

RENDERED: JANUARY 20, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001396-MR

STEVEN KILLIAN

APPELLANT

v. APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 05-CI-00120

TUNACAKES PROPERTIES, INC.,
DENNIS BROWNING, AND
MIKE BROWN

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

KELLER, JUDGE: Steven Killian (Killian) appeals from a judgment of the Spencer Circuit Court based upon a jury verdict in favor of Tunacakes Properties, Inc. (Tunacakes). For the reasons set forth below, we reverse and remand.

FACTS

Tunacakes, a Kentucky corporation doing business under the assumed name of Settlers Trace Grocery, Deli and Bait House (Settlers Trace), owned and operated a small grocery, gas, and boat storage business. Dennis Browning (Browning) and Michael Brown (Brown) were the owners of Tunacakes. On January 30, 2003, Tunacakes agreed to sell the business and entered into a Purchase Agreement with Killian for his purchase of Settlers Trace, including the land, improvements, inventory, and equipment for \$812,500.

It is undisputed that prior to the closing, Killian assigned his interest in the Purchase Agreement to SK Development, LLC (SK Development) and SJK Properties, Inc. (SJK Properties). Killian is the sole owner of SK Development, and is also the controlling shareholder of SJK Properties, owning 70%. Killian's wife owns the remaining 30%. The plan was for SJK Properties to operate and manage Settlers Trace, and SK Development to hold the title to the real property, leasing it back to SJK Properties.

SK Development and SJK Properties financed most of the purchase of Settlers Trace by obtaining a loan from Republic Bank in the principal amount of \$650,000. The parties agreed that Tunacakes would provide additional financing in the amount of \$150,000. Allegedly, the parties initially agreed that, for the first five years, Tunacakes would accept five annual "interest-only" payments in the amount of \$7,500 in lieu of the full principal and interest payments. However, as a result of conditions on the loan SK Development and SJK Properties received from

Republic Bank, Tunacakes agreed to forgo any payments for the first five years.

Thus, on March 31, 2003, SJK Properties executed a Promissory Note to Tunacakes agreeing to pay Tunacakes the principal sum of \$150,000 plus interest at a rate of 5% per-annum, payable in five annual and equal installments of \$34,646.22, beginning on January 31, 2008.

Tunacakes, Browning, Brown, and SJK Properties entered into a Consulting Agreement, whereby SJK Properties agreed to pay Tunacakes 0.65% of Settlers Trace's annual gross sales for years 2003 through 2007. Allegedly, the Consulting Agreement was entered into in order to help provide additional compensation to Tunacakes, because it agreed to forgo any payments for the first five years.

On July 6, 2005, Tunacakes filed suit in the Spencer Circuit Court against SJK Properties alleging that it failed to pay Tunacakes the 2004 consulting fee. After a lapse of nearly three years, the trial court granted Tunacakes's motion to file an amended complaint, and to join SK Development, and Killian, individually, as party defendants to the action.¹ In its amended complaint, Tunacakes alleged that SJK Properties did not pay the consulting fees for years 2004 through 2007. Tunacakes also alleged that no installment payments had been made on the Promissory Note, in breach of its express terms, thus making the entire \$150,000 plus accrued interest immediately due and payable. Additionally, Tunacakes alleged that SK Development and SJK Properties had been unjustly

¹ Republic Bank was also added as a party defendant only for the purposes of asserting any claim it had that was superior to Tunacakes's promissory note. This is not relevant to this appeal.

enriched. Further, Tunacakes alleged that Killian should be held personally, jointly and severally liable along with SK Development and SJK Properties under the Promissory Note and Consulting Agreement.

After a five-day trial, the jury returned a verdict in favor of Tunacakes on all claims against SK Development, SJK Properties, and Killian. Specifically, SJK Properties was found liable to Tunacakes in the amount of \$42,391.67 for breach of the Consulting Agreement, and SK Development and SJK Properties were found to be jointly liable to Tunacakes in the amount of \$150,000 for breach of the Promissory Note. The jury also determined that SK Development, SJK Properties, and Killian were unjustly enriched and were jointly and severally liable for full restitution to Tunacakes.

The trial court subsequently entered a judgment consistent with the jury's verdict. On June 28, 2010, Killian filed a motion to alter, amend, or vacate the judgment arguing that Killian could not be held personally liable for the judgments against SK Development and SJK Properties. The trial court denied that motion. This appeal followed.

ANALYSIS

At the outset, we note that Browning and Brown were not parties to the underlying action. Thus, they are not properly parties to this appeal.

On appeal, Killian argues that the trial court erred in allowing a jury instruction on piercing the corporate veil. As correctly noted by Tunacakes, there

was not a jury instruction on piercing the corporate veil. Thus, this argument is without merit.

Killian also argues that the trial court erred in allowing a jury instruction on unjust enrichment. Although it is unclear, it appears that Killian is arguing that, by allowing the jury instruction on unjust enrichment, the trial court implicitly pierced the corporate veil, allowing Killian to be held personally liable.

The unjust enrichment jury instruction read as follows:

INSTRUCTION NO. 6

Are you satisfied from the evidence that:

a) That SJK, SK Development, LLC and Steven Killian have each benefitted, and have continued to benefit economically by the acquisition of Settlers Trace and that such acquisition would not have been possible unless Tunacakes had agreed to enter into the Consulting Agreement with SJK;

b) That SJK, SK Development, LLC and Steven Killian have each benefitted, and continued to benefit economically by the [sic] purchasing Settlers Trace and that said acquisition would not have been possible unless Tunacakes accepted the Promissory Note from SJK;

c) SJK, SK Development, LLC and Steven Killian, continue to use, possess and/or otherwise enjoy the benefits of an income producing business and property, which would not have been available, but for Tunacakes' acceptance of the payment terms of the Consulting Agreement and Promissory Note; and

d) To prevent unjust enrichment, SJK, SK Development, LLC and Steven Killian, are jointly and severally liable for full restitution to

Tunacakes in amounts now due and owing under the payment terms of the Consulting Agreement and Promissory Note.

Initially, we note that Killian's brief fails to include a statement on how he preserved this issue for appeal as required by Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v). It is not the burden of the Court to search the record to find proof of the Appellants' claims. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Having carefully reviewed the record, we note that this issue was not preserved for review because Killian did not timely object to the unjust enrichment instruction. Pursuant to CR 51(3), the time to object to jury instructions is prior to the court instructing the jury. As stated in *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973), "if the appellants were not satisfied with any phase or portion of the instructions the time to speak was before they were given to the jury." Further, "a general objection without specification is insufficient to preserve the [alleged] error." *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky. App. 2001).

A review of the record reflects that Killian made an objection to the jury instruction on unjust enrichment, but only argued that Tunacakes had not presented sufficient evidence to support a finding of unjust enrichment. Killian did not argue that, by allowing an unjust enrichment instruction, the trial court would be implicitly finding that the corporate veil should be pierced. Although it does appear that Killian raised this issue in his motion to alter, amend or vacate the judgment, an objection to a jury instruction raised for the first time in a post-trial

motion is not timely. *Burgess*, 44 S.W.3d at 814. Therefore, this issue is not properly preserved for our review.

Because this issue was not properly preserved, our review is confined to manifest injustice. As set forth in *Carrs Fork Corp. v. Kodak Min. Co.*, 809 S.W.2d 699, 701 (Ky. 1991):

Civil Rule 61.02 provides that palpable error which affects the substantial rights of a party may be considered by the reviewing court even though insufficiently raised or preserved for review and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error. In applying this rule, the palpable error must result from action taken by the court rather than an act or omission by the attorneys or litigants.

Further, manifest injustice exists only if the error “so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). We believe that the jury instruction on unjust enrichment resulted in a manifest injustice.

First, we note that any jury instruction on unjust enrichment is improper because unjust enrichment is an equitable doctrine, *Dodson v. Key*, 508 S.W.2d 586 (Ky. 1974), and the application of an equitable doctrine to the facts of a case is a question of law. *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. App. 2009). Accordingly, the question of whether Killian, SK Development, and SJK

Properties were unjustly enriched, if it were an appropriate inquiry, should not have been decided by the jury but by the trial court.

Next, we note that unjust enrichment is not an available remedy to Tunacakes with regard to SK Development and SJK Properties. The doctrine of unjust enrichment “is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another.” *Haeberle v. St. Paul Fire & Marine Ins.*, 769 S.W.2d 64, 67 (Ky. App. 1989) (citations omitted). However, when “an express contract is made defining the circumstances under which an obligation may arise with reference to a certain subject matter such contract excludes the possibility of an implied contract concerning the same matter.” *Sparks Milling Co. v. Powell*, 283 Ky. 669, 672, 143 S.W.2d 75, 76 (1940). Therefore, any recovery must be under the terms of the express contract. *Id.* In this case, there was a written contract that set forth the obligations of SK Development and SJK Properties to Tunacakes. Thus, unjust enrichment was not an available remedy for Tunacakes as to SK Development and SJK Properties.

Finally, we conclude that unjust enrichment, as used in this case, imposed personal liability on Killian thereby piercing the corporate veil. As noted by this Court in *Daniels*, 300 S.W.3d at 211, “piercing the corporate veil” is “the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation’s wrongful acts, . . .” (*Quoting* 18 *C.J.S. Corporations* § 14 (2008)). “[T]he decision as to whether to pierce the

corporate veil is an equitable one to be decided by the trial court and not the jury.”

Id. at 213.

Based on the preceding, Killian could not be held personally liable until the trial court determined that the corporate veil could be pierced. Having carefully reviewed the record, we note that the trial court did not make such a finding. Absent such a finding, the unjust enrichment instruction, which allowed the jury to hold Killian personally liable for the liabilities of SK Development and SJK Properties, resulted in a manifest injustice. Accordingly, we remand this case for the trial court to determine whether the corporate veil can be pierced. If the corporate veil cannot be pierced, then a finding that Killian was unjustly enriched would be inappropriate because Killian cannot be held personally liable. If the trial court determines that the corporate veil can be pierced, then there need not be a determination as to whether Killian was unjustly enriched. Killian would be personally and contractually liable for the wrongful acts of SK Development and SJK Properties. As previously noted, because Tunacakes would have contractual remedies, the equitable remedy of unjust enrichment would not apply.

CONCLUSION

For the foregoing reasons, we reverse the Judgment of the Spencer Circuit Court and remand for a new trial. Prior to trial, the court must first determine whether the corporate veil should be pierced. Regardless, Tunacakes is not entitled to an unjust enrichment jury instruction.

ALL CONCUR.

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