STATE OF MICHIGAN

COURT OF APPEALS

ADDY MACHINERY COMPANY,

Plaintiff-Appellant,

v

VANTAGE INDUSTRIES, L.L.C., RONALD E. PRATER, and DAVID VANDERFORD,

Defendants,

and

KOPPY CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 20, 2008

No. 279326
Oakland Circuit Court
LC No. 2006-078004-CK

ADDY MACHINERY COMPANY,

Plaintiff-Appellee,

v

VANTAGE INDUSTRIES, L.L.C., RONALD E. PRATER, and DAVID VANDERFORD,

Defendant,

and

KOPPY CORPORATION,

Defendant-Appellant.

No. 280526
Oakland Circuit Court
LC No. 2006-078004-CK

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In Docket No. 279326, plaintiff Addy Machinery Company ("Addy Machinery") appeals as of right from an order granting summary disposition in favor of defendant Koppy Corporation

("Koppy") pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). In Docket No. 280526, Koppy appeals as of right from the trial court's order denying its motion for sanctions pursuant to MCR 2.114. We reverse and remand for further proceedings consistent with this opinion in Docket No. 279326, and we affirm in Docket No. 280526.

This cause of action arises from Addy Machinery's allegations that Vantage Industries ("Vantage") failed to pay Addy Machinery for heavy equipment that Addy Machinery sold to it. The parties presented conflicting evidence regarding the extent to which Vantage was an instrument of Koppy. On appeal, Addy Machinery contends that the trial court erred when it granted summary disposition to Koppy pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) with regard to its attempt to find Koppy liable for Vantage's breach of contract under a piercing-the-corporate-veil theory. We agree. We review de novo a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(8) or (C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).]

Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When deciding a motion for summary disposition, "all well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

In *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004), this Court stated, "[f]or the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff." (Internal citations omitted.)

The trial court improperly considered documentary and testimonial evidence when it granted summary disposition pursuant to MCR 2.116(C)(8). In its opinion, the trial court did not conduct separate discussions regarding MCR 2.116(C)(8) and MCR 2.116(C)(10). Rather, after stating that the three-prong test applies, the trial court summarized the arguments of the parties, discussed the documentary and testimonial evidence, and granted summary disposition pursuant to both subrules (C)(8) and (C)(10). As stated above, in deciding a motion pursuant to MCR 2.116(C)(8), the trial court may consider only the pleadings. In its first amended complaint, Addy Machinery alleged that Vantage was inextricably intertwined with Koppy, which controlled Vantage by financially supporting it and making all its major decisions. Addy

Machinery also stated that Koppy intended to defraud and hinder Vantage's creditors to avoid Vantage's legal obligations.

Koppy appears to assert on appeal that because Addy Machinery did not explicitly state the violation of each of the three required prongs that must be established in order to pierce the corporate veil, see *Rymal*, *supra* at 293-294, its pleadings failed and summary disposition was appropriate pursuant to MCR 2.116(C)(8). We disagree. As stated above, the pleadings must be construed in the light most favorable to the nonmoving party. Regarding the first prong, whether Vantage was a mere instrumentality of Koppy, Addy Machinery provided a lengthy list of allegations focused on Vantage's dependence on Koppy, stating that the two were inextricably entwined. The allegations indicate that in Addy Machinery's view, Vantage was subject to Koppy's control. As such, although the complaint did not use the term "mere instrumentality," the allegations certainly describe Vantage in such a light.

Similarly, the complaint sufficiently alleged that the corporate entity, Vantage, committed a fraud or wrong. Koppy primarily focuses on the lack of an allegation of fraud in Addy Machinery's complaint when arguing that summary disposition was appropriate. However, the three-prong test states that the plaintiff must demonstrate a fraud *or* wrong. Again, Addy Machinery did not specifically say that Vantage's default on the contract was a fraud or a wrong. However, such a conclusion is certainly natural because one must assume that Addy Machinery would not have sought relief unless it took the position that it had been subject to a wrong.

Likewise, the complaint adequately alleges that Addy Machinery suffered an unjust loss as a result of the wrong. Addy Machinery did not explicitly state that the loss suffered was unjust. However, we assume, particularly when viewing the pleadings in the light most favorable to Addy Machinery, that the premise of Addy Machinery's complaint was that the financial loss resulting from Vantage's default was unjust. As a result, the trial court improperly granted summary disposition of this claim pursuant to MCR 2.116(C)(8).

Regarding the trial court's grant of summary disposition of this claim to Koppy pursuant to MCR 2.116(C)(10), Koppy again asserts that no genuine issue of material fact existed with respect to any of the three requisite prongs. With regard to its argument that Addy Machinery did not present evidence to establish that Vantage was a mere instrumentality of Koppy, Koppy primarily cites Ronald Prater's[1] affidavit to support its position. In the affidavit, Prater states that Vantage intended to make a profit, that individuals separate from Koppy controlled Vantage, that Vantage maintained separate bank accounts from Koppy, that Vantage was adequately capitalized, and that Koppy was not in any way involved with the purchase of the heavy machinery. However, other testimonial evidence contradicted much of the content of Prater's affidavit. For instance, John Cuddeback[2] stated that he was in charge of the financial records of

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[1] Prater is the CEO and sole owner of Koppy. He also started and was president of Vantage.

[2] Cuddeback is the chief financial officer of Koppy. He also handled financial records for Vantage.

both Vantage and Koppy, that Koppy had loaned Vantage three million dollars, advanced Vantage rent payments, and leased equipment to Vantage. Not only does this demonstrate that Koppy's agents had some involvement with Vantage, but it also calls into question whether Vantage was adequately capitalized. Had $10,000 truly been adequate capitalization, it is unclear why Vantage was never able to pay its rent and borrowed such a large sum of money from Koppy that was never repaid. In describing the power structure of Vantage, Cuddeback and David Vanderford's[3] testimony ranged from describing Prater as highly influential over Vantage to being the ultimate decision maker at Vantage. James Addy's[4] affidavit also contradicted Prater's affidavit; Addy stated that he agreed to have Addy Machinery enter into the contract for heavy machinery when Cuddeback assured Addy that Vantage would be able to pay Addy Machinery in a timely manner. This belies Prater's statement that nobody from Koppy was involved in the purchase of the heavy machinery. Should this matter ultimately go to trial, Koppy may very well prove that Prater made decisions for Koppy and not for Vantage, that none of Koppy's agents were involved with the purchase of the heavy machinery, and that Vantage was a completely independent entity. However, we conclude that a genuine issue of material fact exists regarding whether Vantage was a mere instrumentality of Koppy.

There are also genuine issues of material fact regarding whether Koppy used Vantage to perpetrate a fraud or wrong that resulted in an unjust loss (the second and third prongs of the three-prong test). The parties focus a portion of their arguments involving this issue on Vantage's transformation into a minority-owned enterprise in 2003, and Addy Machinery speculates that Prater invited minorities to become partial owners in order to attract contracts for which he was not otherwise eligible. These arguments are irrelevant because there are no allegations that Vantage's minority status was relevant to Addy Machinery's dealings with Vantage. Similarly, Koppy's argument that there is no evidence that Vantage was created with the purpose of perpetrating fraud also lacks merit. The second prong of the piercing-the-corporate-veil test only concerns whether the corporate entity was used for fraudulent or wrongful purposes, not whether the fraudulent purposes were foreseen at the time of formation.

There is a genuine issue of material fact regarding whether Vantage was used for fraudulent or wrongful purposes. Cuddeback, who controlled Vantage's financial records, testified that he did not believe that Vantage could have paid for the heavy machinery in a timely manner. According to Addy, Addy Machinery sold the heavy machinery to Vantage after Cuddeback ensured him that timely payment would be made. Although Cuddeback denies such a conversation, a jury could conclude otherwise based on the evidence currently on record. Further, Vanderford testified that Prater authorized the purchase of the heavy machinery. When taken together, this evidence could lead to a conclusion that Prater and Cuddeback, working in their capacities as Koppy's agents, were aware that Vantage could not afford the heavy machinery in question but misled Addy Machinery in order to induce it to enter into the contract. If Koppy used Vantage to purchase heavy machinery knowing that they could not be paid for, the resulting loss was unjust.

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[3] Vandeford is the former vice-president and part owner of Vantage.

[4] Addy is the president of Addy Machinery.

As a result, there are genuine issues of material fact regarding all three prongs of the applicable test for piercing the corporate veil. Therefore, the trial court erroneously granted summary disposition pursuant to MCR 2.116(C)(10).

Addy Machinery then contends that the trial court erroneously granted summary disposition to Koppy pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) with regard to Addy Machinery's claim of fraud. We agree. In order to maintain a cause of action for fraud, a party must prove the following elements:

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003), quoting *M&D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).]

In general, the material representation must be predicated on a statement that relates to a past or present fact. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). If the material representation in question relates to a future promise, the plaintiff's cause of action lies in contract, not fraud. *Id*. However, there is a recognized exception to this general rule: "A fraudulent misrepresentation may be based upon a promise made in bad faith without intention of performance." *Id*. at 337-338.

In Addy Machinery's first amended complaint, it alleged that on or about February 26, 2006, it was induced to sell heavy machinery to Vantage when representatives of Vantage assured Addy Machinery that Vantage could pay in a timely manner. Addy Machinery further alleged that the Vantage representatives made the representation that Vantage could pay "with the approval and at the direction of" Prater and representatives of Koppy. Addy Machinery also alleged that Prater, Vantage representatives, and Koppy representatives knew that the representation was false, that they intended for Addy Machinery to rely on the representation, and that Addy Machinery relied on the representation to its detriment.

Addy Machinery's allegation of fraud against Koppy is sufficient to survive a challenge pursuant to MCR 2.116(C)(8). As stated above, the first element of fraud is a misrepresentation by the *defendant*. Addy Machinery's first amended complaint alleges that Vantage made the misrepresentation in question and that Koppy had knowledge of, or directed, the misrepresentation. However, as we discussed earlier, a question of fact exists regarding whether Vantage is a mere instrumentality of Koppy and, hence, whether Koppy is liable for the actions of Vantage representatives under a piercing-the-corporate-veil theory of liability, a doctrine used to fasten liability on an entity that uses the corporation to conduct its business. See *In re RCS Engineered Products Co, Inc*, 102 F3d 223, 226 (CA 6, 1996). The theory of piercing the corporate veil is an equity theory used to hold an entity liable when it uses a sham corporation to defraud a third party. *Id.* In this case, Addy Machinery alleges that Vantage made the misrepresentation in question and, under the piercing-the-corporate-veil theory of liability, alleges that Koppy controlled Vantage and, therefore, Vantage's fraudulent actions should be imputed on Koppy. Taking this into consideration, we conclude that Addy Machinery presented

a valid cause of action for fraud against Koppy, and the trial court erred when it dismissed Addy Machinery's claim of fraud pursuant to MCR 2.116(C)(8).

Summary disposition was also not appropriate pursuant to MCR 2.116(C)(10). Koppy argues that Addy Machinery failed to present any evidence that a Koppy representative was involved in the alleged fraud. However, Koppy acknowledges that Addy stated in his affidavit that Cuddeback induced him into the contract by assuring him that Vantage could pay in a timely fashion. Koppy asserts that any such statement would not suffice in a claim of fraud because it related to future conduct, not a past or present fact, and Koppy states that the bad-faith exception to that rule is not applicable because Addy Machinery cannot show that Koppy had reason to believe that payment would not be made. However, Cuddeback testified that he did not believe that Vantage could pay for the heavy machinery in full within 30 days after installation. Further, both Cuddeback and Vanderford described Vantage as a company in constant financial trouble, never showing a profit and never able to pay its rent. Therefore, there is sufficient evidence in the record demonstrating that an alleged assurance that Vantage could pay in a timely manner was made in bad faith, thus allowing the fraud claim to continue despite arising from a promise for future performance. As a result, a genuine issue of material fact exists regarding the first element of fraud.

Next, Koppy argues that Addy Machinery cannot establish that a representation that Vantage could pay in a timely fashion was false or that Koppy knew that the statement was false. However, Addy Machinery presented evidence that Cuddeback had reason to believe that Vantage could not pay in a timely fashion. Vantage's assurance that it could pay in a timely fashion proved to be false when Vantage defaulted on the contract, and Cuddeback's testimony regarding Vantage's financial difficulties is evidence of Koppy's knowledge of the representation's inaccuracy or demonstrates that the statement was made recklessly. Therefore, genuine issues of material fact exist regarding the second and third elements of the fraud claim.

Neither party discusses whether genuine issues of material fact existed regarding the remaining elements of a fraud claim, i.e., whether the representation was made with the purpose of inducing reliance, whether reliance actually occurred, and whether that reliance was detrimental. However, we believe that questions of fact exist regarding these elements as well. First, because a question exists regarding whether Cuddeback assured Addy that Vantage could pay in a timely fashion when he knew that this was not the case, one can logically assume that the false statement was made in order to induce Addy Machinery to enter into the contract. The evidence demonstrates that such reliance actually occurred because Addy stated in his affidavit that Cuddeback's statement influenced his decision to sell heavy machinery to Vantage. Finally, the reliance was clearly detrimental because Addy Machinery suffered a significant financial loss. Therefore, genuine issues of material fact exist regarding all the elements of Addy Machinery's fraud claim, and summary disposition pursuant to MCR 2.116(C)(10) was inappropriate.

In Docket No. 280526, Koppy contends that the trial court erred when it denied Koppy's motion for sanctions pursuant to MCR 2.114(E) and (F). We disagree. We find that sanctions are not appropriate in this case, because Addy Machinery sufficiently pleaded a claim of fraud and a piercing-the-corporate-veil theory of liability. Koppy also claims that it is entitled to costs pursuant to MCR 2.114(F) because Addy Machinery's claims were frivolous. Again, because

Addy Machinery pleaded valid causes of action, these claims are not frivolous and an award of costs is inappropriate.

In Docket No. 279326, we reverse the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and remand for further proceedings consistent with this opinion. In Docket No. 280526, we affirm the trial court's denial of costs and sanctions. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens