

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002131-MR
AND
NO. 2007-CA-002180-MR

THOMAS J. SCHULTZ

APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE G. CLAYTON, JUDGE
ACTION NO. 04-CI-003093

GENERAL ELECTRIC HEALTHCARE
FINANCIAL SERVICES, INC.; GENERAL
ELECTRIC COMPANY; AND GENERAL
ELECTRIC CAPITAL CORPORATION

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: Thomas Schultz appeals from a judgment of the Jefferson Circuit Court which awarded General Electric Healthcare Financial Services, Inc., General Electric Company, and General Electric Capital Corporation² \$450,000. GE sued Mr. Schultz, who was the sole shareholder of Intra-Med Services, Inc. (hereinafter Intra-Med), to pierce the corporate veil and find Mr. Schultz personally liable for a portion of a \$4.7 million judgment previously entered for GE against Intra-Med. The trial court granted GE a judgment on the pleadings and awarded GE a judgment in the amount of \$450,000³ against Mr. Schultz individually.

Mr. Schultz argues that the judgment on the pleadings was in error because he denied the allegations GE made which would allow a piercing of the corporate veil and that his affirmative defenses precluded a judgment on the pleadings. In the alternative, he argues that if GE was entitled to pierce the corporate veil, then the \$450,000 amount awarded was too much and should be lowered. GE argues that the judgment on the pleadings was properly granted and that \$450,000 was the proper amount awarded.

Mr. Schultz was the president and sole shareholder/owner of Intra-Med, a Kentucky corporation that performed medical diagnostic imaging services, such as MRI's and CT scans. GE entered into a contract to lease certain medical

² Hereinafter the appellees will collectively be referred to as "GE."

³ GE stipulated that it was willing to settle for this amount in order to end the legal proceedings.

equipment to Intra-Med. In 2004, Intra-Med defaulted on the contract by failing to make the required lease payments to GE.

On July 8, 2004, GE filed a complaint against Intra-Med in Jefferson Circuit Court. On November 15, 2004, the court entered a judgment on the pleadings in favor of GE for over \$4.7 million. GE was able to collect approximately \$700,000 of the judgment.

While collecting on its judgment, GE learned of certain documents that Intra-Med had produced in discovery in another lawsuit. Those documents revealed that Mr. Schultz had used Intra-Med assets for his own purposes. For example, Mr. Schultz bought multiple pieces of property for himself using Intra-Med funds and that when some of this property was later sold, Mr. Schultz kept the proceeds. GE intervened in this other lawsuit and filed a third-party complaint against Mr. Schultz seeking to pierce the corporate veil and hold him personally liable for the judgment against Intra-Med.

On April 17, 2007, GE filed a motion for partial judgment on the pleadings in which it requested a partial judgment in the amount of \$1,150,000. This was allegedly the amount of Intra-Med funds which Schultz used improperly.

On August 10, 2007, the trial court held that Mr. Schultz's admissions in his answer to GE's third-party complaint support the conclusion that Schultz improperly used Intra-Med's funds. It also held that none of Mr. Schultz's affirmative defenses would preclude an entry of judgment against him. However, the court found that Mr. Schultz might have been entitled to receive some

payments from Intra-Med because he personally loaned the company \$700,000.

Because of this possibility, the court denied GE's motion.

GE next filed a motion in which it stated it would settle for \$450,000, the difference between \$1,150,000 and the claimed \$700,000 loan. GE also stipulated that it would voluntarily dismiss its remaining claims against Mr. Schultz if the court entered the \$450,000 judgment. The court ultimately granted the motion on September 10, 2007. Mr. Schultz filed a motion to alter or amend, but it was denied. This appeal followed.

Mr. Schultz argues that granting GE's motion for a judgment on the pleadings was improper because he sufficiently denied GE's allegations as to survive the motion. He also argues that his affirmative defenses created questions of fact that precluded granting the motion. We disagree.

[A] judgment on the pleadings can be granted only if, on the admitted material facts, the movant is clearly entitled to a judgment. Relief must be denied if there is a material issue of fact When a party moves for judgment on the pleadings, he admits for the purposes of his motion not only the truth of all of his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary. The question thus presented is one of law and requires an examination of the pleadings. (Citations omitted).

Archer v. Citizens Fidelity Bank & Trust Co., 365 S.W.2d 727, 729 (Ky. 1963).

Not only does the moving party admit the truth of the non-moving party's allegations, but he also admits the truth of the non-moving party's defenses.

Sheffer v. Chromalloy Min. and Mineral Division of Chromalloy American Corp.,

578 S.W.2d 594, 595 (Ky. App. 1979). Only the denial of material facts will be effective in defeating a motion for judgment on the pleadings, denial of legal conclusions will not. *Archer, supra*. We review *de novo*. *Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1001, 1005 (6th Cir. 1995).

Mr. Schultz admitted several facts in his answer to GE's third-party complaint. The relevant admitted facts are: on November 15, 2004, GE was awarded a judgment in the amount of \$4,746,921.80, plus interest, against Intra-Med; Mr. Schultz had knowledge of the GE judgment on or after November 15, 2005; on or about December of 1998, Mr. Schultz, individually, purchased real property located at 7405 New LaGrange Road, Louisville, KY 40242, using Intra-Med funds; Intra-Med did not receive any of the proceeds from the subsequent sale of the New LaGrange Road property in March of 2004; on or about October of 2000, Mr. Schultz, individually, purchased and improved real property located at 8700 Dixie Highway, Louisville, KY 40258, using Intra-Med funds; after entry of the GE judgment, Mr. Schultz sold the Dixie Highway property, which had been purchased and renovated by Mr. Schultz with Intra-Med funds, for \$850,000; Intra-Med did not receive any of the proceeds from the sale of the Dixie Highway property; on or about May 24, 2001, Mr. Schultz, individually, purchased a marina slip for \$23,000 with Intra-Med funds; and that Intra-Med did not receive any of the proceeds from the subsequent sale of the marina slip. It is from these admitted facts that GE moved for a judgment on the pleadings.

“Three basic ‘theories’ have been utilized to hold the shareholders of a corporation responsible for corporate liabilities. These have been labeled (1) the instrumentality theory; (2) the alter ego theory; and (3) the equity formulation.”

White v. Winchester Land Development Corp., 584 S.W.2d 56, 61 (Ky. App. 1979) (citation omitted). GE focused on the instrumentality theory in its motion.

Under the instrumentality theory three elements must be established in order to warrant a piercing of the corporate veil: (1) that the corporation was a mere instrumentality of the shareholder; (2) that the shareholder exercised control over the corporation in such a way as to defraud or to harm the plaintiff; and (3) that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss. The courts adopting this test have been virtually unanimous in requiring that these three elements co-exist before the corporate veil will be pierced.

Id.

Mr. Schultz argues that the judgment on the pleadings should be reversed because he denied the allegations in the complaint regarding the elements of the instrumentality theory. We disagree. In its complaint, GE specifically alleged each of the three elements of the instrumentality theory separately from its allegations of the facts relied upon to satisfy those elements. In his answer, Mr. Schultz denied these allegations while admitting the alleged facts. We find that his denials were insufficient to withstand a judgment on the pleadings because they were denials of conclusions of law and not material facts. As noted in *Archer*, *supra*, at 729, only the denial of material facts will be effective in defeating a motion for a judgment on the pleadings.

The admitted facts recited *infra* support the finding that the corporate veil should be pierced under the instrumentality theory. Mr. Schultz treated the corporation as a mere instrumentality by using corporate funds for his own individual purposes to purchase real estate and a boat slip. The admitted facts also demonstrate that Mr. Schultz harmed GE by using corporate funds as his own even after GE obtained a monetary judgment against Intra-Med. Money that could have been used to satisfy that judgment was used by Mr. Schultz for his own purposes. Finally, not piercing the corporate veil would subject GE to an unjust loss. As previously stated, money that could have been used to satisfy GE's judgment against Intra-Med was removed from the company and used elsewhere. GE has only been able to recover around \$700,000 from a \$4.7 million judgment. Piercing the corporate veil appears to be the only method for GE to recover its judgment.

Mr. Schultz also argues that his twenty-two affirmatively pled defenses should have precluded a judgment on the pleadings. He claims that the defenses negate the finding of fraud and unjust loss, which are elements of the instrumentality theory. He specifically cites to three defenses: that GE, at the time it entered into its agreement, knew Intra-Med could not pay the full amount owed if there was a default of the lease; that GE had access to all of Intra-Med's financial information and still proceeded with the transaction; and that GE had the option of asking Mr. Schultz to individually guarantee these agreements.

The first two defenses cited are without merit. While GE had Intra-Med's financial information, it certainly did not expect Mr. Schultz to use

corporate funds as his own or to sell corporate assets and keep the proceeds for himself. While we find that the admitted facts show fraud on the part of Mr. Schultz, it is clear they also demonstrate harm to GE. The second prong of the instrumentality theory states that the plaintiff (GE) must have been defrauded or harmed.

Mr. Schultz does cite to *White, supra*, for the contention that the failure to obtain a personal guarantee could show the lack of an unjust loss. In *White*, a previous panel of this Court found that a bank did not suffer unjust loss because it could have required personal loan guarantees from the primary shareholders of a corporation. While we believe that this issue is one to be considered, it is not dispositive. It is just another factor to be considered when balancing the equities of the case. Further, if the lack of a personal guarantee were dispositive of the issue, the entire concept of piercing the corporate veil would be obsolete and irrelevant. We find that Mr. Schultz's blatant use of corporate funds as his own outweighs the lack of a personal guarantee.

In summary, Mr. Schultz's defenses do not preclude a judgment on the pleadings. Even if we were to find that each of the defenses is true, as is required for a judgment on the pleadings, *Sheffer, supra*, none of the defenses negate the fact that he admittedly used corporate funds and property as his own to GE's detriment. Mr. Schultz's admissions fulfill all three elements of the instrumentality theory for piercing the corporate veil and support the trial court's judgment on the pleadings.

In the alternative, Mr. Schultz argues that even if the corporate veil should be pierced, the \$450,000 judgment is too much and should be reduced. We disagree. At the initiation of this suit, Intra-Med still owed GE approximately \$4 million. GE could have sought to recover the full \$4 million amount from Mr. Schultz, but it settled for \$1,150,000 and then later for \$450,000. Once the corporate veil is pierced, Mr. Schultz could have been held liable for the full \$4 million; therefore, a \$450,000 judgment is not excessive.

For the foregoing reasons we affirm the trial court's judgment on the pleadings.

LAMBERT, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion. I do not believe this case should have been subject to a judgment on the pleadings.

I begin with the legal framework in which a CR 12.03 motion must be considered. A judgment on the pleadings must be issued with caution and "only if, on the admitted facts, the movant is *clearly* entitled to a judgment." *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727, 729 (Ky. 1963)(emphasis added). Since the adoption of the civil rules, liberality and simplicity in pleadings is the style in Kentucky. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). Most importantly, for the purpose of the motion, the moving party admits the non-

moving party's defenses. *Sheffer v. Chromalloy Mining and Mineral Div. of Chromalloy Am. Corp.*, 578 S.W.2d 594, 595 (Ky. App. 1979).

Thus, in view of this state's notice theory of pleading as contrasted to fact pleading, a judgment on the pleadings against a defendant who has filed a proper answer is a rarity. *La Vielle v. Seay*, 412 S.W.2d 587 (Ky. 1967). This is particularly true where, as in this case, the litigation is complex, the burden upon the plaintiff substantial and the defendant has filed an answer complete with assertions of fact, law, and affirmative defenses.

The complexity of the present case is evident by the applicable legal theories and proof required. Generally speaking, the corporate veil should only be pierced "reluctantly and cautiously." *White v. Winchester Land Development Corp.*, 584 S.W.2d 56, 62 (Ky. App. 1979). The answer denied essential facts asserted in the complaint, including that Intra-Med was an instrumentality of Schultz, that he exercised control over Intra-Med to defraud or harm GE, and that the refusal to disregard the corporate form would subject GE to an unjust loss. Additionally, he set forth twenty-two affirmative defenses supported by assertions of fact including:

14. The Complaint is barred, in whole or in part, because General Electric knew, at the time it entered into its agreements with Intra-Med in July of 2001, that if there was a default and the acceleration clause was invoked, Intra-Med did not have sufficient assets to pay the full amount that was owed.
15. The Complaint is barred, in whole or in part, because GE had, at the time it entered into the agreements with Intra-

Med in July of 2001, full access to Intra-Med's financial information, and still proceeded with the transaction.

16. The Complaint is barred, in whole or in part, because GE had, at the time it entered into the agreements with Intra-Med in July of 2001, the option of asking Thomas Schultz

for an individual guaranty to secure these agreements, and it failed to do so.

Thus, Schultz explicitly refuted that he made any misrepresentations of fact to GE and that GE was defrauded.

Because the circuit court prematurely terminated the litigation, Schultz was not allowed to prove his investment into the corporation of his time, his resources and his in-kind labor. He was not allowed to prove repayments to the corporation for the funds which were expended by the corporation on his personal needs. Although there was proof in the record of some self-dealing between the corporation and Schultz, the judgment on the pleadings did not allow Schultz sufficient ability to prove his possible defenses.

I would reverse and remand the case for further proceeding.

BRIEFS AND ORAL ARGUMENT
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