

RENDERED: JULY 25, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001445-MR

DANIEL D. TAYLOE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CI-07128

SELLCO TWO CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Daniel Tayloe appeals from the entry of summary judgment in favor of Sellco Two Corporation (Sellco) awarding judgment against Tayloe in the amount of \$745,733.47, plus court costs. After careful review, we affirm the judgment of the Fayette Circuit Court.

This case involves the collection of an account receivable. Sellco is the owner of an account receivable against Thoroughbred Coal Company, LLC (Thoroughbred). Tayloe is the managing member of Thoroughbred; Sellco contends he is the sole member, whereas Tayloe contends that his mother is also a member. The account receivable originated with Thoroughbred's purchases of Synfuel (a type of fuel derived from coal) from RC Synfuel, LLC in December 2005 and January 2006, for which Thoroughbred did not pay. Sellco is RC Synfuel's successor in interest.

Sellco filed suit against Thoroughbred in February 2009, and on April 2, 2010, Thoroughbred and Sellco entered into an agreed judgment for \$745,733.47. Tayloe executed the agreed judgment on behalf of Thoroughbred, and Sellco did not obtain a personal guarantee from Tayloe. Rather, Sellco received an assignment of a one million dollar life insurance policy on Tayloe as additional consideration for the settlement agreement and security for the agreed judgment.

During post-judgment discovery, Thoroughbred produced bank records that revealed that Tayloe took at least \$6,145,813.39 in corporate monies for himself. Sellco then filed the present action on December 17, 2010, seeking to hold Tayloe personally liable for the debt. Sellco contended that Tayloe should be held liable because he breached his duties as manager of Thoroughbred and argued that Tayloe owed a duty to Sellco to conduct Thoroughbred's business in a manner so as not to leave it without adequate capital to conduct its business or to prevent

Thoroughbred from paying the judgment. Sellco also contended that Tayloe used Thoroughbred's assets as his own. In an order entered on March 15, 2012, the circuit court entered an order granting Sellco's motion for summary judgment against Tayloe, piercing the corporate veil, and holding Tayloe personally liable. Tayloe subsequently filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the court's entry of summary judgment. The circuit court denied that motion on July 26, 2012, and this appeal followed.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

On appeal, Tayloe first contends that Section 13 of the RC Synfuel Sales Contract precludes Sellco's claims against Tayloe and thus that the trial court improperly entered summary judgment in Sellco's favor.

Section 13 of the terms and conditions of the sales contract provides, "Neither party shall (a) assert or seek to assert any claim against, (b) name in any civil action or proceeding or arbitration, or (c) seek or obtain any judgment, order or decree against any member, manager, shareholder, officer, employee, agent or representative of Buyer or Seller, **with respect to Buyer's or Seller's obligations under this agreement.**" (Emphasis added).

Tayloe contends that the primary objective of contract interpretation is to give effect to the parties' intent at the time they entered into the agreement and to look at the language in the agreement to decipher this intent. However, Tayloe argues that by refusing to enforce the sales contract as written, the circuit court essentially rewrote the agreement between RC Synfuel and Thoroughbred, citing *Meyers v. Kentucky Medical Ins. Co.*, 982 S.W.2d 203, 210 (Ky. App. 1997) ("Courts cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them.") (internal citation omitted). Tayloe contends that the circuit court's interpretation of the contract language renders Section 13 meaningless.

Sellco counters that, by its terms, Section 13 of the sales contract only applies to the buyer's or seller's obligations under that agreement. The circuit

court determined that the action brought in this case is “distinct from a claim based on the sales contract,” thereby making the provision inapplicable. Therefore, Sellco argues that no construction, interpretation, or determination of an alleged ambiguity was necessary. Instead, Sellco argues that its claims arose from Tayloe fraudulently taking assets from Thoroughbred and Sellco after its predecessors became Thoroughbred’s creditors.

Sellco further argues that even if the clause on which Tayloe relies was enforceable, it would have operated only to relieve Tayloe of obligations arising from the contract itself, not responsibility for Sellco’s extra-contractual fraud, tort, and equitable claims. Sellco argues that Tayloe cannot contract away responsibility for his intentional and fraudulent misappropriation of Thoroughbred’s assets and cites to the Restatement (Second) of Contracts § 195(1) (1981) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”).

We agree with Sellco and the circuit court that Section 13 of the sales contract does not apply to the instant claims of Sellco against Tayloe. Furthermore, we also agree that Tayloe cannot contract away his responsibility for his intentional and fraudulent misappropriation of Thoroughbred’s assets. *See Cumberland Valley Contrs., Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007) (an exculpatory clause cannot protect one from liability for willful and wanton conduct). “The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable.” *Hanson v. American*

Nat'l Bank & Trust Co., 865 S.W.2d 302, 309 (Ky. 1993). Accordingly, Section 13 of the sales contract does not insulate Tayloe from the instant action, and the trial court's ruling in this regard is affirmed.

Next, Tayloe argues that the circuit court's decision to pierce the corporate veil violated the plain language of Kentucky Revised Statutes (KRS) 275.150. That statute, in relevant part, provides:

(1) Except as provided in subsection (2) of this section or as otherwise specifically set forth in other sections in this chapter, no member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall be personally liable by reason of being a member, manager, employee, or agent of the limited liability company, under a judgment, decree, or order of a court, agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise. The status of a person as a member, manager, employee, or agent of a limited liability company, including a professional limited liability company, shall not subject the person to personal liability for the acts or omissions, including any negligence, wrongful act, or actionable misconduct, of any other member, manager, agent, or employee of the limited liability company. That a limited liability company has a single member or a single manager is not a basis for setting aside the rule otherwise recited in this subsection.

(2) Notwithstanding the provisions of subsection (1) of this section, under a written operating agreement or under another written agreement, a member or manager may agree to be obligated personally for any of the debts, obligations, and liabilities of the limited liability company.

(3) Subsection (1) of this section shall not affect the liability of a member, manager, employee, or agent of a

limited liability company for his or her own negligence, wrongful acts, or misconduct.

In some states, the laws governing LLCs specifically allow for the piercing of an LLC's corporate veil. *See, e.g.*, Minn. Stat. Ann. § 322B.303(2); Colo. Rev. Stat. Ann. § 7-80-107(1). Tayloe argues that there is no such provision in Kentucky's LLC Act and that instead KRS 275.150(1) demonstrates the Legislature's intent to provide extremely broad protections to members and managers of Kentucky LLCs.

Sellco counters that piercing the corporate veil of an LLC is not any different than piercing the veil of a corporation. Kentucky courts have recognized that limited liability companies were created only as a method of combining the income tax advantages of a partnership with the business advantages of a corporation. *See Racing Inv. Fund 2000, LLC v. Clay Ward Agency, Inc.*, 320 S.W.3d 654 (Ky. 2010). Sellco argues that there is no question that an LLC's corporate veil may be pierced when extraordinary circumstances exist to impose liability, as is the case when the entity has been abused so as to perpetrate a fraud. *Id.* at 656. Sellco contends that Kentucky cases do not distinguish between corporations and LLCs when discussing liability and piercing the corporate veil, citing *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012).

We agree with Sellco that Kentucky law does not distinguish between corporations and LLCs when discussing liability or piercing the corporate veil. *See id.* For instance, in *Hodak v. Madison Capital Mgmt., LLC*, 348 Fed. Appx.

83, 94 (6th Cir. 2009), the Sixth Circuit found no distinction between a corporation and an LLC in a veil piercing action brought against an LLC. While Tayloe cites to this Court's language in *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 469 (Ky. App. 2012), wherein we stated, “[n]o reported Kentucky decision discusses the piercing of an LLC entity[,]” in that particular case, the Court determined that the conduct did not rise to the level of fraud necessary to pierce the corporate veil of the LLC. Importantly, the Court did not determine that it was not possible for the veil to be pierced; it instead determined that with the facts before it, it was not warranted.

We agree with Sellco that Kentucky courts have treated LLCs and corporations similarly for purposes of determining liability when fraud is alleged. Thus, we do not find any error in the circuit court's decision to evaluate whether Thoroughbred's corporate veil could be pierced.

Next, Tayloe argues that the circuit court's summary judgment imposing liability on him did not comply with the requirements for corporate veil piercing recently announced by the Kentucky Supreme Court in *Inter-Tel Technologies, Inc., supra*. The circuit court's judgment was issued on the same day that two opinions of the Supreme Court clarifying a number of issues related to piercing of corporate veils under Kentucky law became final. Tayloe argues that even if the same veil-piercing analysis is applied to Kentucky LLCs and traditional Kentucky corporations, the circuit court's judgment must still be reversed, as the circuit court

did not conduct the proper analysis or find the facts required to pierce the corporate veil in this case.

Tayloe points out that the Supreme Court in *Inter-Tel* held that there are a number of theories by which a creditor may attempt to circumvent the protections provided to shareholders under Kentucky's corporate statutes, but there are two essential elements and required findings in every veil-piercing analysis:

A Kentucky trial court may proceed under the traditional alter ego formulation or the instrumentality theory because the tests are essentially interchangeable. Each resolves to two dispositive elements: (1) domination of the corporation resulting in a loss of corporate separateness *and* (2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice. In assessing the first element, the courts should look beyond the five factors enumerated in *White* to the more expansive lists of factors discussed *supra*. As to the second element, the trial court should state specifically the fraud or injustice that would be sanctioned if the court declined to pierce the corporate veil.

Inter-Tel Technologies at 165 (emphasis in original) (citing *White v. Winchester Land Development Corp.*, 584 S.W.2d 56 (Ky. App. 1979)). As to the first element of any veil-piercing claim, the Supreme Court instructed that it is no longer sufficient for Kentucky courts to consider only the five factors set out in the seminal case of *White*. Instead, Tayloe argues that trial courts must consider a more expansive list of factors when deciding whether to grant the extreme relief sought in a veil-piercing claim. Tayloe contends the trial court did not consider this expansive list of factors in the instant case.

Sellco argues that the trial court properly considered the decisions rendered by the Kentucky Supreme Court in *Inter-Tel* and *Schultz v. General Elec. Healthcare Financial Services, Inc.*, 360 S.W.3d 171 (Ky. 2012). We agree. In addressing Tayloe's motion to alter, amend, or vacate, the circuit court considered and analyzed the decisions rendered in *Inter-Tel* and in *Schultz*. The circuit court also considered the expanded list of factors set forth in those cases, specifically stating:

The additional factors set out in *Inter-Tel* relevant to the issues in this case, *i.e.*, 1) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors—which the post-judgment discovery revealed through the production of [Thoroughbred's] bank records; 2) the commingling of funds; and 3) failure to maintain arm's-length relationships among related entities. These three factors were previously briefed by the parties and discussed at the hearing on the Motion for Summary Judgment. The other factors listed in *Inter-Tel* are not relevant to this case, *i.e.*, failure to issue stock, nonpayment of dividends, whether the parent owns all or most of the stock of the subsidiary. Further, *Inter-Tel* acknowledged that it was unnecessary for each enumerated factor to be satisfied in order for a court to pierce the corporate veil.

Tayloe also asserts that the court should have specifically identified the fraud or injustice that would occur if the veil were not pierced and argues that such findings were not made. However, a review of the record again reflects that the court clearly noted its finding in this regard:

It was Tayloe's actions to divert corporate funds for his personal use to the total of an excess of six million dollars and then after executing the Agreed Judgment on behalf of [Thoroughbred] closed the doors of the

company and opened a competing one. Tayloe...unjustly enriched himself at the expense of the company's creditors by spending company money for his personal expenses.

The circuit court clearly noted the injustice that would occur—the unjust enrichment of Tayloe and the prejudice to the ability of his creditors (like Sellco) to collect their monies owed.

Tayloe's actions are very similar to the facts evaluated by the court in *Sea-Land Services, Inc. v. The Pepper Source*, 941 F.2d 519 (7th Cir. 1991), a case the Kentucky Supreme Court referred to in *Inter-Tel*. In *Sea-Land*, a creditor shipped peppers to a company held to be the alter ego of the defendant. The court affirmed the trial court's summary judgment on the first prong of the “alter-ego” test that there was a unity of interest between the defendant and his corporation. The court remanded the case for the trial court to determine whether failing to pierce the veil would sanction fraud, intentional wrongdoing, or promote injustice. On remand, the trial court found this second element existed and pierced the veil, holding the defendant liable for the company's debt to the creditor. We agree that similarly, Tayloe unjustly enriched himself at the expense of the company's creditors by spending company money for his personal expenses and for expenses of his other companies.

Schultz, the other case rendered by the Kentucky Supreme Court on the day that *Inter-Tel* was rendered, also fails to advance Tayloe's argument that summary judgment was improper in this case. In *Schultz*, the Court described the

circumstances under which a court may properly pierce a corporation's veil, but the opinion turned on the propriety of piercing a veil solely on the pleadings, not on a motion for summary judgment. *Schultz* held only that the trial court erred in piercing the corporate veil based solely on the pleadings and that "the trial court was in no position to conclude that [the shareholder] exercised control of the entity to defraud or harm [the creditor] or that the refusal to disregard the corporate form would subject [the creditor] to an unjust loss." *Schultz*, 360 S.W.3d at 178. To the contrary, the decision in the case at bar was based on a far more developed record. Unlike in a judgment on the pleadings, the context of summary judgment affords the court ample opportunity to consider the evidence of a case. We find *Schultz* to be unpersuasive in the instant case.

A review of the record indicates that there were no genuine issues of material fact and that the trial court did not err as a matter of law. Thus, we affirm the Fayette Circuit Court's March 15, 2012, order granting summary judgment to Sellco Two Corporation and the court's July 26, 2012, order denying Tayloe's motion to alter, amend, or vacate.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Frank C. Medaris, Jr.
Hazard, Kentucky

Keith Moorman
Lexington, Kentucky

BRIEF FOR APPELLEE:

John E. Hinkel, Jr.
Lexington, Kentucky