

20110308

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

MAR 26 2012

STATE OF NORTH DAKOTA

Randall Bakke and Shannon Bakke,)
)
 Plaintiffs/Appellees,)
)
 -vs-)
)
 D&A Landscaping Company LLC, Rocks)
 and Blocks, Inc., Andy Thomas, a/k/a)
 Andrew Thomas, Rocks & Blocks)
 Landscaping & Contracting, LLC,)
)
 Defendants/Appellants.)

Supreme Court No. 20110308

District Court No. 08-10-C-2148

APPELLANTS' APPEAL BRIEF

APPEAL FROM THE AUGUST 8, 2011 AMENDED ORDER
AND AUGUST 10, 2011 AMENDED JUDGMENT
DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE THOMAS E. MERRICK, PRESIDING

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STATEMENT OF ISSUES

- I. Whether sufficient facts exist to pierce the corporate veil of D&A Landscaping Company LLC, and hold Andrew Thomas personally liable.
- II. Whether sufficient facts exist to support a finding of fraud against Andrew Thomas.

STATEMENT OF CASE

On July 23, 2010 Plaintiffs (Appellees), Randall Bakke and Shannon Bakke (hereinafter Bakkes), brought an action against Defendants (Appellants), D&A Landscaping Company LLC, Rocks and Blocks, Inc., Andy Thomas, a/k/a Andrew Thomas (hereinafter Thomas), Rocks & Blocks Landscaping & Contracting, LLC, for, among other things, breach of contract and negligence in regard to construction of a retaining wall on the Appellees' property.

On August 30th, 2010, such Complaint was amended still with claims of breach of contract and negligence, among other things, in regard to the retaining wall. (App. pg. 7)

The case was tried before a jury from July 19-21, 2011. The jury rendered a verdict in favor of Bakkes and a finding of fraud, breach of contract, and negligence by Thomas. There was no finding against D&A Landscaping LLC.

The Amended Order for Judgment was issued on August 8, 2011 and the Amended Judgment on August 10, 2011. (App., pgs. 36, 38)

STATEMENT OF FACTS

During the time of its contact with the Bakkes, Thomas was associated with D&A Landscaping LLC. Such LLC was in place from 2005 until December 31, 2008. [Tr. pgs. 46-47; Tr. pg.129; Tr. pgs.144-147] The LLC was terminated to allow the business to focus on other aspects. [Tr. pgs. 46-47]. Thomas, through D&A Landscaping LLC first came in contact with Bakkes in 2006 regarding the retaining wall. [Tr. pgs. 132-133]

Later, he became a passive investor in a company called Rocks and Blocks, Inc., owning approximately 250 shares, or 14.82% of the company. [Tr. pg. 134] He had no input in actual operation of Rocks and Blocks, Inc.. [Tr. pg. 134]

In 2010, he became involved with Rocks & Blocks Landscaping & Contracting, LLC, which is a distinctly separate company from Rocks and Blocks, Inc.. [Tr. pgs. 134-135]

In his closing argument, counsel for the Bakkes attempted to say Thomas was not functioning as a limited liability company because one of his business cards did not say LLC. [Tr. pg. 138]

There was no claim of fraud specifically referenced in the pleadings. The only claim of fraud is a claim that Thomas did not indicate he was a passive investor in Rocks and Blocks, Inc.. [Tr. pgs. 117-118] Apparently, D&A Landscaping Company LLC was one of the contractors Rocks and Blocks, Inc. recommended to the Plaintiffs. Thomas had no knowledge of this recommendation and there is no evidence in the record that he participated in the operation of Rocks and Blocks, Inc..

In fact, the Bakkes had contacted his company regarding the retaining wall prior

to his becoming a passive investor in Rocks and Blocks, Inc..

LAW AND ARGUMENT

I. WHETHER SUFFICIENT FACTS EXIST TO PIERCE THE CORPORATE VEIL OF D&A LANDSCAPING COMPANY LLC, AND HOLD ANDREW THOMAS PERSONALLY LIABLE.

American Jurisprudence has this to say on corporate existence and piercing the corporate veil:

“The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it, is a legal theory introduced for purposes of convenience and to subserve the ends of justice. Separate corporate identity is a privilege conferred by law to further important underlying policies, such as the promotion of commerce and industrial growth.” 18 Am. Jur. 2nd, *Corporations*, §46, pg. 692.

American Jurisprudence goes on to state that piercing the corporate veil is an exception.

“The doctrine of piercing the corporate veil is the rare exception, . . . The corporate veil may not be pierced absent a showing of improper conduct. The principle of piercing the fiction of the corporate entity is to be applied with great caution, and not precipitately, because there is a presumption of corporate regularity. . . . The corporate entity may not be disregarded simply because it stands as a bar to a litigant’s recovery of property.” 18 Am. Jur. 2d, *Corporations*, §47, pgs. 694-696. (Emphasis added)

The factors to be considered on the issue of piercing the corporate veil are set out in the case of Hilzendager v. Skwarok, 235 N.W.2d 768 (N.D. 1983):

1. Insufficient capitalization for the purposes of the corporate undertaking.
2. Failure to observe corporate formalities.
3. Nonpayment of dividends.
4. Insolvency of the debtor corporation at the time of the transaction in question.

5. Siphoning of funds by the dominant shareholders.
6. Non-functioning of other officers and directors.
7. Absence of corporate records.
8. Existence of the corporation as merely a facade for individual dealings.

There was no evidence received in this case showing any of the shortcomings of D&A Landscaping LLC which were referenced in the Hilzendager, supra, case.

II. WHETHER SUFFICIENT FACTS EXIST TO SUPPORT A FINDING OF FRAUD AGAINST ANDREW THOMAS

Typically, fraud is generally defined as intentional misrepresentation or omission of material fact by one party to another with the knowledge of the falsity or omission and the purpose of the other person relying on such misrepresentation resulting in damage.

To constitute fraud, the misrepresentation must be “material” in that it relates to a matter of some importance and not be minor in nature. The perpetrator must also intend that the other rely on the misrepresentation and suffer a damage. (N.D. Cent. Code §9-03-08; Dvorak v. American Family Mut. Ins. Co., 1993, 508 NW2d 329; WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, 730 NW2d 841.)

Thomas’s involvement in Rocks and Blocks, Inc. was very minor in nature and there is no evidence in the record that he had any involvement in the operation of the company or that he intended his minor passive ownership to have any adverse impacts on the Plaintiffs.

Even in Jablonsky v. Klemm, 377 NW2d 560 (ND 1985), a case involving a retaining wall issue, the Court stated that:

“We believe an element of injustice, inequity or fundamental unfairness must be present before a court may properly pierce the corporate veil.” Jablonsky, pg. 564.

Fraud must be proven by clear and convincing evidence, and the party asserting fraud has the burden of establishing the elements of fraud. American Bank Center v. David L. Wiest v. Howard Palmer and Louis Burckhardsmeier, 2010 ND 251, 793 NW2d 172.

In the instant case, clear and convincing evidence was not produced, and the jury was not instructed as a matter of law regarding the clear and convincing requirement. (App. pg. 20) The elements required to find fraud or constructive fraud were not produced at trial. Thomas never intended to deceive the Bakkes regarding his involvement in Rocks and Blocks, Inc., and since he did not know Rocks and Blocks, Inc. had recommended his company because of his lack of involvement in Rocks and Blocks’ operations, his failure to disclose such involvement was minor. Especially, since he was contacted by the Bakkes regarding the retaining wall prior to his investment in Rocks and Blocks, Inc..

Conclusion

Based on the above-referenced reasonable rationale, Thomas asks that the District Court's Judgment be reversed and Judgment be entered accordingly.

Dated this 23rd day of March, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2012, the Brief of Appellant was served upon the person described below by US Mail at the address of:

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