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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001822-MR

MOUNTAIN PAVING AND
CONSTRUCTION, LLC; AND
SAM DOYLE — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 10-CI-00920

EDDIE WORKMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Sam Doyle and Mountain Paving and Construction, LLC, (Mountain Paving) bring this appeal from a Pike Circuit Court judgment entered October 1, 2012, which pierced the corporate veil and imposed individual liability on Doyle in the amount of $6,000.

Mountain Paving was a limited liability company formed pursuant to the "Kentucky Limited Liability Company Act," Kentucky Revised Statutes (KRS) 275.001 – KRS 275.540. Its principals were Sam Doyle and James Boyd. In 2007, appellee Eddie Workman, entered into a contract with Mountain Paving to pave his driveway, at a cost of $8,000. Both the paver and the roller malfunctioned, with the result that the driveway surface was uneven, with dips and washboard-like effects. As it was too late in the paving season to fix the problem, and the equipment continued to malfunction, James Boyd signed the following handwritten statement on a company printed proposal pad: "I agree to come in spring and re surface with 1 1/2" of asphalt and 100% garetee [sic] for 1 yr after resurfacing." The $8,000 paid by Workman to Mountain Paving was the company's last paving job before going out of business. Mountain Paving was dissolved as a limited liability company shortly thereafter, and Workman's driveway was never repaired.

On June 11, 2007, Workman filed a complaint against Mountain Paving, Sam Doyle and James Boyd, claiming that Doyle and Boyd transferred the assets of the company to themselves without paying its lawful debts, and that the corporate veil should be pierced to hold them individually liable.

In August of 2012, a jury trial was held on Workman's damage claim against Mountain Paving. The jury awarded $6,000 to Workman for the defects in Workman's driveway. The issue piercing the corporate view was tried by the court in September of 2012. Following a bench trial, the trial court held that the

corporate veil should be pierced, and Doyle was adjudged to be individually liable for Workman's claim. This appeal by Doyle and Mountain Paving follows.

On appellate review of a bench trial by the circuit court, this Court will not set aside a trial court's findings of fact unless those findings are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Factual findings are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Substantial evidence is evidence that "has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citation omitted). Due regard is also given to the trial court's opportunity to judge the credibility of the witnesses. CR 52.01; *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). The circuit court's conclusions of law, however, are reviewed *de novo*. *Hoskins v. Beatty*, 343 S.W.3d 639 (Ky. App. 2011).

The members of an LLC are protected from personal liability by KRS 275.150(1), which provides, in part:

> [N]o 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.

This statutory protection from liability is not absolute, however. "Piercing the corporate veil is an equitable doctrine invoked by courts to allow a creditor recourse against the shareholders of a corporation." *Inter-Tel Technologies, Inc. v. Linn Station Properties*, *LLC,* 360 S.W.3d 152, 155 (Ky. 2012). There is no legal basis why this equitable doctrine should not also be applicable to LLCs. A successful veil-piercing claim comprises two elements: first, a showing that those who are held liable "exercised dominion over the corporation to the point that it has no real separate existence[;]" and second, a showing that "continued recognition of the corporation as a separate entity would sanction a fraud or promote injustice." *Id*. at 155. "[G]enerally the first element focuses on the relationship between the corporation and the owners or other corporate actors, while the second element concerns the relationship between the corporation and the plaintiff." *Bear, Inc. v. Smith*, 303 S.W.3d 137, 148 (Ky. App. 2010).

In considering the first element, the courts have identified several factors, none of them dispositive, as having a bearing on the relationship between the corporation and its owners:

> (1) whether the corporation is inadequately capitalized, (2) whether the owners observe corporate formalities, (3) whether the corporation issues stock or pays dividends, (4) whether it operates without a profit, (5) whether there is a commingling of corporate and personal assets, (6) whether the owners use corporate assets as their own, or in general deal with the corporation at arms length, (7) whether there are non-functioning officers or directors, (8) whether the corporation is insolvent at the time of the

> transaction, (9) whether corporate records have been maintained, and (10) whether others pay or guarantee debts of the corporation.

Id. at 148 (citing *White v. Winchester Land Development Corp.*, 584 S.W.2d 56, 61 (Ky. App. 1979)).

The trial court made the following findings under each of these factors, except for (7): (1) Mountain Paving was without capital at any time, other than a nominal $100 contributed when the corporation was founded; (2) no corporate formalities were observed; (3) Doyle and Boyd were paid sums that were not identified as anything other than dividends; (4) the corporation operated without a profit; (5) there was commingling of corporate and personal assets, in that everything used by the corporation belonged to Doyle, including equipment, office supplies and office employees; (6) there was testimony from Doyle that the equipment used by the corporation was also used to perform personal paving for himself, and that the corporation paid for maintenance and parts on equipment individually owned by Doyle; (7) no findings regarding whether there were non-functioning officers or directors; (8) the corporation was insolvent at the time of the transaction with Workman; (9) corporate records were not maintained; and (10) Doyle in his deposition testified that he paid certain personally-guaranteed debts of the corporation.

The trial court concluded that Mountain Paving was not just insufficiently capitalized, but not capitalized at all. It further found that Mountain Paving did not have a separate identity from Doyle's insurance company, which

had offices in the same building, and that insurance company employees would answer the phone when it rang for the paving company.

Appellants argue that the trial court's findings of fact did not support piercing the corporate veil, because Mountain Paving committed no fraudulent or unjust actions. It should be emphasized that a finding of fraud is not necessary to pierce the corporate veil. *See Inter-Tel Technologies, Inc.,* 360 S.W.3d at 165 (overruling *White, supra,* to the extent that it can be read to require evidence of actual fraud before an entity's veil is pierced). Although the trial court concluded that the circumstances of this case may not have risen to the level of fraud, it did find that, in order to get payment from Workman, promises were made by corporate representatives who knew the corporation to be insolvent and who knew Workman would have no legal recourse against the corporation should those promises be breached. The trial court found that if the corporate veil were not pierced, Workman would be subjected to an unjust loss. The trial court concluded that the corporate entity in this case was used to justify a wrong, and could therefore be disregarded.

Appellants argue that "the injustice must be something beyond the mere inability to collect a debt from the corporation." *Inter-Tel*, 360 S.W.3d at 165. But the injustice found by the trial court went well-beyond Workman's inability to collect a debt; the court described with specificity the injustice that would be sanctioned: that in order to induce payment for the defective workmanship in paving the driveway, Mountain Paving through its owners

provided a guarantee to Workman that repairs would be performed in the spring of 2008, knowing full-well that the work would not be performed, that the company would have no assets or capital to perform the work and that Workman would have no recourse against the company. This conclusion was supported by Workman's testimony that he did not pay for the driveway until after Boyd gave him the handwritten guarantee that the repairs would be performed in the spring of 2008.

Appellants argue that the evidence showed that the LLC was not undercapitalized. They acknowledge that a bank account was opened when the business was started that had an opening balance of only $100. They claim, however, that Doyle presented later statements which showed that the account had a balance at times of over $20,000. There is no reference to the record to these bank statements, in contravention of CR 76.12(4)(c)(v), which specifies that the argument must contain "ample supportive references to the record." Appellants have attached a copy of a bank statement to their brief as an appendix, but it shows a daily balance summary of the Mountain Paving's account for October 2008 that ranges from only $100 to $2705.62. Appellants also point to the testimony of Dr. David Snow, an assistant professor of Business Administration at the University of Pikeville. Dr. Snow testified that there is no magic number for capitalization, and that some companies may start out with no capitalization whatsoever. Although undercapitalization on its own is not dispositive, it may indicate the intent to elude creditors. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d

336, 354 (Ky. 2003). The trial court's finding that Mountain Paving was undercapitalized is supported by substantial evidence in the record and will not be disturbed.

Appellants next argue that the owners of Mountain Paving did not fail to observe the formalities of corporate existence in their business operations. They argue that the requirements for establishing an LLC are minimal, as supported by Dr. Snow's testimony that corporate officers, minutes and meetings are not statutorily mandated. The only corporate record produced in this case was the single-page articles of organization. Standing alone, the trial court's finding that corporate formalities were not observed might not be dispositive; however, coupled with its other findings, including the lack of any corporate proceedings or records, supports the finding that the LLC had no "separate entity existence." *Inter-Tel*, 360 S.W.3d at 164.

Appellants further argue that Mountain Paving did not engage in the overpayment of dividends, as evidenced by testimony from Doyle that often the company scarcely made enough money to meet its bills; that he took no income from the company so that the other employees could be paid; and that he lost money in Mountain Paving. The trial court concluded that Doyle and Boyd were paid unidentified sums from the corporation, and concluded that these sums could not be characterized as anything other than dividends. Appellants have offered no explanation regarding the nature of these unidentified sums. The trial court's decision to characterize the payments as dividends is not clearly erroneous, and

mere doubt as to the correctness of a finding will not justify its reversal. *Moore v. Asente*, 110 S.W.3d 336.

Appellants also argue that there was no evidence introduced at trial to establish that the shareholders had siphoned off funds from Mountain Paving, or that the owners of Mountain Paving had guaranteed corporate liabilities in their individual capacities as members of the LLC. Evidence was presented that Boyd had taken money from Mountain Paving to make his house payment, and that Sam Doyle had personally purchased and financed some of Mountain Paving's equipment, which Workman argued amounted to a personal guarantee. The trial court noted Doyle's deposition testimony when he testified that he paid certain personally-guaranteed debts of Mountain Paving from his personal funds. Appellants did not request the circuit court to make any further specific findings regarding these issues; we are therefore without authority to review these issues on appeal. *See Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009).

Although appellants have pointed to evidence in the record that could support reaching a conclusion different from that made by the trial court, substantial evidence does exist to support the trial court piercing the corporate veil in this case.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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