NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1097

PARKPOINT REAL ESTATE INVESTMENT, L.L.C.

VERSUS

SUPER BOUNCE PLAYHOUSE, LLC, MELANIE BEELMAN, EVERETT BEELMAN AND SHIRLEY FUNDERBURK

DATE OF JUDGMENT: MAR 2 4 2014

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2011-16080, DIV. A, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

* * * * * *

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Melanie Beelman, Everett Beelman
Shirley Funderburk

* * * * * *

Higginbotham, J. concurs in the result.

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: REVERSED.

KUHN, J.,

Plaintiff, Parkpoint Real Estate Investments, L.L.C. (Parkpoint), appeals a judgment sustaining an exception of no cause of action against the members of a limited liability company, defendants, Melanie Beelman and Shirley Funderburk, in their individual capacities. For the following reasons, we reverse.

PROCEDURAL AND FACTUAL BACKGROUND

On October 25, 2011, Parkpoint filed suit for breach of contract and for unpaid rents and other monies due, totaling $57,760.33, against Super Bounce Playhouse, L.L.C. (Super Bounce), and the sole members of the limited liability company, Beelman and Funderburk.[1] According to the petition, Parkpoint leased to Super Bounce property in Slidell with the term to begin October 15, 2008 and end on October 14, 2013. In addition to rent, Super Bounce was to pay a portion of the electric bill. An addendum to the lease lowered the rent beginning June 15, 2010, and changed the term of the contract so that it would expire on June 14, 2011.[2] Parkpoint alleged that Super Bounce did not vacate the premises until August 14, 2011, and that it failed to pay rent and the electric bills.

Parkpoint further alleged that Beelman guaranteed the obligation; the lease and addendum show that she signed as an agent of Super Bounce and as a guarantor. According to the petition, Beelman and Funderburk as the sole members of Super Bounce disregarded the distinction between themselves and the company so as to render Super Bounce their alter ego and make them personally liable.

Beelman and Funderburk filed exceptions of no cause and no right of action, which the judge granted as to Funderburk and denied as to Beelman. Beelman and Funderburk filed a motion for new trial, which was granted, and the judgment was

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[1] Parkpoint initially named Melanie Beelman's husband Everett as a defendant but deleted him as a defendant in its amending petition.

[2] Parkpoint attached the lease and addendum as exhibits to the petition. The rent was $9,000.00 monthly the first year, then $10,000.00 per month yearly; the rent was lowered to $6,5000.00 monthly in the addendum, beginning June 15, 2010.

vacated. The judge then granted the exceptions of no cause of action filed by Beelman and Funderburk and gave Parkpoint the opportunity to amend its petition to cure the defects defendants raised in their exceptions.

Parkpoint filed an amending petition, alleging that Beelman and Funderburk distributed Super Bounce's assets to themselves to the extent that the company could not pay its debts as they became due in the usual course of business, resulting in its assets being reduced to less than its liabilities. Parkpoint alleged that Funderburk falsely reported her address as a registered agent to the Secretary of State and that Super Bounce did not have a registered agent domiciled in Louisiana. It asserted that Funderburk was never domiciled and did not reside at the registered address in Louisiana and was at all times a Mississippi domiciliary and resident. According to the amending petition, Super Bounce failed to file annual reports and last filed one on August 4, 2010. Parkpoint attached a printout from the Secretary of State's office showing that Super Bounce was not in good standing for failure to file its annual report. Parkpoint claimed that Super Bounce was undercapitalized so as to mitigate the ability of creditors to recover from it. According to Parkpoint, Super Bounce failed to maintain proper bookkeeping records and proper cash receipt records, and company funds were commingled with Funderburk's and Beelman's money.

Paragraph 18 in the petition states, "On several occasions, both Melanie Beelman and Shirley Funderburk misrepresented or suppressed the truth with the intention either to obtain an unjust advantage for themselves and SUPER BOUNCE PLAYHOUSE, L.L.C. company or to cause a loss or inconvenience to the petitioner." Parkpoint then alleged that, on seven occasions after being notified that the past due rent had to be paid or Super Bounce would be evicted, Beeelman and

Funderburk paid the rent with checks returned for insufficient funds or with checks on which payment was stopped.[3]

According to the petition, when the May 2010 rent was due, Super Bounce was in arrears for $40,000.00 and was notified that, if the arrearage was not paid, it would be evicted or sued. Parkpoint asserted that Beelman and Funderburk represented that, if it would terminate the lease in June 2011 instead of June 2013 and reduce the monthly rent; they would pay the arrearages and timely pay the reduced rent. Parkpoint alleged that, upon those representations and Beelman's and Funderburk's payment by personal check, it agreed to modify the lease. Parkpoint claimed that Super Bounce then continued to pay the rent late.

Parkpoint asserted that on May 13, 2011, Beelman called to tell Parkpoint she was in the process of obtaining a loan to pay the past due amount, which was then $41,388.13. On May 20, 2011, Beelman advised Parkpoint she was still working on the loan to pay the arrearage and to be able to renew the lease. During June 2011, Parkpoint alleged the "defendants" continued to represent to it that the loan was being processed and payments of past due amounts would be forthcoming. Parkpoint asserted the "defendants" pleaded with it to allow Super Bounce to stay beyond the term of the lease (June 2011) because their highest revenue period was approaching. Parkpoint claimed that a loan was apparently not obtained and "defendants" made no rent payments after March 30, 2011. Parkpoint alleged that SuperBounce remained on the premises and received significant revenues but they were not used to pay the rent and utilities. Parkpoint alleged that Beelman and/or Funderburk failed to deposit the revenues into the company's bank account and/or commingled or used the funds for their personal use.

According to Parkpoint, in response to its attorney's letter to Super Bounce that an eviction would be filed if the rent was not current, Beelman said on two

[3] Parkpoint attached copies of the checks to the petition.

different occasions that it would be paid and that "they" would move out August 15, 2011. On August 2, 2011, Funderburk called Parkpoint and advised that the bank was requiring three more months of past bank statements to approve the loan and "it would only be a few days." On August 5, 2011, Parkpoint noticed that Super Bounce had vacated the premises and removed all assets used by it and also things belonging to Parkpoint, despite Beelman's representation that Super Bounce would leave the equipment in place until the past due rent was paid.

Beelman and Funderburk filed exceptions of no cause and no right of action by Melanie Beelman and Funderburk. On October 4, 2012, the judge signed a judgment granting the exceptions of no cause of action filed by Beelman and Funderburk as to their liability as members of the Super Bounce limited liability company; denying the exception of no cause of action filed by Beelman as to her liability as a personal guarantor of the lease; and denying the exceptions of no right of action of Beelman and Funderburk as to their liability as members of the Super Bounce Playhouse limited liability company and of Melanie Beelman as her liability as guarantor of the lease. All allegations brought by plaintiff against Funderburk were dismissed with prejudice. All allegations brought by Parkpoint against Beelman as to her liability as a member of the Super Bounce Playhouse limited liability company were dismissed with prejudice. The judgment was designated as a final judgment pursuant to La. C.C.P. art. 1915B.[4]

Parkpoint appeals from this judgment.[5]

DISCUSSION

On appeal, Parkpoint contends the trial court erred in granting the exceptions of no cause of action and in not allowing it to amend the petition. Parkpoint argues that

[4] The district court concluded there was no just cause for delay and designated the partial judgment as final, although it gave no reasons for its conclusion. Nevertheless, based on our *de novo* review of the relevant factors outlined in ***R. J. Messinger, Inc. v. Rosenblum,*** 2004-1664 (La. 3/2/05), 894 So.2d 1113, 1122, we find the designation was proper.

[5] Beelman filed a cross-appeal, which was later dismissed due to her failure to pay costs.

Super Bounce failed to observe formalities required by law as to a limited liability company so that it should be allowed to pierce the company's veil to assert a cause of action against Beelman and Funderburk. Also, Parkpoint asserts that its allegations of fraud by Beelman and Funderburk were sufficient to state a cause of action for their personal liability. It maintains that the trial court should have allowed it to amend its petition to cure the deficiencies asserted in the exceptions.

Since the exception of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, appellate courts review rulings on an exception of no cause of action *de novo*. ***Louisiana State Bar Association v. Carr and Associates, Inc.***, 2008-2114 (La. App. 1st Cir. 5/8/09), 15 So.3d 158, 167, writ denied, 2009-1627 (La. 10/30/09), 21 So.3d 292. The exception is triable on the face of the pleadings, and for purposes of resolving the exception, the well-pleaded facts in the petition are accepted as true in order to determine whether the law affords a remedy on the facts alleged in the petition. The pertinent question is whether, construing the petition in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. ***Louisiana State Bar Association***, 2008-2114 at p. 11, 15 So.3d at 167.

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. La. C.C.P. art. 934. Conversely, when the grounds of the objection cannot be so removed, the action shall be dismissed. La. C.C.P. art. 934. An opportunity to amend is not permitted when it would constitute a vain and useless act. ***American International Gaming Association, Inc. v. Louisiana Riverboat Gaming Commission***, 2000-2864, p. 18 (La. App. 1st Cir. 9/11/02), 838 So.2d 5, 17.

In the instant case, the trial court did not assign reasons for its judgment

granting the exceptions of no cause of action, but in argument at the hearing and in memoranda on the exceptions, Parkpoint asserted that it was entitled to pierce the company veil to hold Beelman and Funderburk personally liable for Super Bounce's debts. Beelman and Funderburk contended that, as members of a limited liability company, they could not be held liable on that basis. They argued that the only basis for personal liability was under the statute applicable to limited liability companies, La. R.S. 12:1320(D), and that the petition's allegations did not satisfy the statutory basis for personal liability.

A Louisiana limited liability company is a separate legal entity from its members. ***Ogea v. Travis Merritt***, 2013-1085, p. 6 (La. 12/10/13), ___ So.3d ___; ***Charming Charlie, Inc., v. Perkins Rowe Associates, L.L.C.***, 2011-2254, p.5 (La. App. 1st Cir. 7/10/12), 97 So.3d 595, 598. However, in narrowly defined circumstances, when individual member(s) of a juridical entity such as a limited liability company mismanage the entity or otherwise thwart the public policies justifying treating the entity as a separate juridical person, the individual member(s) have been subjected to personal liability for obligations for which the limited liability company would otherwise be solely liable. ***Ogea***, 2013-1085 at p. 6, ___ So.3d at ___; ***Charming Charlie***, 2011-2254 at pp. 5-6, 97 So.3d at 598. The Louisiana Supreme Court explained in ***Ogea***:

> When individual member(s) are held liable under such circumstances, it is said that the court is "piercing the corporate veil." FN3 *See, e.g.*, ***Charming Charlie Inc. v. Perkins Rowe Associates, L.L.C.***, 11-2254, p. 6 (La.App. 1 Cir. 7/10/12), 97 So.2d 595, 598. FN4
>
> FN3. When an LLC is involved, as opposed to a corporation, it may be more correct to refer to "piercing the company veil."
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> FN4. In ***Charming Charlie***, 11-2254 at 6, 97 So.3d 598, the court noted:
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> > Louisiana courts have allowed a piercing of the corporate veil under only two exceptional circumstances, namely, where the corporation is an alter ego of the shareholders and the shareholders have used the corporation to defraud

> a third party (the "alter ego" doctrine) and where the shareholders have failed to conduct a business on a "corporate footing" to such an extent that the corporation ceases to be distinguishable from its shareholders. [Citation omitted.]
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> The court stated: "[T]**he same policy considerations relevant to a determination of piercing the veil of a corporation also apply to a limited liability company**." ***Id.*** Accordingly, the court granted the plaintiff leave to amend the pleadings to state a cause of action by which the veil of an LLC might be pierced. ***Id.,*** 11-2254 at 8-9, 97 So.3d at 599-600.

Ogea, at p. 6, ____ So.3d ____.

The supreme court noted that piercing the corporate veil is largely a jurisprudential doctrine and referred to ***Riggins v. Dixie Shoring Co., Inc.***, 590 So.2d 1164, 1167 (La. 1991) where cases of veil piercing as to corporations were collected and discussed. ***Ogea***, at pp. 6-7, ___ So.3d at ___. This Court in ***Charming Charlie*** also relied on ***Riggins*** for its enunciation of the relevant factors considered in determining whether to apply the alter ego doctrine. ***Charming Charlie***, 2011-2254 at p. 6, 97 So.2d at 598. *See also* ***Imperial Trading Co., Inc. v. Uter***, 2001-0506 (La. App. 1st Cir. 12/20/02), 837 So.2d 663, 669-670, writ denied, 2003-2224 (La. 3/28/03), 840 So.2d 578. Some of the relevant factors considered in determining whether to apply the alter ego doctrine include: commingling of corporate and shareholder funds; failing to follow statutory formalities for incorporating and transacting corporate affairs; undercapitalization; failing to maintain separate bank accounts and bookkeeping records; and failing to hold regular shareholder and director meetings. ***Charming Charlie***, 2011-2254 at p. 6, 97 So.3d at 598-599.

Beelman and Funderburk rely on ***Matherne v. Barnum***, 2011-0827 (La. App. 1st Cir. 3/19/12), 94 So.3d 782, writ denied, 2012-0865 (La. 6/1/12), 90 So.3d 442, to support their contention that the veil of a limited liability company cannot be pierced. However, in ***Matherne***, this Court pretermitted that issue

because it affirmed the trial court's finding that the member of the limited liability company was liable individually because the member, a building contractor, he was negligent in performing construction and was liable under La. R.S. 12:1320(D).[6] ***Matherne***, 2011-0827 at p. 10, 94 So.3d at 790.

While statutory law found in La. R.S. 12:1320(B)[7] insulates a member of a limited liability company from personal liability for a debt or obligation of the limited liability company, statutory authority also provides a cause of action against a member of a limited liability company in certain circumstances. La. R.S. 12:1320(D) states:

> Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any such person because of any fraud practiced upon it by him.

Thus, a plaintiff may assert a cause of action against a member of a limited liability company personally if fraud has been practiced upon the plaintiff. There are three basic elements to an action for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract. *See* La. C.C. art. 1953; ***Ogea***, 2013-1085 at p. 6, ___ So.3d ___; ***Charming Charlie***, 2011-2254 at p. 7, 97 So.3d at 599. Thus, fraudulent intent, or the intent to deceive, is a necessary and inherent element of fraud. Fraud cannot be predicated upon mistake or negligence,

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[6] The other cases Beelman and Funderburk rely on are from other circuits and predate the ***Ogea*** case and are not controlling. ***Breaux v. Vieux Carre Mortgage, L.L.C.***, 2007-1443 (La. App. 4th Cir. 11/19/08) (not designated for publication), and ***Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.***, 43,604 (La. App. 2d Cir. 11/5/08), 997 So.2d 734, writ denied, 2009-0016 (La. 3/13/09), 5 So.3d 119.

[7] Louisiana Revised Statutes 12:1320(B) provides that, except as otherwise set forth in the law, "no member ... of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company."

no matter how gross. ***Charming Charlie***, 2011-2254 at pp. 6-7, 97 So.3d at 599. In pleading fraud, "the circumstances constituting fraud . . . shall be alleged with particularity. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally." La. C.C.P. art. 856.

Based on our *de novo* review, we find that the petition does state a cause of action against Beelman and Funderburk individually. Parkpoint alleges that Beelman and Funderburk commingled Super Bounce's assets with their own, failed to follow statutory formalities for the conduct of its affairs by failing to file an annual report and failing to have a Louisiana domiciliary as a registered agent for service of process,[8] distributed Super Bounce's assets to themselves so that the company had less assets than liabilities, and failed to maintaining proper bookkeeping records and cash receipt records. Parkpoint set forth specific facts to support its allegations unlike the petition in ***Charming Charlie***, which this Court found did not state a cause of action against the member of a limited liability company in his individual capacity. In that case, plaintiff alleged no specific facts supporting its bare assertions that the individual was the company's alter ego and all his decisions regarding it were personal decisions. *See* ***Charming Charlie***, 2011-2254 at pp. 5-8, 97 So.3d at 598-599.

Beelman and Funderburk contend that they cannot be subject to personal liability for Super Bounce's alleged failure to have a proper registered agent for service of process and for its failure to file an annual report, referring to La. R.S. 12:1319(C). La. R.S. 1319(C) provides that "Failure of the limited liability company to keep or maintain any of the records or information required pursuant to this Section shall not be grounds for imposing liability on any person for the debts and obligations of the limited liability company." Yet, La. R.S. 1319(C)'s

[8] La. R.S. 12:1308 requires a Louisiana limited liability company to have a Louisiana citizen who resides in the state as a registered agent for service of process and La. R.S. 12:1308.1 requires it to file an annual report. La. R.S. 12:1308.2 provides that the failure to file an annual report for three consecutive years is grounds for revoking the articles of organization.

reference to "this Section" refers to La. R.S. 12:1319's requirements that each limited liability company shall keep at its registered office the following: a current list of the full name and last known business address of each member and manager, if any; copies of records which would enable a member to determine the members' relative voting rights; a copy of the articles of organization and any amendments; copies of the company's federal and state income tax returns, any reports, and any financial statements for the three most recent years; and a copy of any written operating agreement. The petition does not set forth a breach of these statutory requirements as a basis for piercing the company veil. Therefore, La. R.S. 12:1319 does not serve to exempt Beelman and Funderburk from personal liability based on the allegations in the amending petition.

Further, the petition's allegations also state a cause of action for fraud. Parkpoint initially alleged that Beelman and Funderburk misrepresented or suppressed the truth with the intent to obtain an unjust advantage for themselves and Super Bounce or to cause a loss or inconvenience to it. Parkpoint later alleged that Beelman led it to believe she was obtaining a loan to pay past due rent to enable Super Bounce to stay on the premises beyond the term of the lease. Despite allegedly receiving significant revenues after remaining on the premises, Beelman failed to pay the rent as she had promised and previously gave Parkpoint checks that did not have sufficient funds for payment. Super Bounce later vacated the premises and took items belonging to Parkpoint, according to the petition. Again, this petition in this case is distinguishable from that in ***Charming Charlie*** which did not set forth allegations sufficient to meet the requirement of specificity necessary to plead a cause of action for fraud. In ***Charming Charlie***, the petition did not contain allegations that the company member was the individual who negotiated the terms of the lease with Charming Charlie or that he personally made

any representations or misrepresentations to Charming Charlie. ***Charming Charlie***, 2011-2254 at p. 8, 97 So.3d at 599.

Funderburk's and Beelman's contention that there was no benefit to them from any alleged fraud as the obligations sued upon were contractual obligations is without merit. If the allegations that the revenues Super Bounce earned were used by Beelman and Funderburk personally are true, then their representations that they were obtaining a loan to pay past due rent so that Parkpoint would extend the lease allowed Super Bounce to keep operating and generate more revenue, which could inure to their benefit.

CONCLUSION

For the above reasons, the judgment of the trial court granting Shirley Funderburk's exception of no cause of action in its entirety and granting Melanie Beelman's exception of no cause of action as to her personal liability as a member of a limited liability company is reversed. All costs of this appeal are to be borne by Shirley Funderburk and Melanie Beelman.

JUDGMENT REVERSED.