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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000748-MR

DONNIE BUSH APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 17-CI-00271

JACKSON WHOLESALE CO. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Donnie Bush has appealed from the April 26, 2019, order of the Breathitt Circuit Court denying his motion to quash a garnishment. Finding no error, we affirm.

The underlying action began with the filing of a complaint in December 2017, by Jackson Wholesale Company to collect a defaulted debt from

Parkway Marathon Vancleve in the amount of $9,060.00, plus interest from January 26, 2016, until paid. Parkway Marathon was served via Bush at an address in Campton, Kentucky. Parkway Marathon filed an answer denying the allegations in the complaint and seeking dismissal. In its response to Jackson Wholesale's first set of discovery requests, Parkway Marathon identified itself as a corporation and stated that "[w]hile the Plaintiff has demanded payment on multiple occasions, and the Defendant corporation has admitted that it is indebted to Plaintiff, the Defendant is not in possession of sufficient information to admit the exact amount in dispute." Parkway Marathon then stated that it had been closed since April 2016 and that it had been administratively dissolved by the Kentucky Secretary of State on March 8, 2017. Bush, the former president of Parkway Marathon, was no longer in possession of the original purchase or delivery agreements at issue.

Jackson Wholesale filed a motion for summary judgment in May 2018, stating that there were no disputed issues of material fact and that it was entitled to a judgment in the amount of $9,060.00 for the merchandise Parkway Marathon received, but did not pay for, as set forth on the invoice.

Parkway Marathon responded to the motion for summary judgment, stating that it had been able to find five cleared checks that had not been entirely credited to its account with Jackson Wholesale. Therefore, it argued that a material issue of fact existed as to the amount actually owed. In a separate filing the same

day, Parkway Marathon supplemented its discovery response to show that five payments had been made to Jackson Wholesale totaling $1,600.00. Attached were five checks dated between March 24, 2016, and June 2, 2017. The first three checks, dated March 24, May 6, and July 14, 2016, were from Parkway Marathon's account and were signed by Bush. The checks dated April 22 and June 2, 2017, were personal checks from Bush's account and included notations that they were for payments on Parkway Marathon's account.

The circuit court granted the motion for summary judgment on May 25, 2018, but left the issue as to the exact amount owed open to permit the parties to resolve it. Several months later, on December 21, 2018, the court entered an agreed judgment, noting that the parties had reached an agreement on damages to the effect that Parkway Marathon owed Jackson Wholesale the amount of $8,660.00. The court entered a judgment for this amount in favor of Jackson Wholesale against Parkway Marathon, and it permitted Jackson Wholesale to execute upon the final judgment.

On March 6, 2019, Jackson Wholesale filed an affidavit for an order of wage garnishment, listing Bush/Parkway Marathon as the judgment debtor. The amount due was $8,660.00 and probable court costs were listed as $500.00. Bush was working for the Breathitt County Fiscal Court, which was listed as the

garnishee. In the garnishee's answer, Bush's non-exempt disposable earnings were listed as $222.47 on a bi-weekly basis.

Later that month, Bush, through the same counsel representing Parkway Marathon, moved the court to quash the garnishment order against him, for the return of any amounts garnished plus interest, and for attorneys' fees. He stated that he had never been listed as a defendant in the action and that his name was not on the judgment, making the garnishment inappropriate. In response, Jackson Wholesale stated that Bush was the owner and sole shareholder of Parkway Marathon, that the corporate entity had been dissolved pursuant to an Article of Dissolution filed on March 8, 2017, and that no notice of the dissolution had been sent to Jackson Wholesale, meaning that Bush was not protected by Kentucky Revised Statutes (KRS) 271B.14-070. It cited to *Bear, Inc. v. Smith*, 303 S.W.3d 137 (Ky. App. 2010), for the general rule that, if a shareholder receives any property from a dissolved corporation, the shareholder is liable to any unpaid creditors of the corporation to the extent of the property the shareholder received from the dissolved corporation. Jackson Wholesale also pointed out that Parkway Marathon incorrectly stated in its response to the motion for summary judgment that it had been administratively dissolved, when in actuality Bush had filed articles of dissolution indicating that he was the sole shareholder and voted for the dissolution. Because Bush, the sole shareholder, kept any company assets without

notice to Jackson Wholesale, he was liable to it for the debts incurred by Parkway Marathon.

The circuit court heard arguments of counsel on April 19, 2019, where the parties discussed whether the corporate veil should have been pierced by requiring Bush to pay the corporation's debts. On April 26, 2019, the circuit court denied Bush's motion, finding and concluding as follows:

> 1. The Defendant, through its only shareholder and only member, Donnie Bush, agreed to the amount of the judgment that was entered on December 21, 2018, namely $8,660.00.
>
> 2. The corporate entity of Parkway Marathon dissolved with Articles of Dissolution filed on March 8, 2017 and the Defendant represented to the Court that he was currently a corporation even though it was dissolved.
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> 3. The Court finds that Parkway Marathon through Donnie Bush incurred the debt and agreed to the amount of the debt and, therefore, the garnishment is appropriate.

This appeal by Bush now follows.

On appeal, Bush argues that the circuit court erred in denying his motion to quash the garnishment for two reasons. First, Bush was not a judgment debtor as he was not a party in the collections action; and second, the court improperly pierced the corporate veil without a motion being filed. As these arguments represent questions of law, we shall review the circuit court's ruling *de novo*. *See Saint Joseph Hosp. v. Frye*, 415 S.W.3d 631, 632 (Ky. 2013) ("The

issue presented concerns statutory interpretation, which is purely a question of law, which we review *de novo*.").

For his first argument, Bush asserts that, because he had not been named as a defendant in the action or served in his individual capacity, he was not a judgment debtor under KRS 425.501. Rather, Bush argues he was only served as the registered agent of Parkway Marathon. In *Deal v. First and Farmers National Bank, Inc.*, 518 S.W.3d 159 (Ky. App. 2017), this Court described the operation of the garnishment statute:

> "Any person in whose favor a final judgment in personam has been entered in any court of record of this state may . . . obtain an order of garnishment to be served in accordance with the Rules of Civil Procedure." KRS 425.501(1). "The order of garnishment shall be served on the persons named as garnishees . . . ." KRS 425.501(3). "If the court finds that the garnishee was, at the time of service of the order upon him, possessed of any property of the judgment debtor, or was indebted to him, and the property or debt is not exempt from execution, the court shall order the property or the proceeds of the debt applied upon the judgment." KRS 425.501(5). The burden of claiming and establishing that the property held by garnishee is exempt falls on the judgment debtor. KRS 425.501(4).

Id. at 165 (footnote omitted). Bush cites to the former Court of Appeals' opinion of *Hughes v. Hughes*, 211 Ky. 799, 278 S.W. 121, 123 (1925), for its discussion of a proceeding in personam:

> The purpose of a proceeding in personam is to impose, through the judgment of a court, some responsibility or

> liability directly upon the person of the defendant. Of this character are criminal prosecutions, suits to compel a defendant to specifically perform some act or actions to fasten a pecuniary liability upon him. . . . In proceedings in personam, no judgment is valid unless the defendant has been personally served with notice of the action or suit[.]

Because he was not personally named or served and the judgment was not entered in his name, Bush argues that he could not be a judgment debtor under the garnishment statute.

On the other hand, Jackson Wholesale disputes that the complaint indicates that Bush was only served as the registered agent or company representative. Bush certainly had notice of the lawsuit, and he agreed to the amount of damages that were owed and to the entry of the agreed judgment. We also recognize that Bush had been making payments to Jackson Wholesale through his personal checking account, which establishes that he knew he was responsible for paying the debt. For these reasons, we hold that the circuit court properly upheld the garnishment order.

For his second argument, Bush argues that the circuit court should not have pierced the corporate veil by requiring him to personally pay the judgment because Jackson Warehouse never filed a motion to do so.

> In general, a corporation is treated as a legal entity separate and apart from its shareholders. However, when the corporation is used to justify wrong, protect fraud or defend crime, the law regards the corporation as an

> association of persons. *Dare To Be Great, Inc. v. Commonwealth, ex rel. Hancock*, 511 S.W.2d 224, 227 (Ky. 1974). Two related theories have been used to hold the shareholders of a corporation responsible for corporate liabilities: the "alter ego" theory and the "instrumentality" theory.

Bear, 303 S.W.3d at 147. The *Bear* Court then provides a list of elements a party must provide to establish those theories. Because Jackson Wholesale failed to file a motion and present proof of these elements, Bush argues that the circuit court was not permitted to pierce Parkway Marathon's corporate veil and require him to pay the judgment through the garnishment.

In response, Jackson Wholesale states that there was no corporate veil to pierce because the corporation had been dissolved when the lawsuit was filed. While Bush attempted to shield himself with corporate protection, Jackson Wholesale argued that this protection was unavailable to him because the corporation was not dissolved with adequate notice pursuant to KRS 271B.14-070, which addresses unknown claims against a dissolved corporation.

The *Bear* Court addressed situations involving a dissolved corporation:

> Regarding a shareholder's liability for a corporate debt, the Supreme Court of Kentucky held that
>
> > [W]here a corporation is dissolved or is consolidated its assets become a trust fund for the payment of its debts and may be reached by proceeding against the

> stockholders of the old company in a court of equity . . . . [S]ince all that a corporation has for the payment of its debts is its property, the law, for the protection of creditors, has impressed the property with a trust character for the payment of the debts and said that the corporation holds it for the benefit of its creditors, and when it parts with this property, getting in return nothing the creditor can subject, the law will follow the property into the hands of the taker and make it liable to the extent of the value of the property received.

Reeves v. East Cairo Ferry Co., 289 Ky. 384, 158 S.W.2d 937, 938 (1942) (internal citations omitted).

Thus, the general rule holds that that if a shareholder receives property from a dissolved corporation, that shareholder is liable to any unpaid creditors of the dissolved corporation to the extent of the property received. This general rule has been qualified by KRS 271B.14-060 (dealing with "known claims" against the corporation), stated above, and KRS 271B.14-070 (dealing with "unknown" or subsequently arising claims against the corporation), to the extent that if a creditor receives notice of the corporation's dissolution and does not timely act to enforce any claims it may have, then its claims are extinguished. However, KRS 271B.14-070(4) continues to recognize the rule stated in *Reeves*:

> A claim may be enforced under this section:
>
> (a) Against the dissolved corporation, to the extent of its undistributed assets; or
>
> (b) If the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro

> rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section shall not exceed the total amount of assets distributed to him.

Bear, 303 S.W.3d at 146-47.

Under the circumstances of this case, we perceive no error in the circuit court's ruling. As Jackson Wholesale indicated, the corporation had been dissolved and Bush had notice of the collection action as well as the judgment entered against Parkway Marathon. Parkway Marathon admitted the debt existed, which led to the entry of the summary judgment, and entered into an agreement with Jackson Wholesale as to the proper amount that was owed on the debt. At that time, the corporation had been dissolved at Bush's request. And as the sole shareholder, Bush was the only person who could be held liable to pay the judgment. It would make no sense for Bush to disown the debt after the parties reached an agreement as to the amount owed. A more appropriate time to have raised this issue would have been the summary judgment stage, but Parkway Marathon failed to do so. Rather, Parkway Marathon admitted the existence of the majority of the debt and only disputed whether a small amount of it was owed.

For the foregoing reasons, the order of the Breathitt Circuit Court denying the motion to quash the garnishment order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Bass
Myles Holbrook
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Patrick E. O'Neill
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