RENDERED: JULY 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001134-MR

DENIS A. YALKUT, M.D. APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 16-CI-00154

K. ERIC RUBY, M.D., F.A.C.S.; CHARLES G. RAY, M.D.; THOMAS J. SEREY, M.D.; JOHN M. PATTERSON, M.D.; FREDDIE L. TERRELL, M.D.; WILLIAM R. CROWE, M.D.; TERRANCE R. GRIMM, M.D.; WILLETT H. RUSH, M.D.; R. BRENT TERRELL, M.D.; WILLIAM F. GEE, M.D.; WILLIAM RANKIN, M.D.; WILLIAM R. ALLEN, M.D.; SEAN DELAIR, M.D.; THOMAS K. SLABAUGH SR., M.D.; THOMAS K. SLABAUGH JR., M.D.; TIMOTHY D. ADKINS, M.D.; FRED P. HADLEY, M.D.; AND MARK BEARD, M.D.

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Dr. Denis A. Yalkut appeals from the Madison Circuit Court's grant of summary judgment in favor of Appellees. Dr. Yalkut sought to "pierce the corporate veil" to enforce a judgment against Appellees individually as former shareholders in the medical practice Commonwealth Urology, P.S.C. ("CU"). Finding no error, we affirm.

BACKGROUND

In December of 2010, Dr. Yalkut and Appellees were shareholders in CU. At that time, the required number of shareholders voted to sell the assets of CU to Lexington Clinic (the "Sale"). In early 2011, CU filed suit against Dr. Yalkut seeking declaratory and injunctive relief in an action assigned Case No. 11-CI-00469 (the "2011 Action").

Dr. Yalkut and CU reached a settlement in the 2011 Action and reduced it to writing (the "Settlement Agreement"). Only one of the Appellees was a party to the Settlement Agreement, Dr. William R. Allen, M.D. The Settlement Agreement contained a release, which stated in pertinent part:

> Dr. Yalkut … does hereby release, acquit, and forever discharge [CU] and the Released Parties … and all of their past, present and future … physicians, … principals [and] employees, … from any and all claims and demands of whatever nature, actions and causes of action, damages, expenses, attorneys' fees and costs of any nature whatsoever, including, but not limited to any and all claims, known or unknown, for compensatory and/or punitive damages of whatever kind or nature, arising out of the Employment, the

> Ownership, the Action, the Leases, the Leased Premises, the Sale, and the Disputes or any other matter which could have been presented in any action in a court of competent jurisdiction.

The Settlement Agreement further specified that the "foregoing releases shall be construed as broadly as possible." Further, the Settlement Agreement stated the following:

> The Parties acknowledge they are aware they may later discover material facts in addition to or different from those which they now know or believe to be true with respect to circumstances prior to the date of this Agreement and further acknowledge that there may be future events, circumstances, or occurrences materially different from those they know or believe likely to occur, but that each finally and forever settles and releases all claims, disputes and differences referred to above, known or unknown, suspected or unsuspected, which do now exist, may exist or have existed or may arise between the parties, and in furtherance of such intention, the release set forth herein shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different facts or occurrence of such future events, circumstances, or conditions.

CU sold its assets to the Lexington Clinic on April 1, 2011, and the practice ceased all operations other than to pay its debts and to collect accounts receivable.

In 2014, Dr. Yalkut filed a "Motion for Entry of Judgment" in the 2011 Action claiming that CU had failed to make the required payments under the Settlement Agreement. The Court granted Dr. Yalkut's motion on November 13,

2014 and entered judgment in Dr. Yalkut's favor and against CU in the amount of $65,585.99, plus post-judgment interest. In December of 2014, Dr. Yalkut seized approximately $10,000.00 of the money that was left in CU's bank account via garnishment, and CU formally dissolved shortly thereafter.

In 2016, Dr. Yalkut brought the action involved in this appeal to "pierce the corporate veil" of CU and attempting to enforce the judgment against the individual former shareholders of CU (the "2016 Action"). Specifically, Dr. Yalkut alleged that the Appellees "dominated" the practice, resulting in the loss of "corporate separateness," and thereby defrauded Dr. Yalkut and unjustly enriched themselves. Alternatively, Appellees denied diverting any assets to, or unjustly enriching, any doctor to Dr. Yalkut's detriment.

Appellees filed a motion for summary judgment on June 8, 2016, arguing that the "judgment" upon which Dr. Yalkut sought to enforce was void, that the Settlement Agreement released them from any liability alleged by Dr. Yalkut, and that Dr. Yalkut's veil-piercing theory failed as a matter of law. The trial court entered an order granting Appellees' motion for summary judgment, and this appeal by Dr. Yalkut followed.

ANALYSIS

In reviewing a grant of summary judgment, our inquiry focuses on "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted). However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482 (internal citations omitted). "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

Kentucky courts have explained that settlement agreements are a type of contract and are therefore governed by contract law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). The construction and interpretation of a contract are questions of law for the court. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Absent any ambiguity, a settlement agreement, "will be enforced strictly according to its terms[.]" *Frear*, 103 S.W.3d at 106 (internal quotations and citations omitted). Further, "the

parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence" if no ambiguity exists. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

In this case, Dr. Yalkut argues that the release language in the Settlement Agreement did not apply to his veil-piercing claim because the claims had to arise from the Employment, Ownership, Action, Leases, Leased Premises, Sale, and Disputes, as such terms were defined in the Settlement Agreement. Dr. Yalkut alleges that his veil-piercing claims did not fall under any of the foregoing definitions.

We agree with the trial court, however, that Dr. Yalkut's claims fall within the four corners of the release contained in the Settlement Agreement. The claim in Dr. Yalkut's complaint against the Appellees was clearly based in part on the Sale. The "Sale" is defined in the fourth recital of the Settlement Agreement as follows: "Whereas, [CU] has sold most of its assets to the Lexington Clinic …[.]" Dr. Yalkut alleged in his complaint in the 2016 Action that CU's sale to the Lexington Clinic left CU undercapitalized. Likewise, Dr. Yalkut's complaint sought to raise claims out of his former employment with CU. In his complaint, Dr. Yalkut alleges that "prior to unceremoniously terminating [Dr. Yalkut's] employment, [Appellees] approved, without [Dr. Yalkut] acquiescing, amendments to the CU Stockholder's Agreement – unilaterally attempting to freeze [Dr. Yalkut]

out for the mere price of $10 for his one share and changing the non-compete covenant to a full year." A great deal of the alleged actions taken by Appellees which Dr. Yalkut included in his veil piercing claim were inextricably linked with his former employment with CU, his former ownership interest in CU, and the Sale. Therefore, the release in the Settlement Agreement is unambiguous because it is not susceptible to inconsistent interpretations. Accordingly, the Settlement Agreement bars Dr. Yalkut's actions against his former colleagues on a veil-piercing theory.

Dr. Yalkut further argues that his claim to pierce the corporate veil arose solely from the judgment entered by the trial court and from the Appellees' actions after the signing of the Settlement Agreement, and that the release language in the Settlement Agreement only released those claims which could have been filed at the time of the signing of the Settlement Agreement. However, the Settlement Agreement clearly states that the parties:

> acknowledge that there may be future events, circumstances, or occurrences materially different from those they know or believe likely to occur, but that each finally and forever settles and releases all claims, disputes and differences referred to above, known or unknown … which … may arise between the parties, and … the release set forth herein shall … remain in effect … notwithstanding the occurrence of such future events, circumstances or conditions.

No ambiguity exists in the foregoing language.

The Settlement Agreement does contain an exception which states the following: "[t]he foregoing releases shall be construed as broadly as possible but will in no event apply to: … (c) [the parties'] undertakings to each other in this Agreement." As previously discussed, however, only one of the Appellees, Dr. Allen, was a party to the Settlement Agreement. Dr. Allen was defined as a "Released Party" under the Settlement Agreement, and Dr. Allen's only obligation under the Settlement Agreement was to release Dr. Yalkut and hold him harmless from Dr. Yalkut's obligations in connection with certain leases defined in the Settlement Agreement. Such undertaking by Dr. Allen was not at issue in the 2016 Action. Further, because the remainder of the Appellees were not parties to the Settlement Agreement, none of the individual Appellees had any "undertakings" to Dr. Yalkut under the Settlement Agreement. Accordingly, the exception has no effect on the release language in the Settlement Agreement, and the release contained in the Settlement Agreement bars Dr. Yalkut's complaint as a matter of law.

Alternatively, we find that Dr. Yalkut has not alleged facts sufficient to support his cause of action to "pierce the corporate veil" of CU. Under Kentucky law, a claimant must prove two elements to pierce the corporate veil: "(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." *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, 165 (Ky. 2012).

To prove the first element states above, the Kentucky Supreme Court has supplied a list of factors to examine, including:

> (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.

Id. at 163.

We agree with the trial court that Dr. Yalkut failed to present sufficient evidence of the existence of the first *Inter-Tel* element to overcome the grant of summary judgment. Dr. Yalkut's argument that CU was undercapitalized is unavailing, as the evidence presented indicated that the proceeds of the Sale were disbursed, and the corporation ceased to conduct business, in April of 2011. After that time, there was no need to capitalize CU. Further, Dr. Yalkut's bare argument that CU dissolved only a month after the entry of the judgment does not, without more, infer improper conduct on the part of CU. Finally, Dr. Yalkut

offered very little in the way of proof to support the other factors listed above. Appellees were therefore entitled to summary judgment.

Accordingly, we affirm the Madison Circuit Court's grant of summary judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Leslie Patterson Vose Gregory A. Jackson Lexington, Kentucky	Scott R. Thomas Justin Whittaker Fort Mitchell, Kentucky