

STATE OF MICHIGAN
COURT OF APPEALS

ASSOCIATED CONSTRUCTION SERVICES
CORPORATION,

UNPUBLISHED
August 11, 2011

Plaintiff-Appellant,

v

No. 296894
Oakland Circuit Court
LC No. 2009-097554-CK

COMMERCE 8800 LLC, CRYSTAL HALLEY,
Trustee of the HARPER H. CUNNINGHAM &
SALLY ANN CUNNINGHAM TRUST, and
REPUBLIC BANK,

Defendants,

and

JIMM F. WHITE,

Defendant-Appellee.

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff Associated Construction Services Corporation appeals following a grant of partial summary disposition in favor of defendant. We affirm in part, reverse in part, and remand.

I

Defendant Jimm White contracted for construction services with plaintiff. The contract was, initially, for \$52,000, but throughout construction, increased to \$59,602.75. Defendant made four periodic payments totaling \$26,000. Defendant failed to make additional payments and had a balance of \$33,602.75. Plaintiff brought five counts against defendant: (1) foreclosure of a construction lien against all parties with an interest in the property, (2) breach of contract for failing to pay plaintiff the balance owed on the contract, (3) unjust enrichment, (4) fraud, and (5) piercing the corporate veil. After settlement and a consent judgment, defendant filed a motion for partial summary disposition as to the remaining claims of fraud and piercing the corporate veil. For purposes of appeal, Jimm White is the only defendant.

II

Plaintiff first contends that there was evidence to support its fraud claim, so the trial court's order granting defendant's partial summary disposition was improper. We agree.

An appellate court reviews a trial court's decisions on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 117; 597 NW2d 817 (1999). A review under MCR 2.116(C)(10) requires that the court look at all available "affidavits, pleadings, depositions, admissions and other evidence . . . in the light most favorable to the party opposing the motion." *Id.* at 120. Summary disposition should be granted when there is no genuine issue of material fact. *Id.* at 120. There is a genuine issue of material fact when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

For a fraud claim, plaintiff must establish six elements:

"(1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." [*Candler v Heigho*, 208 Mich 115, 121; 175 NW2d 141 (1919), quoting 20 Cyclopedia of Law and Procedure 13. See also *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).]

Plaintiff must also show that reliance on the misrepresentations was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005), citing *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999). Additionally, there can be no fraud "upon one who has full knowledge to the contrary of a representation." *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951).

Plaintiff contends that defendant made false statements about the amount of money that he had and that plaintiff relied on these representations when entering into the contract. Plaintiff introduced testimony to support its assertion that defendant made statements indicating that he had the funds to cover the entire contract. However, defendant contends that plaintiff knew that defendant was trying to secure financing for the construction project, not that he had the money on hand at the time of the contract. Because this is a question of fact that needs to be resolved, the trial court improperly granted summary disposition to defendant.

III

Plaintiff next contends that evidence existed that Commerce 8800 was a mere instrumentality of defendant White, so the trial court incorrectly granted partial summary disposition in favor of defendants as to the claim of piercing the corporate veil. We disagree.

A grant or denial of a motion for summary disposition is reviewed de novo. *Maiden*, 461 Mich at 117. A review under MCR 2.116(C)(10) requires that the court look at all available "affidavits, pleadings, depositions, admissions and other evidence . . . in the light most favorable

to the party opposing the motion.” *Id.* at 120. Summary disposition should be granted when there is no genuine issue of material fact. *Id.* at 120. There is a genuine issue of material fact when reasonable minds could differ after drawing reasonable inferences from the record. *West*, 469 Mich at 183.

Claims to pierce the corporate veil are equitable in nature and are reviewed de novo. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14; 436 NW2d 790 (1989). “Nevertheless, the decision will not be reversed unless the factual findings are clearly erroneous or the reviewing court is convinced that it would have reached a different result had it occupied the trial court’s position.” *Id.*

With its claim to pierce the corporate veil of Commerce 8800, plaintiff attempts to hold defendant personally liable for the balance of the money due on the contract. With a claim of piercing the corporate veil, a corporate identity will be ignored when three prerequisites are shown: (1) the corporate entity is a mere instrumentality of another, (2) the corporate entity was used to commit a fraud or wrong, and (3) plaintiff suffered an unjust loss or injury. *LaRose Mkt v Sylvan Ctr*, 209 Mich App 201, 209; 530 NW2d 505 (1995). Some courts look at a series of factors to determine whether to pierce the corporate veil: (1) whether the corporation is undercapitalized, (2) whether separate books are kept, (3) whether there are separate finances for the corporation and the individual, (4) whether the corporation is used for fraud or illegality, (5) whether corporate formalities have been followed, and (6) whether the corporation is a sham. *Laborers’ Pension Trust Fund v Sidney Weinerger Homes, Inc*, 872 F2d 702, 704-705 (CA 6, 1988).

There is no evidence that Commerce 8800 was a mere instrumentality of defendant White. Commerce 8800 was a corporation with a federal EIN number that had a separate business purpose and conducted corporate meetings. Commerce 8800 also kept books and records and had a separate bank account. Plaintiff argues that Commerce 8800 was undercapitalized and that because of that defendant should be held personally liable. However, Commerce 8800 was set up to lease a building, and the business rented the building to a financial investment firm and received rental income that would be used to build equity in the building. The money provided during the start up of Commerce 8800 was sufficient for this goal. Because plaintiff failed to establish evidence to show that Commerce 8800 was a mere instrumentality of defendant, the trial court correctly granted summary disposition on this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Jane M. Beckering