory at issue, placed it in the

back of the shooting range and instructed Riggs Guns to come pick it up. Riggs Guns did not do so.

In 2003, Riggs Guns filed an action in Franklin Circuit Court against Greenwood Lodge, LLC. On September 14, 2004, the shooting range and its contents - including the disputed inventory - were destroyed by a fire. On October 21, 2005, the Franklin Circuit Court rendered a judgment against Greenwood Lodge in the amount of \$66,876.46. Greenwood Lodge did not appeal, and the judgment became final.

On September 15, 2009, Riggs Guns filed the instant action seeking to pierce the corporate veil of Greenwood Lodge. In support of the action, Riggs Guns asserted that Greenwood Lodge was inadequately capitalized, that Underwood failed to observe corporate formalities that it was insolvent, had no corporate records and commingled funds with Underwood. The action was prosecuted to obtain a judgment against Underwood in his personal capacity and the other defendants in lieu of Riggs Guns' judgment against Greenwood Lodge.

A bench trial was conducted, whereupon the Fayette Circuit Court entered corrected findings of fact, conclusions of law and judgment on February 17, 2017. The judgment dismissed the claim as to the various defendants upon finding that one was deceased, and the other individuals and corporate entities had no connection to the issues before it. As to Underwood, the Fayette Circuit Court

determined that Riggs Guns failed to meet its burden of demonstrating that Underwood was the alter ego of Greenwood Lodge. While it found that Underwood occasionally commingled corporate and personal funds and that there was evidence suggesting that corporate records may not have been kept in strict accordance with formal corporate procedures, it also concluded that Greenwood Lodge was not undercapitalized and that Underwood never acted with an intent to defraud or cause harm to Riggs Guns. Accordingly, the court dismissed the action as to all defendants, and this appeal followed.

Riggs Guns now argues that the Fayette Circuit Court erred in failing to properly apply the factors allowing him to pierce the corporate veil to the evidence. After addressing the three theories in Kentucky jurisprudence that allow one to pierce the corporate veil, Riggs Guns directs our attention to *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012). *Inter-Tel* set out several factors to consider in determining if an individual has become the alter ego of a corporate entity, allowing an aggrieved party to proceed directly against the individual shareholder. Riggs Guns asserts that the trial court focused all of its attention on whether there was a contract between the parties, failing to focus any of its analysis on whether Underwood should be held personally liable for the debts of Greenwood Lodge. Riggs Guns maintains that Greenwood Lodge did not meet many of the *Inter-Tel* factors for establishing

corporate autonomy, as Greenwood Lodge was undercapitalized, failed to observe corporate formalities, was insolvent, commingled funds, and failed to maintain arm's length relationships with other entities. Ultimately, Riggs Guns maintains that the trial court erred when it determined that Greenwood Lodge had not become a mere façade for Underwood's schemes, and his alter ego for purposes of piercing the corporate veil.

In *Inter-Tel*, the Kentucky Supreme Court set out a litany of factors to be considered in determining whether a corporate entity was autonomous under the laws of the Commonwealth, or whether the entity was merely a “dry shell, . . . puppet, [or] stooge” for its shareholders. *Id.* at 160 (quoting Peter B. Oh, *Veil-Piercing*, 89 Tex. L.Rev. 81, 83 n. 7 (2010)). If found that the corporate entity is to be a mere puppet or alter ego, *Inter-Tel* allows third parties to proceed directly against the shareholders as if the protective corporate entity did not exist. While acknowledging that some commentators rejected “the laundry list approach to assessing corporate separateness,” *id.* at 164, *Inter-Tel* adopted the general consensus that “the checklist approach focuses on factors most often bearing on the loss of separate entity existence.” *Id.* The factors include:

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 the officers or directors;

7. absence of corporate records;
8. commingling of funds;
9. diversion of assets from the corporation to a stockholder or other person to the detriment of creditors;
10. failure to maintain arms-length relationship; and,
11. whether the corporation was a mere façade for the dominant stockholders.

Id. at 163.

Inter-Tel sets out two additional elements to be considered in the analysis: “(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 (emphasis in original).

In examining the issues presented, the Fayette Circuit Court expressly recognized the application of the alter ego doctrine regarding piercing the corporate veil, including the factors set forth in *Inter-Tel*. The court found that Greenwood Lodge was not undercapitalized, and was operating as a shooting range with proper capitalization until it was destroyed by a fire on September 14, 2004. It did find, however, that “there is evidence in this case that funds were occasionally co-mingled to some degree and that personal expenses were sometimes paid with corporate funds. Additionally, there is evidence suggesting that corporate records may not have been kept in strict accordance with formal corporate procedures.” The dispositive consideration in its analysis, however, was

whether Underwood acted with intent to defraud or cause harm to Riggs Guns, and whether the refusal to disregard the corporate entity would subject Riggs Guns to unjust loss. The Fayette Circuit Court answered these questions in the negative.

We conclude that the trial court's disposition of Riggs Guns' claim is supported by the record and the law. The court properly considered and applied the principles set out in *Inter-Tel* to determine if Underwood operated Greenwood Lodge as a mere sham or front for his personal dealings. While it found that some of the elements were present, it also found that other elements were not present. Ultimately, the Fayette Circuit Court placed emphasis on the consideration of whether Greenwood Lodge was a mere façade or sham for Underwood's purported fraudulent intent. Based on the totality of the record and its finding that the testimony of Underwood was credible, the court determined that Underwood operated Greenwood Lodge as a legitimate corporate entity and that there was no basis for finding an actual intent to defraud or harm Riggs Guns.

A successful veil-piercing claim requires a showing of domination over the corporation such that it has no real, separate existence, coupled with circumstances in which the continued recognition of the corporation as a separate entity would sanction fraud or promote injustice. *Inter-Tel* at 155. This burden rests with the complainant. *Id.* Riggs Guns did not meet this burden, and the Fayette Circuit Court correctly so found.

This matter was tried before the Fayette Circuit Court without a jury. The trial court's findings of fact shall not be set aside unless they are found to be clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Kentucky Rules of Civil Procedure (CR) 52.01. The court's application of the law is reviewed *de novo*. *Hoskins v. Beatty*, 343 S.W.3d 639, 641 (Ky. App. 2011). We have no basis for characterizing the trial court's factual findings as clearly erroneous, and therefore conclude that it properly applied the law to the facts. We find no error.

For the foregoing reason, we AFFIRM the findings of fact, conclusions of law and judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Douglas C. Howard
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES:

Edward L. Cooley
Lexington, Kentucky