COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 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. 02-1719-FT **Cir. Ct. No. 01-SC-1940**

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

BOND DRYWALL SUPPLY, INC.,

PLAINTIFF-RESPONDENT,

V.

JAMES H. SMITH D/B/A SMITH DRYWALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

¶1 DEININGER, J.[1] James Smith appeals a judgment awarding Bond Drywall Supply, Inc., $5,000 in damages in this small claims collection action.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Smith claims that the debt was incurred by Smith Drywall, Inc., and that the trial court erred in permitting Bond to "pierce the corporate veil" by awarding judgment against him personally. We conclude the trial court's finding that Bond was not notified that Smith had ceased doing business as a sole proprietor was not clearly erroneous. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 Smith operated a drywalling business as a sole proprietor. He arranged in August 1995 to purchase drywall supplies from Bond on an open account. Bond's president testified that he approved the credit arrangement with Smith "as an individual." The account was reflected on invoices and Bond's computer records as "Smith Drywall," "Jim Smith Drywall," or on occasion, simply "Jim Smith" during the entire time of its existence.

¶3 Smith testified that within several months of his initiating the open account relationship with Bond, he ceased doing business as a sole proprietor and went to work for Smith Drywall, Inc., a corporation formed on October 19, 1995, by his parents. He further testified that he told Bond of his new status, was instructed to have one of his parents call Bond's secretary to set up an account for Smith Drywall, Inc., and that was done. Specifically, he said that he knew the call was made because "I talked to my mom, she said she called her. My dad said she called her."[2] At some point Smith became an officer of the corporation, and he controlled it until it dissolved on January 8, 1999. Thereafter, Smith did business

[2] Neither of Smith's parents testified. Bond did not object to Smith's testimony regarding what his parents told him.

intermittently with Bond on a "cash and carry" basis, conditioned on his making payments on the past due account, which he agreed to do and did.

¶4 Smith introduced cancelled checks showing that from December 19, 1995 through October 15, 1997, payments to Bond were drawn on an account in the name of Smith Drywall, Inc. He also testified that, during the period of the corporation's existence, its employees wore clothing bearing the corporate name; invoices were sent to its customers in that name; and its telephone listings included the "Inc." designation, as did business cards and the return address on its envelopes. Finally, Smith said that the corporation observed such formalities as maintaining a corporate record book, conducting annual meetings and filing annual reports. He acknowledged on cross-examination, however, that invoices from Bond to "Smith Drywall" were sent to and received at the same address before, during and after the period of the corporation's existence.[3] Smith also said that he did not contact Bond to ask why it was not sending bills in the corporate name because he didn't realize that "there wasn't an Inc. on it … until this all came about."

¶5 Bond witnesses disputed that they had received any notice from Smith that he had converted his sole proprietorship to a corporation. Bond's president testified that he was not aware of that fact until Smith filed his answer in response to Bond's complaint in this action. He flatly denied that Smith ever told him "that he was incorporated." Another officer of Bond, who oversaw billing and computer activities, denied that he had seen checks received on the Smith

[3] Smith's drywall business was apparently operated out of a "separate building" located on the same property as Smith's home before, during and after the corporation's existence.

account from "Smith Drywall, Inc.," noting that other employees would have opened the mail and noted payments received on invoices.

¶6 A third Bond family member, who was an officer of Bond Drywall Supply, Inc., during the relevant time period, was the person Smith testified he was instructed to have his mother call regarding the account status change. She testified that she recalled neither telling Smith to do so nor having a conversation with his mother on the topic. Finally, Bond's president testified in rebuttal that he had never seen clothing items bearing the name Smith Drywall, Inc.; that he did not tell Smith "there was not a problem with him incorporating" or to have his mother call; and that he could not recall ever talking to Smith or his mother "about them incorporating and making this a corporate debt."

¶7 At the conclusion of testimony, the trial court ruled from the bench in Bond's favor, awarding a judgment for $5,000 against Smith personally, the amount due not having been in serious controversy. The court made the following findings:

> It's clear from the evidence that [Smith] started his business, started doing business with [Bond] in 1995, started an account with them, and started the account in his own name.
>
> I'm satisfied that he did substantial business with them as an individual prior to the existence of any corporation …. He continued to do substantial business with [Bond] after that date, and, in fact, checks received by [Bond] from him, some of them were personal, at least some of them were personal.
>
> There were invoices received before the incorporation and after the incorporation and after he became an officer and even after the corporation dissolved. The name of the account never changed, even when the corporation started, and [Smith] never objected to that name being used. The name and address never changed, and [Bond] was never told to change it.

Smith appeals the judgment entered against him.

ANALYSIS

¶8 Smith claims the trial court erred in permitting Bond to "pierce the corporate veil" by holding Smith personally and individually liable for the debt of Smith Drywall, Inc. He relies on the well-established principles that "'the corporation is recognized as a legal entity, separate and distinct from its shareholders,'" and that "the 'legal fiction' of a corporation is not one to be lightly disregarded." ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 474, 419 N.W.2d 211 (1988) (citation omitted). He devotes much of his argument to establishing that the record does not support a determination that Smith Drywall, Inc., ignored corporate formalities, was undercapitalized, or existed only as Smith's "alter-ego." These are the types of showings typically required of a creditor in order for it to obtain judgment against an individual for a debt that is nominally that of a corporate entity. *See* ***id***. at 483-86.

¶9 We agree with Smith that the evidence at trial does not establish that Smith Drywall, Inc., was his "alter-ego." He presented evidence tending to show that, during the period of the corporation's existence, it issued checks and advertised its drywall business in the corporate name, and that it observed customary corporate formalities. This evidence was largely uncontested, and the trial court made no findings to support the imposition of personal liability under the ***Consumer Co-op*** factors. We agree with Bond, however, that its claim that Smith was personally liable for the debt is not dependent on those factors but on the fact that Smith did not notify Bond that his orders for drywall supplies were no longer being placed on his own behalf but on behalf of Smith Drywall, Inc.

¶10 The present facts are similar to those in ***Philipp Lithographing Co. v. Babich***, 27 Wis. 2d 645, 646-47, 135 N.W.2d 343 (1965), where a sole proprietor took on partners and then incorporated. Babich had originally obtained printing services on open account based on his personal creditworthiness. ***Id***. The printer continued to do work for Babich's business after it was incorporated, and payments on the account were made with checks bearing the corporate name. ***Id***. The printer sued Babich and his partners in their individual capacities for the balance due on the printing contracts and prevailed after a trial in the circuit court. ***Id***. The supreme court affirmed, applying the following rule:

> The general rule is that partners who continue to hold themselves out as such after the formation of a corporation cannot escape responsibility for contracts entered into after the change in business status without adequate notice that the partnership has been dissolved. This is especially true when the corporation operates under the same name and circumstances as the partnership. The trial court found that respondent "received no actual notice of said incorporation" from appellants and that appellants "continued to deal with [respondent] as partners." These findings will not be upset unless against the great weight and clear preponderance of the evidence.

Id. at 648 (footnotes omitted).

¶11 As in ***Philipp Lithographing***, the trial court here found that Bond received no actual notice that Smith was no longer a sole proprietor: "The name of the account never changed, even when the corporation started, and [Smith] never objected to that name being used. The name and address never changed, and [Bond] was never told to change it." To be sure, the matter of notice to Bond of the change in Smith's status was very much in dispute at trial, but it is the trial court's role, not ours, to determine the weight and credibility of the evidence presented on disputed issues of fact. *See* WIS. STAT. § 805.17(2); ***Fidelity & Deposit Co. of Maryland v. First Nat'l Bank of Kenosha***, 98 Wis. 2d 474, 485,

297 N.W.2d 46 (Ct. App. 1980) ("Where the trial court is the finder of fact and there is conflicting evidence, the trial court is the ultimate arbiter of the credibility of witnesses.").

¶12 In addition, computer records and invoices Bond introduced into evidence lend support to the trial court's finding, in that they indicate Bond maintained the Smith account on its books as "Smith Drywall" from its origination onward, never referring to its customer with a corporate designation. We conclude that the trial court's finding that Bond was not notified of Smith's incorporation was not clearly erroneous.

¶13 Smith argues, however, that the payments to Bond with checks drawn on an account in the name of Smith Drywall, Inc., should have put Bond on notice of Smith's corporate status. We disagree. Two principals of Bond testified that they never saw the checks, and the one Bond officer who did see them testified that she had no responsibilities relating to credit granting or approval. Even though the supreme court noted in ***Philipp Lithographing*** that the payments by corporate check in that case had not been seen by "officers of the company," we do not believe the fact that the person who handled Smith's checks was an officer of Bond is pivotal. More to the point is the fact that the individual in question was performing no more than bookkeeping functions for Bond at the time in question. Like the bookkeeper in ***Philipp Lithographing***, she "was completely unaware of negotiations between the parties, and could not be expected to attach any significance whatsoever to the fact that the account was paid by corporate check." ***Philipp Lithographing***, 27 Wis. 2d at 650.

¶14 Our conclusion gains additional support from the analysis in ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 470 N.W.2d 888 (1991).

The dispute in ***Benjamin Plumbing*** did not involve a change in business status but whether an individual who had procured goods and services had adequately disclosed to the supplier that the items were acquired on behalf of a corporation. *See* ***id***. at 843. Relevant here is the supreme court's endorsement of "the rule that an agent is liable where the contracting party is not aware of the corporate status of the principal," and that it is "the agent who seeks to escape liability who has the burden of proving that the principal's corporate status was disclosed." ***Id***. at 850-51.[4]

¶15 Applied to the present facts, this means that it was Smith's burden to prove that he disclosed his "corporate status" to Bond after the corporation was formed and he continued to obtain supplies from Bond on open account. As we have noted, the trial court found that Smith did not meet this burden, and he is thus liable for the charges he incurred. *See* ***id***. at 852 (noting that whether contracting party has sufficient notice of the principal's corporate status is a question of fact, which may be determined by the "acts and circumstances" surrounding the transaction).

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[4] The supreme court concluded that placing this burden on agents

> creates no hardship on agents, for it is within their power to relieve themselves of liability. Conversely, the contracting party does not have any duty to inquire into the corporate status of the principal even when it is within that party's capability of doing so. As a matter of fairness, the contracting party should not be saddled with the burden of "ferret[ing] out the record ownership" of the principal's business.

Benjamin Plumbing, Inc. v. Barnes, 162 Wis. 2d 837, 851, 470 N.W.2d 888 (1991) (citations omitted).

¶16 Finally, we note that Smith also asks that, "if this case is subject to remand," we instruct the circuit court to address his counterclaim. Smith sought to recover certain post-dissolution payments he made to Bond which he alleges Bond wrongly applied to the corporate debt of Smith Drywall, Inc. Because we have affirmed the judgment holding Smith liable for the debt, there is no need for us to address Smith's counterclaim.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.