IN THE COURT OF APPEALS OF IOWA

ROBERT D. ADAM, et al.,

Plaintiffs-Appellants,

vs.

MT. PLEASANT BANK & TRUST COMPANY, et al.,

Defendants,

BLAKE PHELPS,

Defendant-Appellee.

Filed March 20, 1984

3-332
2-69291

Appeal from the Iowa District Court for Monroe County (on change of venue from Van Buren County) - James P. Rielly, Judge.

Plaintiffs appeal from a partial summary judgment in favor of defendant Blake Phelps. REVERSED AND REMANDED.

James P. Hoffman of James P. Hoffman Law Firm, Keokuk, and James Walter, Bloomington, Illinois, for plaintiffs-appellants.

Gene R. Krekel of Hirsch, Link, Adams, Hoth & Krekel, Burlington, for defendant-appellee Phelps.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

SNELL, J.

Plaintiffs appeal from a partial summary judgment in favor of defendant Blake Phelps. The case arose out of the financial collapse of the Prairie Grain Company at Stockport, a company of which Phelps was an officer. Plaintiffs are farmers who had stored grain at the elevator and were unable to obtain its return. On appeal, Phelps asserts that the trial court erred in granting summary judgment because (1) a creditor may attempt to "pierce the corporate veil" of a business being run as a corporation, and (2) a genuine issue of material fact exists as to whether the corporate veil should be pierced in this case. In response, defendant Phelps asserts that (a) the "piercing the corporate veil" theory was not raised in resistance to his motion for summary judgment, so error was not preserved on that contention, and (b) the partnership theory argued by plaintiffs in trial court is not pursued on appeal and is therefore waived. We reverse and remand.

Plaintiffs are 104 farmers who delivered grain to the elevator which could not be returned due to shortages. They have sued the grain company, the officers and directors, two banks, an accounting firm, and the State of Iowa. Most of these claims have been disposed of in various ways, but the claim against the State of Iowa, among others, remains. See Adams v. Mt. Pleasant Bank & Trust Co., 340 N.W.2d 251 (Iowa 1983). This appeal involves the portion of the case against defendant Blake Phelps, allegedly an "owner" of the company.

Plaintiffs pleaded that Phelps and the other individual defendants "owned and operated" Prairie Grain Company and that "the business was owned and operated by a partnership of [the individual defendants, including Phelps]." The plaintiffs asserted that the individual defendants were "liable for the debts of the partnership." These allegations were denied in Phelps' answer.

On August 16, 1982, Phelps moved for summary judgment, contending that there was no genuine issue of material fact as to whether he was involved in

Prairie Grain Company because he was only involved with Prairie Grain Company, Inc., in its capacity as a legal corporation. Phelps also filed an amendment to his answer in which he denied that he was a partner with the other individual defendants in a "business known as Prairie Grain Company in Stockport, Iowa." The answer stated that Prairie Grain Company, Inc., is a properly organized and authorized corporation. In resistance to this motion, plaintiffs asserted that the individual defendants were co-owners of the business, and were therefore liable as partners for the obligations of the business unless the company was properly incorporated. Plaintiffs asserted the company was not a legal corporation because of various violations of Iowa corporation law as to the operation of the corporation, such as holding annual meetings, and because the corporation's existence had expired before the time of the relevant events. The resistance also contains allegations that Raymond Keller dominated the business, that the board of directors and shareholders never set policy, and that Raymond Keller used Prairie Grain funds for his own purposes.

The court granted the motion for summary judgment, holding that a corporation can be challenged on the ground that formalities have not been satisfied only by means of a quo warranto proceeding. The court also found that the corporate existence of Prairie Grain Company, Inc., was properly revived by filing "Restated Articles of Incorporation" in 1980. The motion for summary judgment of Phelps was therefore granted, and the claim against him ordered dismissed. This appeal followed.

I.

We must first consider the issue of whether plaintiffs' contentions on appeal were preserved below. Plaintiffs here claim that Phelps can be found personally liable by piercing the corporate veil of Prairie Grain Co., Inc. Phelps contends that this theory of recovery against him was not raised below and therefore may not be considered here. Regardless of how plaintiffs' claim is denominated, we believe the theory of their case is properly before us. It is true that plaintiffs' petition with regard to Phelps and other individual defendants refers only to a partnership theory of recovery and that the trial court's decision on the motion for summary judgment indicates that the court did not consider any "piercing the corporate veil" claim. It is clear, however, that plaintiffs' written resistance to Phelps' motion for summary judgment and their arguments at the hearing on the motion raised most, if not all, of the elements of piercing the corporate veil (see division II below) without specifically referring to this theory by name. We believe this is sufficient for plaintiffs to be deemed to have raised this issue below.

II.

Next, we briefly address the quo warranto issue. Phelps argued, and the trial court apparently agreed, that quo warranto is the only way to challenge the corporate existence of Prairie Grain Company. Quo warranto is the appropriate remedy if a party wishes to test the legality of the corporate existence of a corporation, but only when public interests are involved. Hearth Corporation v. C-B-R Development Co., Inc., 210 N.W.2d 632, 634, 635 (Iowa 1973). It is not the exclusive remedy, however, "'when the challenge to corporate legality is merely a casual issue in a case involving enforcement solely of private rights which do not relate to questions of a public interest.'" Id. at 635 (citation omitted). The theory of piercing the corporate veil is an example of the latter situation. Under this theory, plaintiffs do not challenge the fact that the elevator was organized as a legal corporation; instead, they contend that the corporate entity may be disregarded due to particular circumstances in this case. Thus, the quo warranto remedy is neither the appropriate procedural device nor relevant to plaintiffs' theory of piercing the corporate veil.

III.

The principles governing our review of a motion for summary judgment are familiar.

> When a trial court is confronted with such motion under rule 237, R.C.P., it is required to examine, in the light most favorable to the party opposing the motion, the entire record before it including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine for itself whether any genuine issue of a material fact is generated thereby. If, upon this examination, the court determines no such issue is present, and the movant is entitled to judgment as a matter of law, entry of summary judgment is proper.
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> In reviewing the grant or denial of a summary judgment motion this court is guided by the same principles utilized by a trial court in making that determination. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. (citations omitted)

Drainage District No. 119, Clay County v. Incorporated City of Spencer, 268 N.W.2d 493, 499-500 (Iowa 1978). With these principles in mind, we conclude that Phelps did not sustain his burden of proving the absence of any genuine issue of fact. Id.

The corporate veil may be pierced where the corporation is a mere shell, an alter ego of its controlling owner which serves no legitimate business purpose. See generally Northwestern National Bank of Sioux City v. Metro Center, Inc., 303 N.W.2d 395 (Iowa 1981). Fraud is not a prerequisite for piercing the corporate veil. Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 923 (Iowa 1978). The factors which may be considered in determining whether a corporation is merely the alter ego of its controlling owner were set out in Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634 (8th Cir. 1975). A corporation's existence may be disregarded if:

> (1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.

Id. at 638.

In this case, plaintiffs claimed that the elevator violated Iowa corporation law in various procedural and operational respects and that its officers ignored their obligations under the corporate articles and bylaws. Specifically, they allege that the stockholders never held an annual meeting, there were no board of directors meetings after 1966, and the corporate books were never audited. They also allege that Phelps cooperated with a former company officer, now deceased, in personally controlling the business and in misusing corporate funds for gambling and speculation on the commodities market. We believe these allegations are sufficient to raise a fact question whether the grain company's corporate veil should be pierced in this case and, therefore, whether Phelps may be found personally liable. Of course, we intimate nothing regarding our view of the merits of these issues; we only hold that plaintiffs have generated a fact question with regard to their allegations.

We consider one further aspect of the trial court's ruling. Plaintiffs contend that the elevator's initial period of existence was for twenty years under its articles of incorporation. That period ended on August 14, 1978, and therefore there was a gap in the elevator's corporate existence between that date and February 7, 1980, when the elevator's restated articles of incorporation were filed. The court concluded that the elevator's corporate existence was revived by that 1980 filing under Iowa Code section 496A.102. The court does not explain, however, the impact of that holding on plaintiffs' claim against Phelps other than to say that Phelps' motion for summary judgment is sustained. Regarding the issue of liability prior to the revival of a corporation's existence, we held in Kessler Distributing Company v. Neill, 317 N.W.2d 519, 522 (Iowa Ct. App. 1982): "Reinstatement of the corporate charter should not be viewed as retroactively restoring the privilege of limited liability with respect to transactions which took place during the period of time when the corporate charter was revoked."

Under these circumstances, the trial court erred in granting Phelps' motion for summary judgment. We reverse the court's ruling, thereby reinstating plaintiffs' action against Phelps, and remand for further proceedings.

REVERSED AND REMANDED.