

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 19, 2023 Session

**SPSGNVL INCORPORATED v.
AAA ANODIZING & METAL FINISHING, INC. ET AL.**

**Appeal from the Chancery Court for Sullivan County (Blountville)
No. C0017873 E.G. Moody, Chancellor**

No. E2022-01402-COA-R3-CV

This is a breach of contract action in which the plaintiff staffing agency alleged non-payment in accordance with the terms of its agreement with the defendant company. The plaintiff sought recovery from the defendant company, its successor company, and individuals involved in the sale of the defendant company to its successor. The trial court awarded judgment in favor of the plaintiff. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and KRISTI M. DAVIS, J., joined.

R. Lee McVey, II, Kingsport, Tennessee, for the appellants, LaDonna Street Boardwine; Alyce Williford; and Ken Williford.

Francis X. Santore, Jr., Greeneville, Tennessee, for the appellee, SPSGNVL Incorporated.

OPINION

I. BACKGROUND

On January 28, 2010, AAA Anodizing & Metal Finishing, Inc. (“AAA”) entered into a written contract with SPSGNVL Incorporated d/b/a Staff Pro (“Staff Pro”) to provide all labor for AAA’s plant in Bluff City, Tennessee. AAA failed to pay in accordance with the terms of the contract. Staff Pro terminated the contract by letter, dated September 14, 2012, in which it alleged that AAA owed \$30,012.96.

AAA failed to remit payment upon receipt of the demand letter. In October 2013, AAA sold its assets to AAA Custom Anodizing & Metal Finishing (“AAA Custom”) for the sum of \$500. The assets included a customer list and the rented building. Ramon Sanchez-Vinas acted as broker and incorporator for AAA Custom. The debt owed to Staff Pro was omitted from the details of the sale. AAA Custom was subsequently sold to Mountain Empire Anodizing.

Staff Pro filed the instant action against AAA on January 28, 2014, alleging breach of contract and requesting payment of the original amount owed, plus interest and attorney’s fees. Thereafter, Staff Pro amended its complaint three times, each time adding additional parties until the action included the following defendants: (1) AAA; (2) AAA Custom; (3) Ken Williford, General Manager for AAA; (4) Alyce Williford, President and sole shareholder of AAA; and (5) LaDonna Street Boardwine, who provided capital to AAA Custom for the purchase of AAA and is a shareholder of AAA Custom.

Staff Pro alleged that the Willifords and Ms. Boardwine (collectively “Defendants”) were subject to individual liability for their scheme to defraud creditors by utilizing the corporate entities involved as a sham to avoid liability upon the Staff Pro contract. Defendants denied liability and filed motions to dismiss. The court did not issue a ruling on all pending motions; instead, the parties agreed to proceed to a bench trial. Mr. Sanchez-Vinas, Mrs. Williford, and Ms. Boardwine failed to appear at the trial.

The trial was not transcribed by a stenographer; however, the parties entered an agreed statement of the evidence. In summary of that statement, Mrs. Williford was the sole shareholder of AAA, a profitable business at one time. Mr. Williford was the General Manager of AAA; however, he never owned any portion of AAA. Neither Alyce nor Ken signed the agreement between Staff Pro and AAA as a personal guaranty. AAA paid sums owed to Staff Pro for three years. After that time, AAA failed to pay in accordance with the contract. According to her deposition testimony, Mrs. Williford became ill and was unable to pay the bills, resulting in Staff Pro’s termination of the contract.

AAA sold its assets to AAA Custom in October 2013. None of the shareholders of AAA Custom were shareholders of AAA. Mr. Williford did not receive any cash distributions from the sale of AAA assets. Mrs. Williford received \$500 from the sale of AAA’s assets. The other defendants were unaware of the contract, either at the time of contracting or at the time of breach. The parties agreed that proof was not submitted to establish that counsel for AAA Custom also represented AAA; however, a copy of counsel’s conflict waiver was admitted into the record in which counsel secured consent to represent AAA Custom and the Willifords, despite the conflict of interest.

Following trial, the court held that AAA breached a valid contract with Staff Pro by its failure to pay in accordance with the terms of the contract. The court awarded judgment to Staff Pro in the amount of \$93,121.63, which included the principal amount, monthly

interest, and attorney's fees. The court further held that liability for the judgment attached not only to AAA, but also to AAA Custom, Mr. and Mrs. Williford, and Ms. Boardwine.

In so holding, the court found that Mr. Sanchez-Vinas, Mrs. Williford, and Ms. Boardwine were missing material witnesses and would have testified in a manner contrary to their interests or the interest of the business. The court held that AAA Custom failed to collect paid in capital, was grossly undercapitalized, failed to issue stock certificates, diverted its assets to the detriment of creditors, and was used as a personal conduit or shell corporation. This timely appeal followed.

II. ISSUES

We consolidate and restate the issues on appeal as follows:

- A. Whether the court's findings of fact are supported by the record.
- B. Whether the court erred in its application of the missing witness rule.
- C. Whether the court erred in holding Defendants personally liable.

III. STANDARD OF REVIEW

We review a non-jury case de novo upon the record with a presumption of correctness as to the findings of fact unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). "In order for the evidence to preponderate against the trial court's findings of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starks*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). We review questions of law de novo with no presumption of correctness. *Bowden*, 27 S.W.3d at 916 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.3d 920, 924 (Tenn. 1998)); see also *In re Estate of Haskins*, 224 S.W.3d 675, 678 (Tenn. Ct. App. 2006).

The issue as to the missing witness rule requires a different standard or review. Here, we are bound to use an abuse of discretion standard when considering the trial court's usage of the rule. In deciding whether the trial court erred in its application of the missing witness rule, we presume the correctness of the decision and will consider the evidence in the light most favorable to it. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Elchlepp v. Hatfield*, 294 S.W.3d 146, 154-55 (Tenn. Ct. App. 2008); *Rice v. Rice*, 983 S.W.2d 680, 685 (Tenn. Ct. App. 1998). We likewise afford deference to the trial court's credibility assessments of the witnesses who testified. See *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 784 (Tenn. 1999).

IV. DISCUSSION

A.

Defendants argue that the trial court's findings of fact are contradictory and erroneous. Defendants specifically take issue with the following findings of fact:

17. [AAA] sold the assets of the business to [AAA Custom] in October, 2013.

18. AAA Custom allegedly purchased AAA for the debts of AAA, but the debt owed plaintiff was intentionally omitted.

* * *

25. AAA Custom and AAA employed the same attorney in this litigation, as did all defendants to this litigation.

* * *

27. The liabilities—supposedly, all of them, but not plaintiff's—of AAA were transferred to AAA Custom.

Defendants explain that the record contains an Asset Purchase Agreement between AAA and AAA Custom that specifically states that AAA Custom purchased AAA's assets, not liabilities. Defendants assert that any finding that AAA Custom assumed or purchased AAA's liabilities is outside the four corners of the Asset Purchase Agreement. Defendants also note that defense counsel has not and currently does not represent AAA.

The record confirms that defense counsel did not represent AAA and that AAA's liabilities were omitted from the sale as reflected in the Asset Purchase Agreement. However, the record otherwise supports the trial court's ultimate decision as will be discussed below. We hold any error in the court's findings of fact harmless.

B.

Next, we must consider the application of the missing witness rule. The missing witness rule provides that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would have been unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). Our Supreme Court has held inferences about the missing witness are applicable when evidence shows that:

- (1) the witness had knowledge of material facts,
- (2) that a relationship exists between the witness and the party that would naturally incline the witness to favor the party, and
- (3) that the missing witness was available to the process of the court for trial.

Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). These three elements are to be strictly construed due to “potentially critical effect[s]” of the rule. *State v. Francis*, 669 S.W.2d 85 (Tenn. 1984). Once applied, the negative inferences drawn from the missing witness rule are added to the totality of evidence provided.

Defendants first take issue with the court’s citing of portions of deposition testimony that were provided by witnesses not present at the trial. Rule 32.01 of the Tennessee Rules of Civil Procedure provides, in part, as follows:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:

* * *

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, governmental agency or individual proprietorship which is a party may be used by an adverse party for any purpose.

The testimony cited was comprised of statements from Mr. Sanchez-Vinas, Mrs. Williford, and Ms. Boardwine, all either serving as a shareholder or managing agent of the various companies involved. Further, the statement of the evidence that was agreed upon by the parties also cited deposition testimony from Mrs. Williford. Our review of the record reflects that the citing of the deposition testimony was in accordance with Rule 32.01.

Defendants maintain that the court misapplied the missing witness rule to allow the admission of otherwise inadmissible testimony. We disagree. The court cited the deposition testimony in its statement of facts in accordance with Rule 32.01 and then clarified its usage of the missing witness rule in its conclusions of law, finding that the

three missing witnesses, Mr. Sanchez-Vinas, Mrs. Williford, and Ms. Boardwine, would have likely testified at trial in a manner contrary to his or her business or personal interest. The record supports the court's usage of the rule when the witnesses had knowledge of material facts; were naturally inclined to favor the defendant corporations; and were available to the process of the court. Defendants do not maintain otherwise. Under these circumstances, we affirm the court's application and consideration of the missing witness rule.

C.

Lastly, Defendants maintain that sufficient evidence was not presented to pierce the corporate veil of either company and to hold them individually liable. Defendants argue that any analysis was absent as to the piercing of AAA's corporate veil that justified holding the Willifords personally liable on the debt. Defendants note that proof was also not presented to establish the liability of AAA Custom on the debt between AAA and Staff Pro, thereby removing any liability imposed upon Ms. Boardwine.

"A corporation is presumptively treated as a distinct entity, separate from its shareholders, officers, and directors." *Oceanics Sch., Inc. v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003). However, the corporate veil may be pierced, resulting in the individual liability of those who used the corporate entity "as a cloak or cover for fraud or illegality, to work an injustice, to defend a crime, or to defeat an overriding public policy, or where necessary to achieve equity." *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 214-15 (Tenn. 2012) (quoting 18 Am. Jur. 2d Corporations § 57 (2004)). Our Supreme Court explained the burden of proof in such cases as follows:

The party seeking to pierce the corporate veil has the burden of presenting facts demonstrating that it is entitled to relief. In order to pierce the corporate veil, the proof must show that the separate corporate entity is a sham or a dummy or that disregarding the separate corporate entity is necessary to accomplish justice. The question of whether the corporation's separate identity should be disregarded is dependent on the specific circumstances of the case and is a matter particularly within the province of the trial court.

Id. at 215 (internal citations and quotations omitted). In making its determination, the court is guided by the following list of factors:

(1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality

or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities.

Fed. Deposit Ins. Corp. v. Allen, 584 F. Supp. 386, 397 (E.D. Tenn. 1984). “No single factor among those listed is conclusive, nor is it required that all of these factors support piercing the corporate veil; typically, courts will rely on a combination of the factors in deciding the issue. However, in all events, the equities must substantially favor the party requesting relief and the presumption of the corporation’s separate identity should be set aside only with great caution and not precipitately.” *Rogers*, 367 S.W.3d at 215 (internal citations and quotations omitted).

As to the piercing of AAA’s corporate veil to hold the Willifords liable, the record reflects that Mrs. Williford was the sole shareholder of AAA. The Willifords diverted AAA’s corporate assets to AAA Custom to the detriment of AAA’s creditors, namely Plaintiff. Further, Mrs. Williford’s personal liabilities were paid from the funds received from the sale of AAA’s assets to AAA Custom. With these considerations in mind, we agree with the trial court that the equities substantially favor Plaintiff in setting aside AAA’s corporate identity and holding the Willifords personally liable.

As to the piercing of AAA Custom’s corporate veil to hold Ms. Boardwine liable, the record reflects that AAA and AAA Custom used the same office location; that AAA Custom was used by AAA to divert its assets to the detriment of its creditors, benefiting AAA Custom; that stock certificates were never issued;¹ and that AAA Custom was promptly sold to yet another company. With these considerations in mind, we agree with the trial court that the equities substantially favor Plaintiff in setting aside AAA Custom’s corporate identity and holding Ms. Boardwine personally liable.

¹ The trial court noted that witnesses testified by deposition concerning the issuance of stock certificates but proof of the issuance was never provided by Ms. Boardwine, who did not appear for trial.

V. CONCLUSION

For the reasons stated above, we affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed equally to the appellants, LaDonna Street Boardwine; Alyce Williford; and Ken Williford.

JOHN W. MCCLARTY, JUDGE