IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1037

Filed: 20 August 2019

Cabarrus County, No. 18 CvD 463

SYSCO CHARLOTTE, LLC, Plaintiff,

v.

PARIMAL NAIK, BILLY ADAMS, and CAROLINA TRANSITIONAL SERVICES, INC. d/b/a CAROLINA TRANSITIONAL SERVICES, Defendants.

Appeal by defendant from judgment entered 30 May 2018 by Judge Nathaniel M. Knust in Cabarrus County District Court. Heard in the Court of Appeals 23 April 2019.

Olsen Law Offices, by John M. Olsen, for plaintiff-appellee.

Hartsell & Williams, PA, by Andrew T. Cornelius and Austin "Dutch" Entwistle III, for defendant-appellant Parimal Naik.

BERGER, Judge.

Parimal Naik ("Defendant") appeals from an order that granted summary judgment in favor of Sysco Charlotte, LLC ("Plaintiff"). Defendant argues on appeal that the trial court erred (1) by failing to consider his arguments at the summary judgment hearing as evidence; (2) by granting summary judgment based upon

insufficient allegations in Plaintiff's complaint; and (3) because Plaintiff failed to comply with Rule 56(e) and failed to meet its evidentiary burden. We affirm in part, reverse in part, vacate in part, and remand.

Factual and Procedural Background

On February 15, 2018, Plaintiff filed suit in Cabarrus County District Court against Carolina Transitional Services, Inc. ("CTS"); CTS's owner, William Adams ("Adams"); and Defendant, the original incorporator of CTS (collectively, "Defendants"). The complaint alleged damages stemming from Defendants' purchase of food commodities from Plaintiff on credit.

Plaintiff alleged that it entered into a credit agreement with Adams, who had made a personal guarantee for payment. The terms of this credit agreement provided that CTS would notify Plaintiff of any material changes in the business. CTS had allegedly failed to notify Plaintiff of a change in ownership and of the financial condition of the company. In addition, CTS allegedly failed to pay for food it had purchased on credit, and had accrued an unpaid balance of $7,646.12.

After unsuccessful attempts to obtain payment for this debt, Plaintiff filed suit and asserted claims for breach of the duty of good faith, breach of contract, quantum meruit/unjust enrichment, fraud, constructive fraud, breach of fiduciary duty, conversion, and unfair or deceptive trade practices. Plaintiff asserted that Adams

and Defendant were both personally liable through the doctrine of piercing the corporate veil.

Neither Adams nor CTS responded to the lawsuit. Defendant filed an unverified, *pro se* response to Plaintiff's complaint in which he asserted that he had resigned from CTS, "signed over [his] stock to Mr. Adams," and was relieved from liability for any debt incurred by Adams. Defendant's Answer included an attached copy of a Resolution of Incorporator Agreement with Adams, dated July 1, 2017. By the terms of this Agreement, Defendant resigned from any and all positions as an officer, director, employee or agent of CTS, and Adams assumed all responsibility and liability for all debts of CTS.

Plaintiff moved for summary judgment and an entry of default on May 17, 2018. The trial court granted an entry of default against Adams and CTS.

Adams failed to appear at the summary judgment hearing. Defendant argued *pro se* at the hearing that he had never dealt with Plaintiff and had resigned from his position as the original incorporator in August 2017. No testimony was taken under oath at the hearing. Based upon the allegations in the verified complaint, the trial court entered summary judgment against Defendant for unfair or deceptive trade practices. The trial court also entered a default judgment against CTS and Adams. Defendant appeals.

Standard of Review

"The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment *de novo*." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. Of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and quotation marks omitted).

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* at 337, 678 S.E.2d at 353 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.
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> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Blackmon v. Tri-Arc Food Sys., Inc., 246 N.C. App. 38, 41-42, 782 S.E.2d 741, 743-44 (2016) (*purgandum*).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. All inferences of fact must be drawn against the movant and in the favor of the nonmovant." *Strickland v. Hedrick*, 194 N.C. App. 1, 9, 699 S.E.2d 61, 67 (2008) (citation and quotation marks omitted). "The party with the burden of proof who moves for summary judgment supported only by his own affidavits will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721, 329 S.E.2d 728, 729 (1985) (citation omitted).

Analysis

Defendant argues that the trial court erred in granting summary judgment in favor of Plaintiff. We agree. While Defendant did not provide evidence to contradict the allegations in Plaintiff's verified complaint, the complaint nevertheless failed to allege facts sufficient to support entry of summary judgment.

I. Summary Judgment Hearing

Defendant first argues that the trial court erred in not considering as evidence his answer or statements in which he denied association with CTS at the hearing on the motion for summary judgment. We disagree.

"When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of his

pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e). "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." N.C. Gen. Stat. § 1A-1, Rule 11(a) (2017).

"Oral *testimony* at a hearing on a motion for summary judgment may [also] be offered; however, the trial court is only to rely on such testimony in supplementary capacity, to provide a small link of required evidence, but not as the main evidentiary body of the hearing." *Strickland v. Doe*, 156 N.C. App. 292, 296, 577 S.E.2d 124, 129 (2003) (citations and quotation marks omitted) (emphasis added). "[C]onclusory allegations, unsworn statements or inadmissible hearsay . . . cannot be relied upon to overcome evidence that [a party] is entitled to summary judgment." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 705, 709, 582 S.E.2d 343, 345-46 (2003).

Defendant failed to file a sworn affidavit or verified pleading. While he did provide arguments at the summary judgment hearing, Defendant was not under oath. Thus, his statements could not be properly considered as evidence to support or oppose entry of summary judgment. Therefore, Defendant failed to provide any evidence that would contradict the allegations that had been made in Plaintiff's verified complaint, and failed to give the trial court any basis on which it could enter summary judgment in his favor. Therefore, the trial court did not err in not using

Defendant's unverified pleading and arguments made during the hearing as evidence.

II. Piercing the Corporate Veil

Defendant also argues that the trial court erred by piercing the corporate veil and holding him personally liable for unfair or deceptive trade practices. While Plaintiff's complaint supports a finding of unfair or deceptive trade practices on the part of the co-defendants, Plaintiff's complaint failed to allege or otherwise establish Defendant's control and complete domination over CTS to warrant piercing the veil to hold him personally liable.

"The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders." *Green v. Freeman*, 367 N.C. 136, 144-45, 749 S.E.2d 262, 270 (2013) (citing *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008)). "The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form." *Id.* at 146, 749 S.E.2d at 271. "The piercing the corporate veil doctrine is a drastic remedy and should be invoked only in an extreme case where necessary to serve the ends of justice." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 37, 560 S.E.2d 817, 829 (2002) (citation and quotation marks omitted).

> The mere fact that one person . . . owns all of the stock of a corporation does not make its acts the acts of the

> stockholder so as to impose liability therefor upon him. However, when, as here, the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) (citations omitted).

To pierce a corporate veil, our Supreme Court enumerated the requisite

> elements which support an attack on separate corporate entity under the instrumentality rule:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
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> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [a] plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 454-55, 329 S.E.2d 326, 330 (1985) (citation omitted).

The Court in *Glenn v. Wagner* further articulated factors that are to be considered when determining whether to pierce the corporate veil, which include,

inter alia, "inadequate capitalization," "non-compliance with corporate formalities," "complete domination and control of the corporation so that it has no independent identity," and "excessive fragmentation of a single enterprise into separate corporations." *Id*. at 455, 329 S.E.2d at 330-31 (citations omitted). However, the Court in *Glenn* emphasized that "these are merely factors to be considered to determine whether sufficient control and domination is present to satisfy the first prong of the three-pronged rule known as the instrumentality rule." *Id*. at 458, 329 S.E.2d at 332.

> It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had no separate mind, will or existence of its own and was therefore the mere instrumentality or tool of the dominant shareholder.

Atlantic Tobacco Co. v. Honeycutt, 101 N.C. App. 160, 165, 398 S.E.2d 641, 643 (1990) (*purgandum*).

In *Atlantic Tobacco Co. v. Honeycutt*, this Court declined to pierce the corporate veil against one of two named corporation owners when all of the plaintiff's evidence was directed at the president and sole shareholder, rather than at the defendant. *Id*. at 165, 398 S.E.2d at 644. There, the defendant owned part of the land on which the corporation operated in her individual capacity and further acted as a secretary and manager. *Id*. at 162, 165, 398 S.E.2d at 644, 642. The president and sole shareholder, on the other hand, controlled business decisions and directed payments. *Id*. This

court determined that the plaintiff failed to produce evidence suggesting the defendant exercised sufficient control over the business's operations. *Id*. at 165, 398 S.E.2d at 644.

"As an equitable doctrine, [veil piercing] cannot be invoked to subvert the reasons which brought it into existence; thus, a court will disregard the corporate form when necessary to prevent fraud or to achieve equity." *Id*. at 164, 398 S.E.2d at 643 (citing *Glenn*, 313 N.C. at 454, 329 S.E.2d at 330). "[O]ur Supreme Court has instructed us to focus on the 'reality' of the situation and determine if 'an element of injustice or abuse of corporate privilege' exists such that the corporate entity was used as a 'mere instrumentality or tool.' " *Timber Integrated Investments, LLC v. Welch*, 225 N.C. App. 641, 652, 737 S.E.2d 809, 818 (2013) (quoting *Glenn*, 313 N.C. at 458, 329 S.E.2d at 332) (finding a genuine issue regarding a company's true corporate identity given evidence suggesting the company may have been dominated entirely by only one or both named defendant directors).

Plaintiff failed to allege sufficient facts to satisfy notice pleading requirements in its complaint to pierce the corporate veil against Defendant, even when these facts were admitted by Defendant.

> A pleading which sets forth a claim for relief . . . shall contain . . . [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . .

N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2017). "Notice of the nature and extent of the claim is adequate if the complaint contains sufficient information to outline the elements of the claim or to permit inferences to be drawn that these elements exist." *Pastva v. Naegele Outdoor Advert., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 493 (1996) (*purgandum*). Comment (a)(3) to Rule 8 of the North Carolina Rules of Civil Procedure provides that "[b]y specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules." *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970) (internal quotations omitted).

The allegations here are similar to those utilized in *Atlantic Tobacco* in that it establishes the requisite control and domination of only one named defendant—in this case, Adams. While most of Plaintiff's allegations are directed generally at "Defendants," Plaintiff identifies Adams as the owner and the party with whom it entered into the credit agreement. Further, the complaint alleges that Adams personally guaranteed the debt repayment. The only time Defendant is identified in the complaint—aside from being named with Adams as bearing personal liability under the theory of piercing the corporate veil—is as the original incorporator of CTS. Otherwise, the complaint is silent as to Defendant's actions, and only speaks generally of "Defendants." The complaint alleged only that Plaintiff had dealings with Adams, and failed to allege that Defendant was anything more than the original

incorporator. Accordingly, the allegations in the complaint do not raise the inference that Defendant had exercised the requisite control and domination to pierce the corporate veil and hold Defendant personally liable.

In addition, Plaintiff's complaint failed to allege any degree of control and domination by Defendant. Plaintiff's complaint failed to allege with particularity any action on the part of Defendant that would constitute fraud or misrepresentation, either under Rule 8, or Rule 9 of the Rules of Civil Procedure.[1] The complaint did not provide a date, time frame, or setting for any alleged transaction or misrepresentation by Defendant, and failed to identify which party had made the alleged misrepresentations—it merely referred to "Defendants."

While the complaint alleged that Adams submitted the credit application and made the personal guarantee, there was no allegation that Defendant made any representation or misrepresentation. Moreover, Plaintiff's allegation that "[it] reasonably relied on Defendants' promise to notify" is insufficient to establish justifiable reliance based on the conduct of the sole Defendant pursuing this appeal.

Finally, the complaint did not address the instrumentality elements to permit inferences of their existence. Although Plaintiff's Complaint did parrot two of the factors in *Glenn*, it did not indicate which, if any, corporate requirements the

[1] Plaintiff's complaint failed to provide notice of any actions by Defendant. While "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein[,]" *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005), we note that neither party addressed the special pleading requirements of Rule 9(b) in their briefs.

Defendant had allegedly failed to follow or how he had allegedly undercapitalized the corporation. Regardless, the nominal presence of these two factors alone would not warrant a finding as a matter of law that Defendant exercised control and complete domination over CTS's finances, policy, and business practices in the contested transaction with Sysco.

We therefore reverse the trial court's order granting summary judgment in favor of Plaintiff. Because we reverse on this issue, the trial court's award of attorney's fees is vacated.

Conclusion

For the reasons stated herein, the trial court did not err in not considering Defendant's arguments and unverified answer as evidence at the hearing on Plaintiff's motion for summary judgment. However, the trial court erred in granting summary judgment in favor of Plaintiff. The award of attorney's fees is vacated.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).