IN THE COURT OF APPEALS OF IOWA

No. 7-069 / 96-0140

000035

ROBERT H. BROCKMAN and KIM L. BROCKMAN,
Husband and Wife,

Appellees,

vs.

IOWA CHIROPRACTIC PHYSICIANS, INC.,

Appellant,

and

VICTOR J. KIRKLAND and NEVADA PROFESSIONAL FINANCIAL CORPORATION,

Defendants.

FILED
AUG. 22, 1997

IOWA CHIROPRACTIC PHYSICIANS, INC.,

Appellant,

vs.

ROBERT H. BROCKMAN and KIM L. BROCKMAN,

Appellees,

and

MICHAEL BROCKMAN, PATRICK BROCKMAN, and MARY ANN BROCKMAN,

Appellees.

Appeal from the Iowa District Court for Lee County, William L. Dowell (summary judgment), John G. Linn (discovery sanctions), and R. David Fahey (trial), Judges.

Iowa Chiropractic Physicians, Inc. appeals from an order of the district court finding plaintiffs had a mortgage interest in real estate, the real estate was subject to a constructive trust, and ICP was a sham corporation and alter ego of defendant Victor J. Kirkland. **AFFIRMED.**

John C. Kirkland II, Pacific Palisades, California, and James L. Sayre of James L. Sayre, P.C., Des Moines, for appellant.

R. L. Fehseke, Jr., of Fehseke Law Offices, Fort Madison, for appellees.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

HABHAB, C.J.

Plaintiffs-appellees Robert and Kim Brockman owned and operated Brockman Chiropractic Center in Fort Madison, Iowa. In July 1992, they entered into a "purchase and sale agreement" with defendant Victor J. Kirkland to sell him the assets of their practice. It was agreed that the Brockmans would sell their real estate and all aspects of the practice, including equipment, patient records, and accounts receivable.

Kirkland believed he would be able to obtain financing through the Small Business Administration and conveyed his optimism to the Brockmans. To enable Kirkland to obtain the SBA loan, the Brockmans conveyed their real estate to him by warranty deed. Kirkland contacted the Brockmans and proposed a modified agreement under which he would pay $1500 per month toward a revised purchase price until he secured financing. The Brockmans accepted the modified agreement. Kirkland was unable to obtain financing.

Kirkland managed the practice and changed its name to Iowa Chiropractic Physicians. In September 1992, the Brockmans brought suit against Kirkland seeking rescission of all agreements. They alleged Kirkland made fraudulent misrepresentations regarding his ability to obtain financing. They requested the court declare the deed void and declare the Brockmans to be the owners of the real estate. Kirkland counterclaimed alleging the Brockmans violated a noncompetition agreement and misrepresented the financial condition of the practice.

Kirkland retained his brother, an attorney licensed to practice law in California, to represent him. The action was removed to the United States District Court for the Southern District of Iowa. The court determined the parties had not met their respective burdens of proof.[1] Accordingly, it dismissed the claims and counterclaims.

Two days after the Brockmans filed their petition, Iowa Chiropractic Physicians became Iowa Chiropractic Physicians, Incorporated (ICP), a closely held Nevada corporation. Kirkland's four children, ranging in age from ten months to six years, were issued 98.5% of the shares of stock. The remaining shares were issued equally to three employees of ICP, one of whom was the sole officer of the corporation. Phyllis Klimesh performed the duties of president, vice president, secretary, and treasurer. ICP transferred a security interest in personal property and fixtures and a mortgage on the real estate to Nevada Professional Financial Corporation (NPFC).

On September 24, 1993, the Brockmans brought suit against Kirkland, ICP, and NPFC. This petition forms the basis of the appeal presently before us. The Brockmans sought judgment against Kirkland for amounts due under the agreement. The petition alleged the Brockmans had a mortgage interest in the real estate they had

---

[1] We note the parties in the federal court stipulated the warranty deed that is the center of this controversy was a "deed of trust." The attorney who proposed this wordage in the stipulation was Kirkland's brother.

transferred to Kirkland and they sought, among other things, to foreclose it. In addition, they requested a declaration that their rights were prior, superior, and paramount to those of ICP and NPFC. The petition further alleged Kirkland had transferred the assets which are the subject of this controversy to ICP.

The Brockmans obtained default judgments against Kirkland and NPFC. In entering the default judgments, the court ruled the warranty deed was a deed of trust constituting a mortgage against the real estate and should be foreclosed. The court declared the interest of the Brockmans was prior, superior, and paramount to those of Kirkland and NPFC. The court entered judgment against Kirkland personally and ruled the warranty deed and agreements as to personal property and fixtures should be foreclosed. The court issued a special execution for the sale of the real estate and personal property and directed a sheriff's deed issue to the purchaser and a writ of possession then issue to the grantee.

ICP retained Kirkland's brother, the same attorney who represented Kirkland in the first action, to represent it in this action. ICP counterclaimed against the Brockmans and other members of the Brockman family for breach of contract, inducing breach of contract, and trade libel. After a motion by the Brockmans, and without resistance by any of the affected parties, the court severed the counterclaims and provided that trial of the counterclaims would be rescheduled by the court administrator.

ICP filed a motion for summary judgment claiming there were no genuine issues of material fact. The court, among other reasons, denied the motion concluding there were genuine issues of material fact regarding the relationship between Kirkland and ICP and that genuine issues of material fact existed as to whether the deed was a warranty deed or a deed of trust.

The Brockmans amended their petition to request the court impose a constructive trust on the real estate and chiropractic business. ICP did not answer the amended petition. The parties began to conduct discovery, but the Brockmans were forced to file several motions to compel. While these motions and motions for sanctions were pending, ICP filed for chapter 11 bankruptcy relief in California.

On May 3, 1995, the bankruptcy court issued an order confirming ICP's plan of reorganization. The bankruptcy court rejected the Brockmans' contention they held more than an unsecured claim, but ruled it would "defer to the Iowa state court's determination of the respective rights of the Brockmans and the reorganized Debtor." After the automatic stay was lifted, discovery proceedings continued. The court issued an order compelling discovery and noted the order represented the third time the Brockmans had been successful in obtaining court assistance to compel discovery. The court in its order stated that failure of ICP to comply with the order could result in the court striking all of ICP's claims and defenses.

The Brockmans then filed a motion for sanctions after they received discovery they believed was inadequate. ICP again did not resist the motion. The court found ICP's conduct was part of a long-standing, continuing, and consistent pattern of refusal to comply with discovery requests and court orders. The court found ICP's conduct was willful and in bad faith. The court struck all defenses ICP raised to the Brockmans' claims. The court later clarified its order by providing ICP could not introduce exhibits at trial, offer testimony contrary to the Brockmans' evidence, or cross-examine the Brockmans or their witnesses on facts set forth in their testimony.

Following a bench trial, the court issued its findings of fact, conclusions of law, and order. ICP did not appear at trial nor did anyone appear for it. The court noted ICP had failed to file an answer to the Brockmans' amended petition. The court ruled the real estate described in the warranty deed was subject to a mortgage in favor of the Brockmans. The court placed the real estate in a constructive trust in favor of the Brockmans. The court held ICP was a sham corporation and the alter ego of Kirkland. The court directed the proceeds from any transfer of the real estate be used first to satisfy the Brockmans' lien, which it determined to be in excess of $70,000. Finally, the court ruled the Brockmans would continue to have the beneficial ownership of an interest in the real estate by virtue of the constructive trust.

ICP has appealed and contends (1) its counterclaims should be remanded for trial; (2) the district court erred in prohibiting ICP from participating in the trial; (3)

000042

the district court erred by denying ICP's motion for summary judgment, and (4) the district court's order is contrary to law. The Brockmans have not filed an appellate brief. On June 28, 1996, they filed a statement informing this court they would not be filing a brief but consented to our jurisdiction over, and disposition of, the appeal.

I. Counterclaims

The Brockmans' petition and amended petition sought foreclosure of a mortgage and imposition of a constructive trust, matters to be tried in equity. ICP counterclaimed against the Brockmans and added three other members of the Brockman family. ICP alleged contract and tort causes of action, claims to be tried at law. The Brockmans moved to sever the counterclaims from the underlying foreclosure action. ICP did not resist. The court ruled "trial on the mortgage foreclosure" would proceed first and separately as an equitable action, with trial on the counterclaims to occur at a later date to be scheduled by the court administrator and case coordinator.

After taking its appeal from the trial court's ruling, ICP now urges us to stay this appeal and remand the case with directions to schedule and proceed to trial on the counterclaims. What ICP seeks, in effect, is not a remand but a dismissal of this appeal without prejudice to being refiled after trial of the counterclaims. We decline the invitation.

From our review of the record, ICP, except for its position that this appeal should be either stayed or dismissed without prejudice, fails to advance a plausible reason for our granting their request. ICP has not satisfied us that the interest of justice would better be served by our staying or dismissing without prejudice the appeal that they took. ICP knew at the time of the court's ruling that the two actions were to be severed and the Brockmans' claim was to be tried first. It offered no resistance to that order.

It cannot go unnoticed that the trial of this action on the Brockmans' claim took place on December 11, 1995. By this date, if the parties were truly interested in disposing of the counterclaim, the court administrator surely would have fixed it for trial by now. In either event, the district court alerted ICP to the availability of procedural devices to protect its rights on the counterclaim if the Brockmans prevailed on their claims. ICP's claim under this division is denied.

II. Discovery Sanctions

Following termination of the automatic stay, the Brockmans moved for further sanctions based on the failure of ICP to provide discovery. ICP argued the confirmation of a plan of reorganization under chapter 11 of the Bankruptcy Code barred any sanctions. The district court rejected this argument based on the decision of the bankruptcy judge to defer to the determination of the Iowa court as to the

respective rights of the parties. The court ordered ICP to comply with discovery and warned failure to do so would lead to additional sanctions. When ICP provided inadequate discovery responses, the district court imposed the sanctions from which ICP now appeals.

ICP renews its argument the confirmation of the plan of reorganization barred the district court from imposing sanctions. ICP also challenges the sanction as excessive.

A. Chapter 11 Discharge

ICP argues Bankruptcy Code section 1141 is dispositive and prevented the district court from compelling discovery and ordering sanctions. ICP reasons the discovery requests and subsequent orders constituted preconfirmation claims that were discharged under section 1141(d)(1)(A). The thrust of ICP's argument is the order of confirmation automatically extinguishes all prior existing debts and deprives the court of jurisdiction over any lawsuits filed prior to entry of the order of confirmation.

ICP's argument ignores the exceptions contained in section 1141:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation.

11 U.S.C. § 1141(d)(1)(A) (1994). If the plan or order confirming the plan provides

otherwise, the property does not vest in the estate of the debtor and claims of creditors are not released. *Steele v. First Nat'l Bank*, 136 B.R. 278, 280 (Bankr. D. Kan. 1991).

In the order confirming the plan, the bankruptcy judge estimated the Brockmans' claim was unsecured, but recognized the "rather murky" evidence on both sides of the issue. The court wrote it would defer to the Iowa court's determination of the respective rights of the Brockmans and ICP. The bankruptcy judge directed the proceeds of ICP's sale of the property be held by a disbursing agent pending a final order by an Iowa state court, at which time the disbursing agent would distribute the proceeds as directed by the Iowa court. The judge confirmed the plan but deemed it modified to conform to the court's order.

Under section 1141, the bankruptcy judge had the power to modify the plan, and his modification caused the property not to vest in ICP's estate and the Brockmans' claims were not released. By deferring to the determination to be made in pending litigation in Iowa, and by directing the disbursing agent to distribute proceeds in accordance with the Iowa decision, the bankruptcy judge prevented what might otherwise be a discharge. The bankruptcy judge's deference to the determination and final order of the Iowa court is broad enough to encompass discovery necessary to reach that determination. *See Carter v. Jernigan*, 227 N.W.2d 131, 136 (Iowa 1975) ("The very purpose of the modern rule allowing prior discovery is to learn the facts so the court can apply the appropriate substantive rule of law.").

B. Sanction Imposed

We review discovery sanctions for an abuse of discretion. *Kendall/Hunt Publishing Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). We will find an abuse of discretion when the ruling rests on clearly untenable or unreasonable grounds. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 681 (Iowa 1995). An abuse of discretion also occurs when substantial evidence does not support the trial court's ruling. *Pierce v. Nelson*, 509 N.W.2d 471, 473 (Iowa 1993).

ICP claims it fully complied with the district court's discovery orders and provided all requested discovery to the Brockmans. ICP also argues the discovery the Brockmans requested had no reasonable connection to the documents and witnesses they planned to present at trial, so no basis existed for preventing cross-examination or prohibiting it from introducing evidence. For the reasons that follow, we disagree and affirm the trial court on this issue.

The Brockmans served subpoenas and notices of deposition, but ICP's counsel instructed the deponents not to appear. His basis for doing so was an alleged failure of the Brockmans to respond to discovery requests, but he did not seek a protective order or file a motion to compel. ICP responded to discovery requests with stock responses alleging the requested discovery was not reasonably calculated to lead to discovery of admissible evidence. Counsel for the Brockmans attempted to resolve discovery problems when ICP's responses to discovery became two months past due.

On at least three occasions, opposing parties successfully sought court intervention to require ICP to provide discovery.

Despite the Brockmans' success on three occasions, ICP continued to provide inadequate discovery. The court issued an order compelling ICP to respond to all outstanding discovery requests and warning failure to do so would cause the court to impose stiffer sanctions, including striking claims and defenses. ICP provided three boxes of materials, but the Brockmans itemized to the court the numerous documents not provided. The Brockmans also itemized the inadequacy of responses to many interrogatories.

The district court found ICP acted willfully and in bad faith as part of a "long-standing, continuing, and consistent pattern of refusal to comply with discovery." Substantial evidence supports this finding. ICP had fair warning through at least four court orders that it had not been responding adequately to discovery. It was specifically warned of further sanctions awaiting it if it did not comply with discovery. Even so, ICP's subsequent responses were clearly inadequate. The district court did not abuse its discretion in imposing sanctions or by fashioning the sanctions it did.

III. Alleged Error in Denial of Motion for Summary Judgment

ICP argues the district court erred by not granting its motion for summary judgment. Generally, an appeal from a final decree presents for review all rulings inhering in that decision. *Mason City Prod. Credit Ass'n v. Van Duzer*, 376 N.W.2d 882, 887 (Iowa 1985). An exception applies when the district court denies a motion for summary judgment and the case proceeds to trial. On appeal from a final judgment following trial, determination of the existence or nonexistence of genuine issues of material fact made upon affidavits, depositions, and pleadings for the purpose of adjudicating a motion for summary judgment is superseded by the court's rulings on motions for directed verdict at the close of all the evidence.[2] *Klooster v. North Iowa State Bank*, 404 N.W.2d 564, 567 (Iowa 1987). Consequently, determinations made in advance of trial concerning a genuine issue of material fact will not constitute grounds for reversal when a full trial is subsequently held and sufficient evidence is produced to sustain the claim. *Id.*

Although ICP did not attend the trial and thereby did not make a motion for directed verdict, its absence was by its own choosing. The parties conducted some discovery after the denial of the summary judgment motion, and the record was

---

[2] But even if we were to consider the order denying summary judgment, we would reach the same conclusion as the trial court that there are genuine issues of material fact to submit to the fact finder. In addition, based on the record before the trial court, the pleadings, and the unanswered amendment to the pleadings, the court was unable as a matter of law to grant the relief ICP sought in its summary judgment motion.

further developed at trial. Since a full trial was held on the merits, we need only determine whether there is the requisite degree of proof necessary to sustain the trial court's decision.

The district court found the deed was a deed of trust. The court reasoned the parties stipulated in the action removed to federal court that the deed was a deed of trust. The court found the parties intended the deed be construed as a mortgage.[3] The court found Kirkland [4] represented to the Brockmans that recording the deed was necessary for him to obtain SBA financing and he agreed to reconvey the property if financing were denied. We agree with the trial court that the deed executed and delivered by the Brockmans to Kirkland is in fact and in law a deed of trust.

We also agree with the trial court that imposition of a constructive trust was proper. The Brockmans have established a right to a constructive trust by clear, convincing, and satisfactory evidence. As discussed, the record clearly demonstrates Kirkland fraudulently placed the property in question beyond the reach of the Brockmans. In this respect, a party in whose favor a constructive trust has been

---

[3] But even if the trial court had not taken and considered evidence on this issue, we believe it could have found the deed to be a deed of trust on the strength of the Brockmans' amended petition which ICP did not answer The amendment to the petition speaks in terms of "deed of trust" and asks "that the court impress a constructive trust upon the property in question." Since the allegations in the amendment to the petition were not denied, they stand admitted and further proof on those issues were unnecessary. *Claeys v. Molden Schardt,* 148 N.W 2d 479, 484 (Iowa 1967).

[4] As noted earlier, the trial court entered a default judgment against Kirkland for his lack of appearance.

established may trace the property to where it is held and reach whatever has been obtained through the use of it. *Benson v. Richardson*, 537 N.W.2d 748, 760 (Iowa 1995) (holding alter ego doctrine may be used to satisfy the liabilities of individual owners by using corporate assets). The transfer of the property in question by Kirkland to ICP was indeed a fraudulent conveyance.

We agree with the trial court's holding that ICP was a sham corporation and an alter ego of Kirkland formed to avoid Kirkland's liability to the Brockmans.

The legal treatment of a corporation as an entity entirely separate from its stockholders will be disregarded when the corporate form is invoked to subvert the ends of justice. *Benson*, 537 N.W.2d at 761. Courts may ignore the corporate form to avoid fraud or injustice or when it is merely a device set up to ensure the avoidance of the legal obligations of shareholders. *Id.* Although ICP maintains it purchased the corporation from Kirkland, and Phyllis Klimesh maintained in an affidavit that Kirkland had no personal equity interest in ICP, other evidence was to the contrary.

Kirkland's brother represented him in the first action by the Brockmans. Kirkland's brother maintained ICP hired him because of his success in the first action, but the court found Kirkland's brother represented ICP from its inception. Kirkland's brother also represented Klimesh as her personal attorney. ICP was incorporated the same day Kirkland filed the warranty deed transferring property to ICP.

000051

Kirkland continued to manage the affairs of ICP. His four children, ranging in age from ten months to six years, were issued 98.5% of the shares of stock. The three employees were issued the remaining shares, or one-third each of the 1.5% remaining. Klimesh was the only officer of the corporation and made decisions on ICP's behalf, but she did not know the total number of shares issued or their allocation to the stockholders. She did not know the amount of Dr. Sherman's compensation and had not seen his employment contract.[5] Until corrected by Kirkland at her deposition, she believed ICP was an Iowa corporation.

JoAnn Hippe, another employee, did not know if any stockholder meetings had been called and she did not attend any. She knew she owned stock, but did not know how many shares or the allocation of shares between stockholders. Dr. Sherman did not even know he had been issued shares. He did not pay for the shares and did not know why ICP issued stock to him. Kirkland claimed not to know how many shares were issued to his children or to other shareholders. He maintained Klimesh would know this information, but she did not. We affirm the trial court on this issue.

IV. Conclusions

In conclusion, we affirm the trial court in all respects. There are several other issues raised by ICP on appeal which we have considered but not expanded upon. As

---

[5] Dr Sherman was granted employment under the purchase and sale agreement.

to those issues, we find they either were not raised before the trial court, or, if they were, we find them to be without merit. As it relates to ICP's "election of remedies" issue and "estoppel" argument, those contentions were neither pled nor argued nor were they considered by the trial court in its ruling. Under established appellate rules, we decline to consider them on appeal.

AFFIRMED.