

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0586
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-151

**IN COURT OF APPEALS
DISTRICT IV**

BOMBARDIER, INC.,

PLAINTIFF-APPELLANT,

v.

**APPLIED MOLDED PRODUCTS CORP. AND APPLIED
COMPOSITES CORP.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Bombardier, Inc., appeals the summary judgment dismissing its complaint against Applied Composites Corp. (AC). Bombardier's suit concerned a soured business relationship with Applied Molded Products Corp. (AMP). It alleged that AC was liable as AMP's alter ego. In arguments on

summary judgment, Bombardier alleged that AC was liable under other legal theories, as well. We affirm the trial court's decision to grant summary judgment.

¶2 Applied Composites Holdings, LLC, owns AMP and AC, and maintains them as separate corporate entities. AMP is a Wisconsin corporation with a plant in Watertown, Wisconsin. AC is located in Illinois.

¶3 In October 2000, AMP contracted with Bombardier to provide parts for Bombardier's products. A few weeks later, due to labor concerns at the AMP plant, Bombardier and AC signed a contingency contract authorizing AC to complete work on the AMP project, if AMP could not.

¶4 According to Bombardier's complaint, AMP breached the October 2000 contract and a subsequent modified agreement, and committed other acts that damaged Bombardier, including retention of Bombardier property. An amended complaint alleged AC's liability for those actions as AMP's corporate alter ego. There is no allegation that AC committed any breach of the November 2000 contingency agreement, which Bombardier apparently never sought to invoke.

¶5 In response to the amended complaint alleging AC's liability, AC moved to dismiss. Because both parties submitted factual material, the trial court construed AC's motion as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b) (1999-2000).¹ On review of the submissions, the trial court concluded that there was no factual basis to impose liability on AC for AMP's

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

actions. The trial court also found insufficient facts to support any other legal theory of liability advanced by Bombardier, and granted summary judgment.

¶6 We review a decision on summary judgment de novo, using the same methodology as the trial court. *See Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). We begin by determining whether the complaint states a claim for relief. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In deciding whether a complaint states a claim for relief, we deem true all facts pleaded and all reasonable inferences favoring the plaintiff that may be derived from those facts. *Id.* at 317. If we conclude that the complaint states a claim, we examine the party's factual submissions. *Id.* at 315. Upon review of those submissions, we will determine that summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).

¶7 Liability as the alter ego of a corporate entity depends on: (1) complete domination of finances, policy and business practice in respect to a transaction, such that the corporate entity to the transaction had no separate mind, will or existence of its own; (2) use of this domination to commit fraud, violate a legal duty, or commit other dishonest and unjust acts in contravention of the plaintiff's legal rights; and (3) a showing that the control and breach of duty proximately caused the plaintiff's injury. *Consumer's Coop. of Walworth v. Olsen*, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988). All three conditions must be met before a court may exercise its discretion to impose liability on the corporate alter ego. *Id.* at 485.

¶8 Bombardier cites the following facts in support of its claim for alter ego liability: the two corporations were owned by the same holding company;

they shared corporate officers and marketing staff, including the same CEO and treasurer; they were not distinguished on AC's corporate web page; AC was responsible for temporarily removing certain Bombardier property from the Watertown plant and transferring the property to its Illinois plant; and decisions for both corporations were frequently made jointly at the Illinois offices. In opposition, AC points to evidence that AMP and AC maintained separate work forces belonging to separate unions; each corporation had a separate payroll; each had separate contracts, purchase orders and invoices, and generally targeted different markets; each maintained separate assets, loans, bank accounts and financial records; no record exists of AC and AMP commingling or transferring assets; and only eleven out of approximately 400 employees provided services to both corporations, with the salary for those eleven was fairly proportioned between the two entities.

¶9 The evidence, even when viewed most favorably to Bombardier, provides no reasonable grounds to impose liability on AC. Plainly, AC and AMP were closely related, as they shared a common owner and management, and produced the same products. Plainly, they worked together on Bombardier's product order, as evidenced by AC's contingency agreement. However, those circumstances do nothing to establish AC's domination of AMP, a fraud on Bombardier, or a causal connection between the corporate relationship and Bombardier's losses. Nor are the facts cited by Bombardier evidence of anything more than a close relationship. Whether to impose liability on another for the acts of a corporate entity is an equitable decision, reserved for the trial court's discretion. See *Consumer's Coop.*, 142 Wis. 2d at 472. But that discretion may not be properly exercised without a reasonable basis. See *Prahl v. Brosamle*, 142

Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). None exists here in the facts of record.

¶10 Bombardier also asserts that we should permit it to proceed against AC as the corporate successor to AMP. This theory of liability applies only to a purchaser corporation. There were no allegations or facts submitted that AC purchased or otherwise assumed ownership or control of AMP assets.

¶11 Bombardier next contends that a material fact dispute exists concerning AC's independent liability for breaching the November 2000 contingency agreement. There was no allegation, nor facts submitted, that Bombardier ever sought performance under that contract, or that Bombardier failed or refused to perform it.

¶12 Bombardier nevertheless contends that AC is judicially estopped from denying its independent liability because it sued Bombardier in an Illinois court for breaching the contingency contract. Judicial estoppel prevents a party from maintaining clearly inconsistent positions in separate proceedings where the facts are the same in both cases, and the party to be estopped convinced the court to adopt its position in the first of the two proceedings. *See Harrison v. LIRC*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994). In this case, there is no inconsistency in AC's allegation that Bombardier breached the contract, and the denial that it also breached the contract. Additionally, there is no evidence of record to show that AC prevailed on its claim in Illinois.²

² Bombardier also presents an argument for the application of equitable estoppel against AC. Bombardier raises this argument for the first time on appeal, and therefore waives it. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

