COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-1883

STATE OF WISCONSIN | **IN COURT OF APPEALS**
DISTRICT IV

ROBERT P. LUNKE,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF BANGOR, A MUNICIPAL CORPORATION,

DEFENDANT-APPELLANT,

ROPAL, LTD.,

DEFENDANT.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 VERGERONT, J. The Village of Bangor appeals orders denying its motion for summary judgment against Robert Lunke and dismissing him as a

party, leaving the corporation, Ropal, Ltd., as the only plaintiff. The court determined that there was no basis for piercing the corporate veil of Ropal, Ltd. and holding Lunke liable regarding the building which the Village had ordered razed and removed. The Village contends the court applied an incorrect legal standard in deciding that there were no grounds to pierce the corporate veil and that material issues of fact entitle the Village to a trial. We conclude the court properly dismissed Lunke and therefore we affirm.

¶2 This dispute concerns a piece of real estate with a building known as the Sprehn Feedmill, located in the Village of Bangor. The County of La Crosse placed the property for sale due to unpaid taxes, and on July 8, 1997, Lunke submitted a bid in the amount of $351 for the property. The bid was accepted by the county. On August 21, 1997, the Village issued an order directing the county and/or Lunke to raze and remove the building under the authority of WIS. STAT. § 66.05 (1997-98)[1] which authorizes the Village to issue orders to raze and remove

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[1] WISCONSIN STAT. § 66.05 provides in part:

> Razing buildings; excavations.
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> ….
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> (1m) (a) The governing body or the inspector of buildings or other designated officer in every municipality may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof and restore the site to a dust-free and erosion-free condition…. The order shall specify a time in which the owner shall comply therewith and specify repairs, if any. It shall be served on the owner of record or the owner's agent where an agent is in charge of the building in the manner provided for service of a summons in the circuit court.
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> ….

(continued)

buildings within the municipality that are so dilapidated as to be unsafe, unsanitary or otherwise unfit for human occupancy or use when it would be unreasonable to

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> (2) (a) If the owner fails or refuses to comply within the time prescribed, the inspector of buildings or other designated officer may cause such building or part thereof to be razed and removed and may restore the site to a dust-free and erosion-free condition either through any available public agency or by contract or arrangement with private persons, or closed if unfit for human habitation, occupancy or use. The cost of such razing, removal and restoration of the site to a dust-free and erosion-free condition or closing may be charged in full or in part against the real estate upon which such building is located, and if that cost is so charged it is a lien upon such real estate and may be assessed and collected as a special tax. Any portion of the cost charged against the real estate that is not reimbursed under s. 632.103 (2) from funds withheld from an insurance settlement may be assessed and collected as a special tax.
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> (b) Any municipality, inspector of buildings or designated officer may, in his, her or its official capacity, commence and prosecute an action in circuit court for an order of the court requiring the owner to comply with an order to raze or remove any building or part thereof issued under this section if the owner fails or refuses to do so within the time prescribed in the order, or for an order of the court requiring any person occupying a building whose occupancy has been prohibited under this section to vacate the premises, or any combination of the court orders. Hearing on such actions shall be given preference. Costs shall be in the discretion of the court.
>
> ….
>
> (3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof and restoring the site to a dust-free and erosion-free condition or forever be barred. The hearing shall be held within 20 days and shall be given preference. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

repair the buildings. The order alleged that the county was the current record titleholder of the property but that on information and belief, Lunke had an interest in the property by virtue of being the successful bidder in the offer for sale of the premises. The order was served on the County of La Crosse and on Lunke.

¶3 Lunke filed an application for an order restraining the razing and removal of the building, asserting he was deemed the successful bidder and was interested in having the status of the building examined by an architect and had secured the services of an architect to analyze the building to determine if all or portions of it could be utilized. The application explained that the purpose of an order restraining the razing and removal of the property was to permit an investigation of "the building's potential and to proceed with renovation if feasible." The Village of Bangor and Lunke signed a stipulation agreeing that the Village would not enforce the order until May 1, 1998, and on or before that date Lunke could submit the engineering or architectural plans to the Village and the Village would notify Lunke whether it approved of the plans within thirty days. Lunke agreed that if the plans were not approved by the Village, a hearing to cover the status of the building would be held, and the Village agreed that if it approved the plans, it would vacate the order to raze and remove. Apparently an order was entered pursuant to this stipulation restraining enforcement of the order to raze and remove.[2]

¶4 In June 1998, the circuit court entered an order dissolving that restraining order, and the Village petitioned for an order requiring Lunke to

[2] We infer such a restraining order was entered from the June 1998 order dissolving the order restraining enforcement of the order to raze and remove, but we are unable to find that in the record.

comply with the order to raze and remove. The petition alleged that Lunke was president of a corporation, Ropal, Ltd.; on information and belief, that corporation had inadequate funds to repair the building and was operated solely as the alter ego of Lunke; and therefore the corporate veil should be pierced to hold Lunke personally liable.

¶5 Both Lunke and Ropal, Ltd. filed responses to the Village's petition. In Lunke's response he denied that Ropal, Ltd., the legal owner, was his alter ego and denied any basis for his personal liability or obligation to have the building razed and removed at his expense. Lunke alleged as affirmative defenses that at all times he was acting in an agency capacity for Ropal, Ltd., and as its chief executive officer was not obligated to expend his personal funds; WIS. STAT. § 66.05 permits relief against only the owner and he is not the owner; the Village is equitably estopped from challenging the identity and owner of the purchaser of the property, and public policy prohibits the Village from trying to pierce the corporate veil. Lunke also moved that the caption be modified and changed from "Robert P. Lunke, Plaintiff, v. Village of Bangor, Defendant" to "Village of Bangor, Petitioner, v. Ropal, Ltd., Owner/Respondent, and Robert P. Lunke, Respondent" and that the petition be dismissed as to him.

¶6 Ropal, Ltd.'s response admitted it was the owner of the property and denied that Lunke had any ownership interest or personal ownership in the property; admitted that it did not have adequate capitalization to raze the building, which on information and belief would exceed the cost of $200,000; and denied any basis on which to hold Lunke responsible for the ownership/obligation of Ropal. The response asserted a number of affirmative defenses that are not relevant to this appeal and asked that the caption be changed in the same manner as requested by Lunke.

¶7 The Village moved the court for a summary judgment declaring that the corporate veil was pierced and Lunke was personally liable for the obligations of Ropal, Ltd. with respect to the property and asking the court to order compliance with WIS. STAT. § 66.05(2)(b). The Village submitted Lunke's deposition in support of its motion and, in opposition to the motion, Lunke submitted his affidavits. Together these submissions show the following.

¶8 Lunke is employed full time at the Trane Company as a machinist and has a farm which is largely rented out, although he has some beef cattle there. Lunke incorporated Ropal, Ltd. in late 1990 and early 1991 as a subchapter S corporation for the purpose of investing in a business or real estate transaction. Lunke has continuously held the office of president and has been one of its three directors. The other officers and directors have been and continue to be: Ray A. Sundet, vice-president/treasurer/director, and Sarah J. Nohr, secretary/director. When Lunke established the corporation he made a $1,000 capital contribution in exchange for 100 shares of stock, and that is the only capital contribution he has made. At the inception of the corporation, Lunke also deposited $10,000 in the corporate account from his personal funds, as a loan to the corporation. Ropal, Ltd. has one checking account.

¶9 Lunke made a number of investigations for potential businesses for Ropal, Ltd. since its creation. However, for one reason or another he decided that none of the fifteen projects or properties investigated was right for Ropal, Ltd., with the result that the corporation has not operated a business since it was formed and has not owned real estate other than the Sprehn Feedmill. Ropal has never had any employees.

¶10 The only personal property the corporation owns are some small tools, including a power air drill or air hammer, which Lunke has used on personally owned trucks on the Sprehn Feedmill property. The power tool was purchased in 1996 with a check from Ropal, Ltd.'s checking account to which Lunke had deposited money from his personal account as a loan. There is no note documenting that loan but there is a corporate resolution. Lunke has deposited other money from his personal funds into the corporate account and he considers it all a loan. Lunke paid for the attorney's bill for preparing the corporation's subchapter S tax return and his personal tax returns, which was one bill, out of the corporation's checking account. He also paid some of his personal taxes out of the corporation's account—specifically, he withdrew $2,000 in the spring of 1997 to pay toward his personal tax bill. This withdrawal was from funds he loaned the corporation, and the corporation remained solvent.

¶11 Lunke has never received compensation from Ropal, Ltd., although it is due him—for example, for the work he has done in the past investigating leads for businesses and for work since the Sprehn Feedmill was purchased. He could justify compensation of at least $1,000 a year beginning in 1991 through 1998, and that amount is many times in excess of the rental value for use of the power air hammer and the amount of personal expenses paid out of the corporate account. There are no delinquent accounts against Ropal, Ltd. other than the dispute in this action. Tax returns for the corporation have been filed for each year with the exception of 1997, for which an extension was obtained.

¶12 When Lunke learned Sprehn Feedmill was up for sale for unpaid taxes, he viewed the site but did not have access to it because it was posted as no trespassing. He had no knowledge that the Village of Bangor was considering a plan to raze that building. He determined that the building would be suitable for

two purposes—storage to third parties and, later, development of a fish hatchery—and these were business opportunities Ropal, Ltd. should pursue. He estimated it would cost $40,000 to develop a storage business and more for a fish hatchery. He discussed it with his board of directors and decided to bid for the property. When the property was purchased, Ropal, Ltd. had a balance in its account of $2,500, which was owed to Lunke. Lunke planned to have the corporation borrow the $40,000 to develop the storage business, with his personal guarantee of the loan, and was confident the corporation had the ability to borrow that amount of money with his personal guarantee. The minutes giving Lunke the power to make the bid on behalf of Ropal for the property were prepared after this legal proceeding started.

¶13 Lunke paid the down payment upon the bid of $351 from the corporate account, and he submitted it as an agent of Ropal, Ltd. He intended the corporation to own the property, although the bid was issued in his name. The balance of the $351 was submitted by Attorney Ray Sundet on behalf of the corporation out of a trust account from funds belonging to the corporation. Attorney Sundet, with Lunke's knowledge and consent, requested that the county clerk issue this deed in the name of Ropal, Ltd., which it was. That deed has been recorded by the corporation, thus ratifying and accepting title to the property. Lunke would not have purchased the Sprehn Feedmill on his own because he was concerned about the potential liability of a new business in a building he had not entered for inspection, and the reason he set up Ropal, Ltd. was to have the benefit of not being responsible for corporate debts contracted in the normal course of business, such as the purchase of real estate.

¶14 The order to raze and remove the Sprehn building was issued forty-one days after Lunke submitted the bid and came as a surprise to him. That order

terminated any possibility that Ropal, Ltd. would be able to develop a business at the Sprehn Feedmill or go into any other business. The cost of razing was grossly disproportionate to the value of the property.[3] If the Sprehn Feedmill were razed, the resulting empty lot would be worth not more than $25,000, its tax appraised value. At the time of Lunke's deposition, the plan for the property was to do nothing with the building and liquidate the corporation.

¶15 Lunke attached to one of his affidavits copies of the corporate records of Ropal, Ltd. He averred that although the written minutes memorializing the meetings were prepared on a tardy basis, that was done without prejudice to any creditor or person, and the minutes are accurate when they indicate the date meetings were held and the business conducted at the meetings.

¶16 Lunke also submitted the affidavit of Thomas Walch, a certified public accountant. Walch averred that he is familiar with the taxation of corporations, especially under subchapter S, and the creation and continuation of corporations. In his experience it is common practice for corporations to be in "standby modes" and not engaging in business, either because a business venture has not been found or because a corporation has disposed of its real estate holdings and has no other assets on hand other than cash. A subchapter S corporation is not a tax paying entity itself, but, rather, all income or losses are passed directly to the shareholder. It is not unusual that financial transactions between a corporation and the sole shareholder are not documented with the same formality as transactions between the corporation and third parties, and he frequently encounters situations

[3] Lunke averred he had received a bid for $275,000. The Village in response submitted an affidavit averring that it had received a bid in the amount of $75,000 to raze the property. The Village acknowledged that the cost of razing the building is not a material issue in dispute and we agree.

where the sole shareholder or majority shareholder lends funds to the corporation but does not document the loan until after the fact. Also, frequently when a small corporation has small amounts of income or cash assets, there is not a corporate resolution or an employment agreement concerning compensation to an officer or director but, rather, informal distribution in lieu of set compensation. It is a common and prudent business practice to purchase property like the Sprehn Feedmill—property with a potential but unknown and not fully considered liability—through a corporate entity; it is contrary to his experience that such a property would have been purchased by any knowledgeable entity other than one having a limited liability. The plan for Ropal, Ltd. to borrow $40,000 with a personal guarantee by the sole shareholder to develop the business is a normal business practice.

¶17 Based on these submissions, the trial court determined the corporate veil had not been pierced and that any liability was with Ropal, Ltd. and not Lunke. The court reasoned that Ropal, Ltd. was not undercapitalized because the corporation had not been carrying on a business and therefore did not require capitalization, and it did have the ability to borrow $40,000 which was the amount necessary to renovate the property to carry out the plan for a business on the property. The court did not view the overlapping between personal and corporate activities to be dispositive. As for whether the corporation was created and carried out for an improper purpose, either one of fraud or to perpetuate an injustice on another entity or for some other inequitable reason, the court concluded that the affidavits did not show that. The court therefore denied the Village's motion for summary judgment and, in a separate "supplemental order," dismissed Lunke.

DISCUSSION

¶18 The Village contends the trial court erred in deciding that the requirements for piercing the corporate veil were not met. The Village also contends that certain evidence not presented to the trial court would entitle it to a trial and, therefore, asks that if we do not reverse the trial court order and direct it to grant summary judgment in the Village's favor, we should reverse and remand for a trial on the issue of Lunke's liability. We address the second contention first.

¶19 Summary judgment in favor of the moving party is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). However, the court is specifically authorized by statute to award summary judgment to the non-moving party if it determines that party is entitled to judgment as a matter of law. *See* § 802.08(6). In other words, if the facts presented to the trial court are undisputed, the court may decide either party is entitled to a judgment as a matter of law, regardless of which moved for summary judgment. Although the trial court did not expressly state that it was granting summary judgment in Lunke's favor, that is in fact what it did when it decided that, as a matter of law, the corporate veil should not be pierced and Lunke therefore had no personal liability. There is nothing unfair in requiring a party to present all evidence supporting its motion for summary judgment to the trial court before the motion is decided, since the statute puts litigants and their attorneys on notice that the court may enter summary judgment for the non-moving party, if the facts are undisputed and the other party is entitled to judgment as a matter of law.

¶20 The Village contends that its motion asked that the corporate veil be pierced only "on the issues presented." However, the party moving for summary judgment is not entitled to limit consideration to the legal theories that party chooses,

if other legal theories are supported by the factual submissions of the parties. According to the Village, a material fact that remains in dispute is whether Lunke knew of the plans to raze the property prior to the purchase. The Village asserts that this was "not addressed or raised in the various briefs," and the trial court "took it for granted." However, Lunke averred in his affidavit that when he was considering the purchase, he had no knowledge that the Village planned to raze the building, and the raze order was issued forty-one days after he submitted the bid for the property, coming "as a complete surprise to me." If the Village believed this was a material fact and disputed Lunke's averment, it was incumbent upon the Village to submit an affidavit or other proof conforming to WIS. STAT. § 802.08(3) to controvert his averment. If there were a dispute on a material fact, that, of course, would mean that neither party was entitled to summary judgment, and that would be inconsistent with the Village's motion. However, we see no reason why it could not have changed its position in the trial court, after reading Lunke's submissions in opposition to its motion and realizing there were material facts in dispute after all. But, having filed no submission to controvert Lunke's averment, and having proceeded with its motion for summary judgment, the Village may not on appeal rely on facts not in the record to argue that it is entitled to a trial.

¶21 Therefore, the only potential issues before us on this appeal are whether on the record before us there are disputed facts and, if there are not, whether the trial court correctly ruled that, based on the undisputed facts, the corporate veil should not be pierced. The Village does not argue that there are disputed facts on the record before us, and we therefore turn to its argument that the court erred in deciding the corporate veil should not be pierced.

¶22 Generally, we review summary judgments de novo employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.

2d 304, 315, 401 N.W.2d 816 (1987). However, because piercing the corporate veil is an equitable remedy, we review the circuit court's decision not to pierce the corporate veil for an erroneous exercise of discretion. *See* ***Consumer's Co-op v. Olsen***, 142 Wis. 2d 465, 472, 419 N.W.2d 211 (1988). In the context of a summary judgment, this means that if the facts are undisputed, and if the trial court applied the correct standard of law, we will affirm the court's decision if there is a reasonable basis for it. *See* ***id***. at 472-73. We conclude that the trial court did apply the correct standard and there is a reasonable basis for its decision.

¶23 We begin by noting that under WIS. STAT. §§ 66.05 and 74.53(1)(b) the owner of the dilapidated property is liable for razing it. The recorded deed to the property shows that Ropal, Ltd. is the owner of the property. Therefore, Lunke has liability only if the corporate veil should be pierced to make him liable for this obligation of Ropal, Ltd.

¶24 The fundamental premise with respect to the imposition of personal liability on shareholders for corporate debts is that, "[b]y legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances." ***Consumer's Co-op***, 142 Wis. 2d at 474. That "legal fiction" is not lightly disregarded, but there are certain situations in which, courts have held, "piercing the corporate veil" is justified. ***Id.*** at 475. "If applying the legal fiction would defeat some strong equitable claim, the legal fiction is disregarded and the transaction is considered [either] as one of the individual or of the corporation, whichever will prevent the inequitable result." ***Wiebke v. Richardson & Sons, Inc.***, 83 Wis. 2d 359, 364, 265 N.W.2d 571 (1978). The "instrumentality" or "alter ego" doctrine is applied to determine when equity requires piercing the corporate veil, and this doctrine requires proof of the following elements:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Consumer's Co-op, 142 Wis. 2d at 484.

¶25 "[F]ailure to follow corporate formalities is a factor relevant to the first element, whereas inadequate capitalization is primarily significant with respect to [the third factor]." ***Id.*** at 485. "The absence of any one of these three elements prevents piercing the corporate veil." ***Id***.

¶26 The trial court did consider each of the three elements of the alter ego doctrine. It determined that there was overlapping "in terms of what's personal and what's corporate," but stated that fact was not dispositive. This is a correct statement of the law, because there must be proof of all three elements, and this is only one.

¶27 The court also considered whether Lunke's control of the corporation was used to commit a fraud or to perpetuate an injustice or inequity, and concluded it was not. This conclusion is supported by the record. The property was purchased from the county in order to establish a storage business for third parties and, possibly at a future time, a fish hatchery. There is no evidence that Lunke made any misrepresentations in bidding on the property or did so with any intent to commit a fraud or evade a legal duty. It is undisputed on this record that Lunke did not know of the plan to raze the building when he bid. The Village

appears to suggest that fraud or dishonesty is implicit in Lunke's creating Ropal, Ltd. to carry on a business and in recording the corporation as the owner of the property, because those are means to shield him from personal liability. But that is precisely the purpose of the legal fiction that treats the corporation and its shareholders as separate legal entities and imposes on shareholders only limited personal liability for corporate debts. *See* ***Consumer's Co-op***, 142 Wis. 2d at 474.

¶28 Finally, the court considered whether Ropal, Ltd. was undercapitalized, which is relevant to the third element. Undercapitalization is "measured by the nature and magnitude of the corporate undertaking." ***Ruppa v. American States Ins. Co.***, 91 Wis. 2d 628, 645, 284 N.W.2d 318 (1979). The trial court understood this, and correctly analyzed undercapitalization in the context of the actual operation of Ropal, Ltd. Since the corporation had not, prior to the bid, actively engaged in any business, it had no need for any significant capital. The undisputed evidence is that Ropal, Ltd. did not owe any creditors. The plan with respect to the Sprehn Feedmill was that the corporation would borrow $40,000 to develop the property for a storage business, using Lunke's personal guarantee. Walch's affidavit avers that this is consistent with reasonable business practice, and there is nothing in the record showing that the corporation could not have borrowed this amount in this manner.

¶29 The Village's argument on undercapitalization assumes that the adequacy of Ropal, Ltd.'s capitalization should be judged by the cost of razing the building. But, as we have said above, there is no evidence that the property was purchased with knowledge that the owner was to be ordered to raze the building; instead the evidence is just the opposite. Therefore, that cost is not part of the corporate undertaking against which the adequacy of the capitalization is to be judged.

¶30 The Village also emphasizes the statement in ***Consumer's Co-op*** that the adequacy of capitalization is to be "measured as of the time of formation of the corporation." ***Consumer's Co-op***, 142 Wis. 2d at 486. However, the sentences that follow place this statement in context, and show that the court is simply applying the general rule that adequate capitalization is "measured by the nature and magnitude of the corporate undertaking to the circumstances of that case." ***Id.*** at 486-88. The focus on capitalization when the corporation is formed is proper when the corporation immediately begins operating a business, and the court looks at the nature of the undertaking at that time. *See* ***id.*** at 491. The point the ***Consumer's Co-op*** court is making by referring to initial capitalization is that "[a] corporation that was adequately capitalized when formed but which subsequently suffers financial reversal is not undercapitalized." ***Id.*** at 486. On the other hand, even if initial capitalization is adequate to the business initially undertaken, if the corporation substantially expands the size or nature of the business, there may be undercapitalization without a new infusion of capital. *See* ***id.*** at 486-87. This analysis supports, rather than undermines, the trial court's focus on the actual extent of Ropal, Ltd.'s business activity.

¶31 The trial court expressly recognized the equitable nature of the remedy of piercing the corporate veil and concluded that the equities did not warrant piercing the corporate veil. The trial court reached this conclusion through the application of the correct law to the undisputed facts of record. Therefore it properly denied the Village's motion for summary judgment and properly ordered Lunke dismissed as a party.

By the Court.—Order affirmed.

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