In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00314-CV

BYRON MORGAN, APPELLANT

V.

SHAWN FULLER, APPELLEE

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2012-503,563, Honorable William C. Sowder, Presiding

May 11, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Before us pends the second chapter in the dispute between Byron Morgan and Shawn Fuller. In *Morgan v. D&S Mobile Home Ctr., Inc.*, No. 07-13-00263-CV, 2014 Tex. App. LEXIS 8443 (Tex. App.—Amarillo, August 1, 2014, no pet.), we reversed, in part, the entry of a summary judgment granted against Morgan. Via that summary judgment, the trial court rebuffed Morgan's attempt to pierce the corporate veil of D&S

Mobile Home and hold Fuller liable for a judgment recovered against D&S.[1] The matter was remanded to the trial court for further proceedings.

Thereafter, the trial court convened a non-jury trial and entered judgment for Fuller. In its findings of facts and conclusion of law, the trial court stated, among other things, that 1) one seeking to piece the corporate veil must prove that " . . . the corporation was used for perpetrating a fraud primarily for the direct personal benefit of the defendant or that Defendant received a direct personal benefit from this transaction"; 2) "[t]he proof in this case does not prove these elements of Plaintiffs case by a preponderance of the evidence"; and 3) "Fuller did not receive any direct personal benefit from this transaction." So too did it conclude that Morgan failed to prove that the release he executed (after the dispute arose) lacked consideration or that the consideration for it failed. We address only his contention that he failed to satisfy the elements prerequisite to piecing the corporate veil for it is dispositive of the appeal. Allegedly, the aforementioned findings and conclusions were legally and factually insufficient. We affirm.

Standard of Review

Where a party with the burden of proof at trial challenges the factual sufficiency of a finding on appeal, it must demonstrate that the verdict is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *John H. Carney Assocs. v. Ahmad*, No. 07-15-00252-CV, 2016 Tex. App. LEXIS 989, at *4 (Tex. App.—Amarillo January 28, 2016, pet. filed) (mem. op.). Under

[1] Morgan had sued D&S for fraud and deceptive trade practices related to the acquisition of a mobile home. Though a jury found in favor of him on both claims, judgment was entered awarding recovery only upon the deceptive trade practice finding. *Morgan v. D&S Mobile Home Ctr., Inc.* No. 07-13-00263-CV, 2014 Tex. App. LEXIS 8443, at *1 (Tex. App.—Amarillo August 1, 2014, no pet.). Fuller was the president and sole-shareholder of D&S when the sale occurred.

that standard, we consider and weigh all of the evidence, not just that favoring the verdict. *Id.* Only if the evidence supporting the finding is so weak, or is so against the great weight and preponderance of the evidence, that the verdict is clearly wrong and unjust, may we set it aside. *Id.* This standard does not permit us to pass upon witness credibility. *John H. Carney Assocs. v. Ahmad*, 2016 Tex. App. LEXIS 989, at *4. Nor may we substitute our judgment for that of the factfinder even if the evidence would clearly support a different result. *Id.*

Finally, if we deem the evidence factually sufficient to support the verdict, that implicitly negates a legal sufficiency challenge levied against the same verdict. This is so because a factual sufficiency point concedes the existence of conflicting evidence on an issue. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied). So, holding that the determination is factually sufficient means that some evidence appears of record to support the verdict, and that is all the evidence needed to defeat a legal sufficiency challenge.

Application of Standard

Normally, a shareholder may not be liable for corporate obligations or debts. *See* TEX. BUS. ORG. CODE ANN. § 21.223(a) (West 2012) (stating that a shareholder may not be held liable to the corporation or its obligees with respect to 1) the shares, 2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory, or 3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality). This general

rule, though, has its exception. That exception arises where the creditor "demonstrates that the [shareholder] . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the [creditor] primarily for the direct personal benefit of the [shareholder], beneficial owner, subscriber, or affiliate." *Id.* at § 21.223(b). When enacting that statute, however, the legislature did not define the phrase "primarily for the direct personal benefit." According to Morgan, though, the element was satisfied because he showed that his payment to D&S for the mobile home was used to pay the debts of D&S and keep the company operating. That, in turn, benefitted Fuller ". . . because the value [of] his property's liabilities were reduced. . . ." In other words, Fuller's shares in D&S were an asset of his, and so long as D&S remained in business by paying its debts, then his asset retained its value. So, he allegedly benefitted when the corporation used Morgan's money to pay its bills.

In making this argument, however, Morgan does not attempt to address the evidence supporting the trial court's finding. Nor does he try to explain why it is so weak or so against the great weight and preponderance of the evidence that the verdict is clearly wrong and unjust. This omission is of import since satisfying that standard was and is his burden.

Furthermore, it may be that Fuller's corporation was able to live another day due to its ability to satisfy some demands from its creditors. Yet, the monies paid by Morgan were not pocketed by or diverted to Fuller. *See e.g. Farr v. Sun World Sav. Ass'n*, 810 S.W.2d 294, 297-98 (Tex. App.—El Paso 1991, no writ) (stating that 1) "[t]he lack of corporate formalities and the absence of oversight by other directors or shareholders enabled Farr to handle the company financial affairs as he saw fit", 2) "Farr used

company funds for his own personal benefit when he paid on his personal stock purchase loans" and 3) "[t]his supports the lower court's finding of alter ego between August 1987 and September 1988, and supplies the direct personal benefit element of shareholder liability. . . ."); *see also*, *TransPecos Banks v. Strobach*, No. 08-14-00059-CV, 2016 Tex. App. LEXIS 2968, at *38 (Tex. App.—El Paso March 23, 2016, no pet.) (in uphold the summary judgment denying Bank's attempt to pierce the corporate veil, the court noted the absence of evidence that the shareholder distributed assets to herself or anyone else); *Bates v. de Tournillon*, No. 07-03-0257-CV, 2006 Tex. App. LEXIS 956, at *10 (Tex. App.—Amarillo, February 3, 2006, no pet.) (mem. op.) (in reversing the finding that the corporate veil should be pierced, the court noted, among other things, the absence of evidence indicating that Bates "personally made any use of the items" he removed from the company and stored).

Again, the funds were used to satisfy the financial obligations of D&S. That is evidence tending to contradict the notion that the fraud previously attributed to D&S was perpetrated for the primary, direct benefit of Fuller. *See Rutherford v. Atwood*, No. 01-00-00113-CV, 2003 Tex. App. LEXIS 7761, at *12-13 (Tex. App.—Houston [1st Dist.], August 29, 2003, no pet.) (mem. op.) (recognizing that "Rutherford's [*i.e.*, the shareholder's] use of the Atwood funds allowed Triad [*i.e.* Rutherford's company] to pay personnel and suppliers on other jobs, to offset overdrafts on Triad's NationsBank account, and to continue to do business on other jobs . . ." but concluding nonetheless that such ". . . evidence fails to show that Rutherford's draws from Triad's account either (1) related to the transaction at issue, *i.e.*, the remodeling contract between Triad and the Atwoods, or (2) were primarily for Rutherford's direct personal benefit.").

Of additional note is the evidence that Fuller received no salary from D&S during the time the fraud occurred.[2] Such evidence also tends to contradict the suggestion that the fraud in question was perpetrated primarily for his direct benefit. *See e.g. Solutions Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 388-89 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (stating that "even if we assume maintaining a personal salary from or ownership interest in Solutioneers—by misappropriating the Miller sponsorship payment in order to keep Solutioneers afloat—constitutes a direct personal benefit . . . we find no evidence in the record regarding any salary Haynes received from Solutioneers or any evidence illustrating how Haynes's conduct surrounding the Miller transaction affected this salary."). To that we also add Fuller's testimony wherein he 1) denied receiving any benefit from the transaction between Morgan and D&S and 2) explained how D&S reaped no profit from the transaction.[3]

Simply put, we reviewed the entire record, found evidence that the mobile home transaction and fraud related thereto (as found in the prior lawsuit) was not perpetrated primarily for the direct benefit of Fuller and that such evidence is not weak or against the great weight and preponderance of other evidence. So, the verdict is not clearly wrong or unjust. In other words, the verdict had the support of factually sufficient evidence, and, consequently, we overrule both the legal and factual sufficiency challenges levied by Morgan against the finding that he failed to satisfy the elements of § 21.223(b) of the Business Organizations Code.

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[2] The trial court found that "[d]uring the time relevant to these transactions, Fuller did not receive a salary from D&S."

[3] The trial court also found that the "[e]xpenses for ancillary services performed by D&S in transportation, installation of skirting, a new air conditioner and repair attempts on the home eliminated any net profit to D&S on this transaction."

Our decision to overrule Morgan's evidentiary challenges is dispositive of the appeal. We need not address whether the trial court's decision to deny Morgan recovery could be supported by the other grounds mentioned in its findings of fact and conclusions of law.

The judgment of the trial court is affirmed.

Brian Quinn
Chief Justice