

**IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
FILED**

November 19, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

THE OCEANICS SCHOOLS, INC.,	)	
	)	03A01-9904-CV-00153
Plaintiff/Appellant	)	
	)	
vs.	)	Appeal As Of Right From The
	)	KNOX COUNTY CIRCUIT COURT
OPERATION SEA CRUISE, INC.,	)	
	)	HON. WHEELER A. ROSENBALM
Defendant/Appellee	)	JUDGE

**For the Appellant:**

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**For the Appellee:**

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AFFIRMED

Swiney, J.

**OPINION**

This is an appeal from the Trial Court's Order denying the motion of Plaintiff/Appellant, The Oceanics Schools, Inc. ("Appellant") for Writ of Execution against Clifford E. Barbour, Jr., sole shareholder of Defendant/Appellee, Operation Sea Cruise, Inc.

("Appellee" or "OSC"), or in the alternative, to Amend, after final judgment, Appellant's Complaint to domesticate a foreign judgment against OSC, by adding Barbour as a party-defendant. We address the following two issues in this appeal: (1) Was it error for the Trial Court to refuse to issue a Writ Of Execution upon an individual, Barbour, who is not a judgment debtor if it is alleged that the judgment debtor is that individual's alter ego; and (2) Was it error for the Trial Court to deny Appellant's motion to add a new party, Barbour, as an additional Defendant after the judgment is final? The answer to both is "no". For the reasons herein stated, we affirm the judgment of the Trial Court.

### **BACKGROUND**

                     Clifford E. Barbour, Jr., formed Operation Sea Cruise, Inc., under the laws of Panama in 1965 for the purpose of acquiring ownership of, repairing, and operating the sailing vessel "Antarna." Barbour owned 100 percent of the shares of OSC, which purchased the sailing ship in 1967 and extensively repaired and restored it. In 1971, The Oceanics Schools, Inc. (Appellant), chartered the Antarna from Appellee for use as a school ship in exchange for Appellant's providing repairs and supplies to make the vessel operational.

Appellant invested approximately \$630,000 in repairs and supplies for the Antarna and began using the vessel in its school program. In March 1972 Appellee reclaimed possession of the vessel in the Panama Canal Zone and subsequently sold the Antarna to a third party, who sailed the ship out of Panamanian waters to the Azores, Portugal. The proceeds of that sale were paid by Appellee to Barbour in repayment of "a portion of the loans to the corporation by [Barbour]."

Appellant filed suit against Appellee and the vessel by Writ of Attachment in the District Court of Ponta Delgada, Azores, Portugal, for breach of contract and obtained a judgment against Appellee for \$929,815.55 plus interest. That Court then issued a Rogatory Letter to the Circuit Court for Knox County, Tennessee for seizure of properties of Appellee or any other persons as may be liable for the obligations of Appellee, and

apparently identifying Clifford E. Barbour, Jr., Dorothy Drake Barbour and David Barbour as directors and managers of Appellee.

Appellant filed its Complaint in Knox County Circuit Court to domesticate the Portugese Judgment, and served summons on Clifford Barbour on May 15, 1995, through his attorney, Michael Fitzpatrick, who answered in this manner:

2. Both the Complaint and the Rogatory Letter attached thereto leave the impression that the domestication is against not only the named defendant, but also three individuals including Clifford E. Barbour, Jr. The judgment does not purport to do so. To the extent that the Complaint attempts to do so, the Judgment is void and of no force or effect for the failure to serve process; comply with due process; or to name Clifford E. Barbour, Jr. as a party in the final judgment.

By Order of the Circuit Court for Knox County, the Portugese Judgment against Appellee was domesticated on March 26, 1997. However, upon execution of that judgment, no assets of Appellee were found. After discovery by Appellant submitted to and answered by Appellee, Appellant filed a "Motion for Issuance of Writ of Execution or, Alternatively, to Amend the Complaint to Add a Party Defendant," on December 1, 1998, asking the Circuit Court to issue a writ of execution against the real and personal property of Clifford Barbour or allow the Appellant to amend the domestication Complaint to add Barbour as a party-defendant.<sup>1</sup> For grounds, Appellant alleged that Barbour owned 100 percent of the shares of Appellee, that he was at all times a director and secretary/treasurer of that corporation, that he failed to adequately capitalize the corporation, and that he made personal loans to the corporation to gain an unlawful preference as a purported creditor over future creditors such as Appellant. Further, Appellant alleged that Appellee failed to observe corporate formalities and could not produce corporate documents. In short, Appellant says the Appellee is the alter ego of Barbour, the corporate veil should be pierced, and Barbour found liable for the judgment against Appellee even though he was not a defendant in either the original suit where the judgment was obtained by Appellant against Appellee or in this suit.

Appellee responded, denying that Clifford Barbour is the entity against whom Appellant received its judgment and arguing that no rule of civil procedure in Tennessee permits Appellant to amend a complaint to add an additional Defendant after judgment has been rendered and is final. Further, Appellee argues that Appellant's motion, seeking in essence to pierce the corporate veil of Appellee, is governed by the laws of the jurisdiction where the corporation was chartered, i.e., Panama, and Appellant has failed to cite any Panamanian law indicating that Barbour is individually liable for debts of Appellee.

The Trial Court heard the Appellant's motion on February 19, 1999, and found that the motion was not well-taken and should be denied. The Court found that Clifford Barbour was never made a party to the case, final judgment was entered against the corporate defendant- judgment debtor on March 26, 1997, no appeal was taken, and the judgment became final on April 26, 1997. The Trial Court correctly declined to grant the Writ Of Execution against Barbour since Barbour was not a judgment debtor in that court. The Trial Court also denied the alternative relief requested to amend the complaint to add Barbour as a Defendant. The Trial Court's basis for such denial was that Appellant did not attempt to make Barbour a party in the Tennessee suit to domesticate the foreign judgment until long after the Tennessee judgment became final on April 26, 1997. It was the opinion of the Trial Court that if Appellant now wishes to proceed against Mr. Barbour in an attempt to pierce the corporate veil, a separate action must be commenced by filing a separate complaint against Mr. Barbour on that claim. We agree.

### **DISCUSSION**

On appeal, Appellant asks this Court to reverse the Trial Court's refusal to issue a Writ of Execution against Barbour. Alternatively, Appellant seeks an order directing Barbour to show cause why the Writ of Execution should not be issued, or the granting of its motion to add Barbour as a party-defendant in Appellant's suit against Appellee.

Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the trial court, unless the preponderance of the evidence is

otherwise. Rule 13(d), T. R. A. P.; *Lindsey v. Lindsey*, 976 S.W.2d 175, 178 (Tenn. Ct. App. 1997).

In reviewing questions of law, our scope of review is de novo with no presumption of correctness for the trial court's conclusions. *Billington v. Crowder*, 553 S.W.2d 590 (Tenn. Ct. App. 1977). Under Rule 15, T.R.C.P., permission to amend pleadings “. . . shall be freely given when justice so requires.” The decision whether to grant such amendment is in the sound discretion of the trial court, and our standard of review requires that the trial court will not be reversed unless abuse of discretion has been shown. *Williams v. Sugar Cove, L.P.*, 955 S.W.2d 75 (Tenn. Ct. App. 1997); *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989).

We first address the issue of whether the Trial Court erred in refusing to issue a Writ of Execution against Barbour pursuant to the Portuguese judgment against Appellee. Our answer is no.

A Writ of Execution is an order directing the sheriff to levy upon and sell the judgment debtor's property not statutorily exempt as identified in the writ. “Executions issue against the goods and chattels, lands and tenements, *of the defendant.*” Tenn. Code Ann. § 26-1-104 (1980). The defendant in this case, from the filing of the Complaint through the date the judgment became final, was Operation Sea Cruise, Inc. Although it is common for a plaintiff to bring suit against a closely held corporation and a sole shareholder individually in the same action, and to obtain judgments against both defendants, the Appellant in this case did not do so. When asked why Appellant did not originally sue Barbour individually, counsel replied that, at the time suit was commenced, “there was no way to suspect another defendant.” He stated that post-judgment discovery in this case, in the form of answers to interrogatories, provided sufficient facts about Barbour's involvement with the Appellee that this Court should designate Barbour as the alter ego of the named defendant, Appellee. The argument, taken as a whole, seems to be that we should consider Barbour as a de facto defendant, against whom execution of judgment is now proper, notwithstanding that Barbour was never sued. For authority, Appellant cites several cases in which this Court

pierced a corporate veil and reached a shareholder for corporate debts. In those cases, however, the shareholders were named parties. *Savco, Inc. v. Century Home Improvement, Inc. and Marvin Griffith*, No. 03A01-9611-CV-00360 (Tenn. Ct. App., filed May 13, 1997) *pet. for rehearing denied June 23, 1997*; *Judd's Inc. v. Doris L. Muir, Allan T. Muir and Holladay-Tyler Printing, Inc.*, No. 03A01-9801-CH-00002 (Tenn. Ct. App., filed June 26, 1998) *perm. app. denied* December 7, 1998. Appellant has cited no Tennessee case, and we are aware of none, in which a Tennessee court has authorized execution of a judgment against a party who was never sued. Appellee argues that “to execute on a judgment, you first must have a judgment.” We agree. Accordingly, the Trial Court did not err in refusing to order execution against Barbour for the corporate debt of Appellee, or in refusing to order Barbour to show cause why the Writ of Execution against him should not be issued.

Appellant next contends that the Trial Court erred in refusing to allow it to amend its complaint to add Barbour as a defendant. This Court addressed a similar factual situation in *Williams*, 955 S.W.2d at 75. In that case, plaintiff sought to pursue a “supplemental complaint” filed three years after he was granted complete relief against the original defendants by way of a final judgment. The Trial Court dismissed the supplemental complaint and the plaintiff appealed. We affirmed the judgment of the Trial Court, holding that plaintiff was not permitted to file a supplemental complaint under Rule 15 of the Rules of Civil Procedure after a judgment has become final. *Id.* at 76. Moreover, we held that the filing of a supplemental complaint which seeks money judgments against new defendants is not authorized under Tenn. Code Ann. § 26-4-101(a), which is limited by its terms to a complaint that seeks to compel the discovery of property of the *defendants* as to whom the plaintiff is a creditor. *Id.* at 77.

Not only was it not an abuse of discretion by the Trial Court to deny Appellant’s motion to amend the complaint to add Barbour as an additional Defendant long after the

judgment was final, the Trial Court properly refused Appellant's request to amend its complaint long after the original judgment domesticated in Tennessee became final. We agree with the Trial Court that Appellant's remedy is to pursue its claims against Mr. Barbour in a separate suit against Mr. Barbour to attempt to pierce the corporate veil. In such a suit, all parties would be before the court with an opportunity to present their claims and defenses.

### **CONCLUSION**

\_\_\_\_\_ For these reasons, the judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings, if any, as may be required, consistent with this Opinion, and for collection of the costs below. Costs on appeal are assessed against the Appellant.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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CHARLES D. SUSANO, JR., J.