[Cite as *Flagstar Bank, FSB v. Sellers*, 2010-Ohio-3951.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

FLAGSTAR BANK, FSB,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-287
	:	O P I N I O N
- vs -		8/23/2010
	:	
ADRIAN SELLERS,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV05-12-4168

Thompson Hine LLP, Scott A. King, 2000 Courthouse Plaza, N.E., P.O. Box 8801, Dayton, Ohio 45401-8801, for plaintiff-appellee

Stephen R. Felson, 215 East Ninth Street, Suite 650, Cincinnati, Ohio 45202, for defendant-appellant

Steven A. Tooman, 6900 Tylersville Road, Suite B, Mason, Ohio 45040, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Adrian Sellers, appeals from the Butler County Court of Common Pleas decision granting summary judgment to Flagstar Bank, FSB. For the reasons outlined below, we affirm.

{¶2} On December 30, 2005, Flagstar, a federal savings bank which buys,

repackages, and sells mortgage loans, filed suit against Sellers, a mortgage broker, seeking to pierce the corporate veil of his former company, American Liberty Mortgage, Inc., and hold him personally liable in order to collect upon a default judgment it received against his corporation in the Hamilton County Court of Common Pleas. On June 17, 2009, following a number of delays and a lengthy discovery process, the trial court granted Flagstar's motion for summary judgment. Thereafter, on October 1, 2009 the trial court denied Sellers' motion to stay garnishment proceedings.

{¶3} Sellers now appeals from the trial court's decisions, raising two assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO FLAGSTAR AND DENYING SUMMARY JUDGMENT TO ADRIAN SELLERS."

{¶6} In his first assignment of error, Sellers argues that the trial court erred by granting summary judgment to Flagstar. We disagree.

{¶7} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.,* Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.,* 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-

Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. An appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard,* citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶8} A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Hillstreet Fund III, L.P. v. Bloom*, Butler App. No. CA2009-07-178, 2010-Ohio-2961, ¶9, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶9} The principle that shareholders of a "corporation are generally not liable for the debts of the corporation is ingrained in Ohio law." *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, ¶16; *RCO Internatl. Corp. v. Clevenger*, 180 Ohio App.3d 211, 2008-Ohio-6823, ¶9. Notwithstanding the protections afforded by the corporate form, shareholders are not absolutely immune from liability for the

actions of the corporation for, "[l]ike every other fiction of the law, when urged to an intent and purpose not within its reason and policy, [the corporate form] may be disregarded." (Brackets sic.) *Dombroski* at ¶17, quoting *State ex rel. Atty. Gen. v. Std. Oil Co.* (1892), 49 Ohio St. 127, paragraph one of the syllabus. In other words, "in certain circumstances, the corporate form may be disregarded, and the corporate veil pierced, for the purpose of reaching the assets of the corporation's individual shareholders." *Minno v. Pro-Fab, Inc.*, 121 Ohio St.3d 464, 2009-Ohio-1247, ¶8. Piercing the corporate veil in this manner, however, "remains a 'rare exception,' to be applied only 'in the case of fraud or certain other exceptional circumstances.'" *Dombroski* at ¶17, quoting *Dole Food Co. v. Patrickson* (2003), 538 U.S. 468, 475, 123 S.Ct. 1655.

{¶10} In *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 1993-Ohio-119, the Ohio Supreme Court established a three-pronged test for courts to use when deciding whether to pierce the corporate veil. The test, which "focuses on the extent of the shareholder's control of the corporation and whether the shareholder misused the control so as to commit specific egregious acts that injured the plaintiff," provides for the following:

{¶11} "The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." Id., at paragraph three of

the syllabus; *Dombroski* at ¶18.

{¶12} In *Dombroski*, while continuing to adhere to the "principle that limited shareholder liability is the rule * * * and piercing the corporate veil is the 'rare exception' that should only be 'applied in the case of fraud or certain other exceptional circumstances,'" the Ohio Supreme Court expanded the second prong of the *Belvedere* test to read as follows:

{¶13} "To fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, *or a similarly unlawful act*." (Emphasis added.) Id., at syllabus, ¶26, 28, quoting *Dole Food Co.*, 538 U.S. at 475.

{¶14} Proof as to each of the three prongs "will result in individual shareholders being held liable for corporate misdeeds because 'it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity.'" *Minno* at ¶9, quoting *Belvedere* at 287; *Dombroski* at ¶18.

{¶15} Initially, Sellers argues the trial court erred by granting summary judgment to Flagstar because "it did not even allege the elements of fraud," let alone state them with particularity as required by Civ.R. 9(B). However, contrary to Sellers' claim, Flagstar was not required to plead fraud in order to fulfill the second prong of the piercing the corporate veil test for "a plaintiff may also meet that prong by demonstrating 'an illegal act, or a similarly unlawful act.'" *RCO Internatl. Corp.*, 2008-Ohio-6823 at ¶12, quoting *Dombroski*, 2008-Ohio-4827 at syllabus. Furthermore, "[u]nlike common-law fraud that must be pleaded with particularity under Civ.R. 9(B), no similar requirement applies when the issue of fraudulent conveyance is raised,"

which, after reviewing the record, is exactly what occurred here. *Stewart v. R.A. Eberts Co. Inc.*, Jackson App. No. 08CA10, 2009-Ohio-4418, ¶26, citing *Wagner v. Galipo* (1990), 50 Ohio St.3d 194, 197. Accordingly, Sellers' first argument is overruled.

{¶16} Sellers also claims that the trial court's decision granting summary judgment to Flagstar holding him personally liable by piercing American Liberty's corporate veil "cannot stand" for "[t]here is simply nothing in the record to support a finding that [he] committed 'fraud, an illegal act, or a similarly unlawful act'" as required to fulfill the second prong of the piercing the corporate veil test established by the Ohio Supreme Court in *Belvedere*, and as modified by *Dombroski*. This argument lacks merit.

{¶17} It is undisputed that Sellers' control over American Liberty was so complete that the corporation did not have its own separate mind, will, or existence, and that if his control over American Liberty resulted in a fraud, an illegal act, or a similarly unlawful act, such actions caused Flagstar to suffer injury or unjust loss. Therefore, because it is unquestioned that the first and third prong will be satisfied, our review focuses exclusively on the second prong of the piercing the corporate veil test.

{¶18} Turning to the facts of this case, the evidence indicates that on June 10, 1999, Flagstar entered into a "Wholesale Lending Broker Purchase Agreement" to purchase mortgage loans from American Liberty, a mortgage brokerage firm, which, at that time, was solely owned by Jim Guthery. Under this agreement, American Liberty warranted that all information submitted in each loan would be true and accurate, and that the loans would conform to the requirements of secondary

lenders. If any loan breached these warranties, American Liberty agreed to repurchase the loan from Flagstar.

{¶19} In August of 1999, approximately one month after American Liberty entered into its agreement with Flagstar, Sellers became American Liberty's co-owner and vice-president.

{¶20} Two years later, in November of 2001, Guthery sold his share of American Liberty to Sellers, making Sellers American Liberty's sole owner and operator. Shortly thereafter, according to Sellers' deposition testimony, Flagstar requested American Liberty to repurchase a number of non-conforming loans.[1] American Liberty, however, did not repurchase the offending loans, but instead, ceased its brokerage operations and transferred virtually all of American Liberty's assets, which included, among other things, $126,543.49 in cash and accounts receivable, as well as $93,403 worth of office furnishings and equipment, to either Sellers or American Financial Freedom, Inc., a corporation Sellers had established in June of 2001, thereby leaving American Liberty insolvent.

{¶21} In January of 2002, Sellers, the sole owner of American Financial, began operating American Financial by using the same offices, equipment, computer software, and employees as that of the recently defunct American Liberty.

{¶22} On May 18, 2006, Flagstar obtained a default judgment against American Liberty in the Hamilton County Court of Common Pleas. The First District Court of Appeals upheld Flagstar's default judgment against American Liberty in an accelerated opinion dated July 1, 2009.

1. Specifically, although he now claims it was a mistake, Sellers testified that Flagstar requested American Liberty to repurchase the loans "somewhere" between November and December of 2001, or January of 2002.

{¶23} After a thorough review of the record, we find no genuine issue of material fact as to whether Sellers controlled American Liberty in such an egregious manner as to commit fraud, an illegal act, or a similarly unlawful act by systematically disposing of its assets to either himself or to American Financial to the detriment of Flagstar, its creditor, in violation of the Ohio Uniform Fraudulent Transfer Act. See R.C. 1336.04(A)(1); R.C. 1336.05(A); see, also, *Stewart*, 2009-Ohio-4418 at ¶25-26. As the trial court found, and to which we agree, there was no other purpose for Sellers, who admittedly knew of Flagstar's demands for repurchase, "to continue with [American Financial] and transfer assets and funds to [American Financial] except to avoid an obligation to buyback [the] non-compliant loans." Therefore, having found no genuine issue of material fact as to whether Sellers' exercised control over American Liberty in such a manner as to commit fraud, an illegal act, or a similarly unlawful act, thereby fulfilling the second prong of the piercing the corporate veil test, we necessarily conclude that the trial court did not err by granting summary judgment to Flagstar. Accordingly, Sellers' first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "THE TRIAL COURT ERRED IN DENYING MR. SELLERS' MOTION TO STAY GARNISHMENT PROCEEDINGS."

{¶26} In his second assignment of error, although presented under a claim alleging the trial court erred by denying his motion to stay garnishment proceedings, Sellers actually argues that the "damages cannot be fixed at this time," and therefore, this court lacks jurisdiction for we are not faced with a final appealable order. However, after a thorough review of the record, we find the trial court's October 29, 2009 judgment entry setting damages at "$1,483.099.45, plus interest and less any

payments made on the remaining loans at issue," is a final appealable order for the computation of damages owed by Sellers is mechanical and the task is unlikely to produce a second appeal. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 546, 1997-Ohio-366. Accordingly, Sellers' second assignment of error is overruled.

{¶27} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.